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Improving access to Foreign Direct Investment for Pacific Island Countries:

*Pursuit of International Investment
Agreements from a development perspective*

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ABSTRACT

With aims of economic development and its associated benefits, most countries have established networks of treaties, inclusively termed International Investment Agreements (IIAs), which liberalise, promote, protect and regulate investment flows between the parties. The average number of Bilateral Investment Treaties concluded and in force per country is around 11. Except for Papua New Guinea, the Pacific Island States each have 1 (three of 16 included States) or no IIAs in force – limiting access and control over incoming international investment in their economies.

This paper analyses the potential of IIAs in promoting Foreign Direct Investment (FDI), economic development and its associated benefits in Pacific island nations. It examines the existing IIAs reached by Pacific island countries and compares them with IIAs in place in other Small Island Developing States outside the Pacific. Finally, it explores the best practices for the design of a model IIA which might be suited to the investment and development policies, and particular economic conditions of Pacific island states, with the explicit aim of enhancing the contributions to the development outcomes of those economies.

This research uses treaty analysis alongside social and political science approaches to development and economic data. Key legal sources include identified treaties and their mapping data from the UNCTAD database, economic data, arbitral proceedings and awards, and public policy statements on foreign investment from Pacific island countries. It will assume underlying principles of sovereign self-determination and pursuit of the Sustainable Development Goals.

Included economies: Cook Islands; Fiji; Kiribati; Micronesia, Federated States of; Marshall Islands; Nauru; Niue; Palau; Papua New Guinea; Samoa; Solomon Islands; Timor; Tonga; Tuvalu; Vanuatu.

INTRODUCTION

With aims of economic development and its associated benefits, most countries have established networks of treaties, inclusively termed International Investment Agreements (IIAs), which liberalise, promote, protect and regulate investment flows between the web of parties. The average number of Bilateral Investment Treaties concluded and in force per country is around 11 (10.7, with a median of 5). Except for Papua New Guinea, the Pacific Island States each have 1 (three of 16 included States) or no IIAs in force – limiting access and control over incoming international investment in their economies. This paper will seek to better understand the potential of an expanded IIA network for the Pacific region and examine IIAs currently in place in Pacific Island economies. It will then examine IIAs in place in other Small Island Developing States outside the Pacific, to identify where design for development has been incorporated in the negotiated text. Finally, it will explore best practice design of a model IIA which might be suited to the investment and development policies, and particular economic conditions of Pacific Island States, with the explicit aim of contributions to the development outcomes of those economies.

The included economies represent a standard list of Pacific Island Countries (PICs), in this case drawn from the Oceania (Developing Economies) group on the UNCTAD investment database country groupings, plus Timor-Leste for a more complete view of Melanesian economies. US and French overseas territories have been excluded, but States with compacts of free

association (such as Micronesia and the Cook Islands) are included.¹ This paper uses IIAs to mean Bilateral Investment Treaties (BITs) as well as Treaties with Investment Provisions (TIPs).² Agreements within scope for discussion include BITs and TIPs; which are in force on 1 July 2020; which have a focus economy as a party.³ Agreements which are signed but not in force will be discussed briefly for supplementary relevance. Though UNCTAD lists the *Cotonou Agreement (2000)* and the *South Pacific Regional Trade and Economic Cooperation Agreement (1980)* ('SPARTECA') as an IIAs, these treaty texts focus on trade treatments and only refer in passing to investment protection mechanisms. As such, they have also been excluded as they do not provide meaningful comparison to the development of IIAs generally in the Pacific. The *Australia - Fiji Trade Agreement (1999)*,⁴ though it includes an investment promotion provision, cannot be meaningfully included in an analysis of investment agreements as it lacks any substantive investment protection functions.

This work deals only with provisions of investment treaty law, defined as agreements governing the flow of capital and other factors of production. While some intersections with trade law may be referred to tangentially, here we will not deal with agreements relating to the international movement of goods and services. As noted of a selection of agreements above, treaties dealing with trade address discrete economic activities from capital investment per se, especially activities at late and final stages of economic production, which will often require a stable investment environment in place to flourish. Further, trade agreements play a significant

¹ Included economies (World Bank country code): Cook Islands (COK); Fiji (FJI); Kiribati (KIR); Micronesia, Federated States of (FSM); Marshall Islands (MHL); Nauru (NRU); Niue (NIU); Palau (PLW); Papua New Guinea (PNG); Samoa (WSM); Solomon Islands (SLB); Timor Leste (TMP); Tonga (TON); Tuvalu (TUV); Vanuatu (VUT).

² These definitions are used as per the UNCTAD International Investment Agreements Navigator available at <<https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>>.

³ Included agreements: Australia-Papua New Guinea Trade and Commercial Relations Agreement (1976) ('PATCRA'); Germany - Papua New Guinea BIT (1980); Papua New Guinea - United Kingdom BIT (1981); Australia - Papua New Guinea BIT (1990); China - Papua New Guinea BIT (1991); Tonga - United Kingdom BIT (1997); Australia-Fiji Trade Agreement (1999); Portugal - Timor-Leste BIT (2002); Japan - Papua New Guinea BIT (2011).

⁴ *Agreement Between The Government Of Australia And The Government Of Fiji On Trade And Economic Relations*, signed 11 March 1999 (entered into force 15 December 1999) ('Australia - Fiji Trade Agreement').

role in the regulation of tax and tariff matters, relating directly to governments' revenue resulting from trade. Investment treaties, on the other hand, largely address private activities of investors relating to business establishment, operations and financial transactions; they operate largely as guarantees of the market's operation with respect to foreign investors, rather than detailed outlines of the movement of goods and services through a market.

On that note, however, significant export markets for the Pacific remain limited, and key exports are sold to preferential markets, including those established to Australia and New Zealand under SPARTECA.⁵ Article II(d) of SPARTECA lists one of the agreement's aims as 'to foster the growth and expansion of exports of Forum Island countries through the promotion of investment';⁶ a recognition of the intertwined relationship that is carried over into PACER Plus,⁷ the region's next significant agreement to come into force. The focus economies do not have any past treaties which have been terminated or superseded, and there is no current information indicating that further agreements are under negotiation.

This research will use treaty analysis alongside social and political science approaches to development and economic data. Key legal sources will include identified treaties within scope and their mapping data from the UNCTAD database, economic data, arbitral proceedings and awards, and public policy statements on foreign investment from Pacific island countries. It will assume underlying principles of sovereign self-determination and pursuit of the Sustainable Development Goals.

⁵ Kym Anderson and Malcom Bosworth, *Reforming Trade Policy in PNG and the Pacific Islands* (University of Adelaide Press, 2000) 17.

⁶ *South Pacific Regional Trade and Economic Cooperation Agreement*, Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu opened for signature 14 July 1980, Article II (d) (entered into force 1 January 1981) ('SPARTECA').

⁷ *Pacific Agreement on Closer Economic Relations Plus*, Australia, Cook Islands, Federated States of Micronesia, Kiribati, Nauru, New Zealand, Niue, Palau, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, signed 14 June 2017, [2017] ATNIF 42 (entered into force not yet in force) ('PACER Plus'). PACER Plus is expected to come into force in 2020.

‘In the face of the ambitious 2030 Agenda for Sustainable Development, donors have turned to the for-profit private sector to supplement the widening gap in official development finance vis-à-vis the heightened financing needs generated by the pursuit of the Sustainable Development Goals.’⁸

⁸ UNCTAD, *Least Developed Countries Report 2019: The Present and Future of External Development Finance - Old Dependence, New Challenges*, UN Doc UNCTAD/LDC/2019) Overview V (*LDC Report 2019*).

I BACKGROUND AND LANDSCAPE: IIAS AND THE PACIFIC

IIAs have traditionally served three key purposes: protection of investors (especially nationals from traditional colonial era capital exporters), attraction of inward capital flows to support economic development (especially in less and least developed countries), and codifying and clarifying the rules and enforcement mechanisms available across the respective jurisdictions for each trans-boundary investment.⁹

Defining the role of International Investment Agreements (IIAs) in a country's development strategy and investment policy is an essential foundational step for policymakers in balancing investment protection and promotion with sovereign formulation of development strategy and sectoral policies.¹⁰ While a direct correlation between the conclusion of IIAs and Foreign Direct Investment (FDI) inflows is uncertain in current literature,¹¹ the role of IIAs as a fundamental aspect of attractive investment environments (with complementary national and international systems of investment protection) is not debated.

IIAs offer additional stability and transparency to national investment policy frameworks.¹² In this way, IIAs contribute to the reinforcement of investor confidence by providing an 'insurance policy' in environments where other risk factors such as weaker governance systems may be unfavourable to attracting FDI.¹³ However, while IIAs can form a building block to stable growth and development through FDI, they alone cannot turn a bad domestic investment climate into a good one, nor guarantee improved FDI flows.¹⁴ It is therefore important that

⁹ Hisham Ababneh, 'A Model BIT for Development: The Example of Jordan' (Dissertation Thesis, University of Pittsburgh, 2017) 2, 7.

¹⁰ UNCTAD, United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, UN Doc UNCTAD/DIAE/PCB/2015/5) 72 (*IPFSD*).

¹¹ Sarah Bauerle Danzman, 'Contracting with Whom? The Differential Effects of Investment Treaties on FDI' (Pt Routledge) (2016) 42(3) *International Interactions* 452-478.

¹² UNCTAD, *IPFSD*, UN Doc UNCTAD/DIAE/PCB/2015/5 (n 10) 72.

¹³ *Ibid.*

¹⁴ *Ibid* 73.

where countries opt to conclude IIAs, those agreements are coherent with economic policy and development strategies in place. This includes complementing non-economic policies (e.g. environmental, social, health or cultural policies).¹⁵

With the exception of Papua New Guinea, the Pacific Island economies within scope each have 1 or no IIAs in force (see Figure 2). This paper argues that for economies among the Pacific island countries IIAs represent an important step towards a coherent approach to investment for development, and looks at what design features might be appropriate for general application across the development of new IIAs with PICs as parties.

Features of PIC economies

The OECD notes that Small Island Developing States (SIDS), of which Pacific Island Countries (PICs) are a subset, have important and unique economic conditions. The process of creating context-adapted IIAs for PICs creates agreements must harmonise with these economic conditions.

Heterogeneity - The economies of the individual Pacific island nations are subject to distinct context-specific needs, opportunities and challenges, which ‘point to the need for tailored development approaches across the group’.¹⁶ As such, the detailed design of IIA provisions requires evolution of both the treaty making process, as well as the substantive elements included in individual provisions. Broadly, this will mean: incorporating concrete commitments for the promotion and facilitation of sustainable investment; balancing State commitments with investor obligations for responsible investment; ensuring an appropriate balance between investment protection and the scope for regulatory contributions to

¹⁵ Ibid.

¹⁶ Siân Herbert, 'Development Characteristics of Small Island Developing States' (K4D Helpdesk Report, Institute of Development Studies).

development outcomes, and; careful selection of Investor State Dispute Resolution mechanisms.¹⁷ In particular, the design of the scope and definitions in IIAs, national treatment, most favoured nation treatment (MFN), fair and equitable treatment (FET) and expropriation will require detailed attention if they are to be drafted equitably to complement sustainable development in Pacific economies.

Environmental vulnerability – Pacific Island States are particularly vulnerable to the impacts of the climate crisis – especially sea-level rise, increased frequency of natural disasters, and changes in marine ecology (on which fishing and tourism industries often depend).

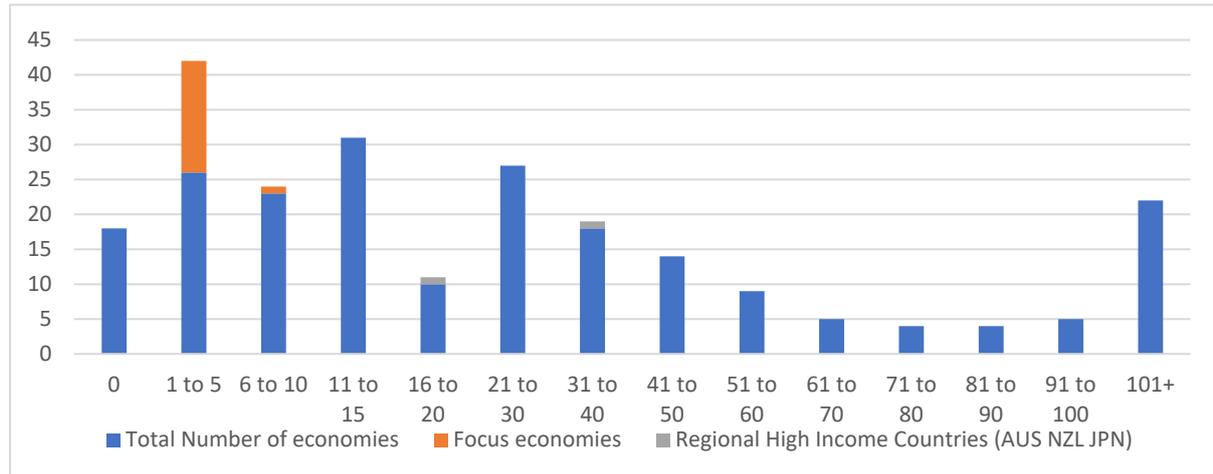
Small country size and remoteness – The small land and population sizes present in Pacific island countries are a particularly strong defining feature of their economies. These can create limitations inhibiting investment in economies of scale, and result in relatively higher costs for state services. These costs can be further compounded by the additional costs imposed by the remoteness of some island nations: many island nations in the Pacific have restrictive air and shipping options, as well as high infrastructure maintenance costs imposed by the effects of tropical climates and the impact of anthropogenic climate change. Limitations of size and scale also mean that Pacific island countries generally have narrowly based economies which are not easily diversified. A few key products and sectors (often tourism and resource extraction) often form large proportions of GDP. Further, many States are dependent on strategic imports such as fuel, food, industrial supplies, and healthcare.¹⁸

Exclusion / integration in the global economy - Small geographic and population size limit Pacific island economies' potential to develop fully independent, capital-intensive, domestic

¹⁷ UNCTAD, *IPFSD*, UN Doc UNCTAD/DIAE/PCB/2015/5 (n 10) 78-9.

¹⁸ Herbert (n 16) 3.

economies. These kinds of economies require foreign investment and export markets as drivers of economic growth. As such, global economic integration, particularly in relation to access to capital investment flows, is critical to economic and social development outcomes.¹⁹ An economy's IIA network is one facet of integration with global markets: the mean number of



IIAs per economy globally is 32 (median 20; see Figure 1). Our Pacific Focus economies, excepting PNG, have one or none (Figure 2).

Figure 1 Prevalence of IIAs per economy (Global)²⁰

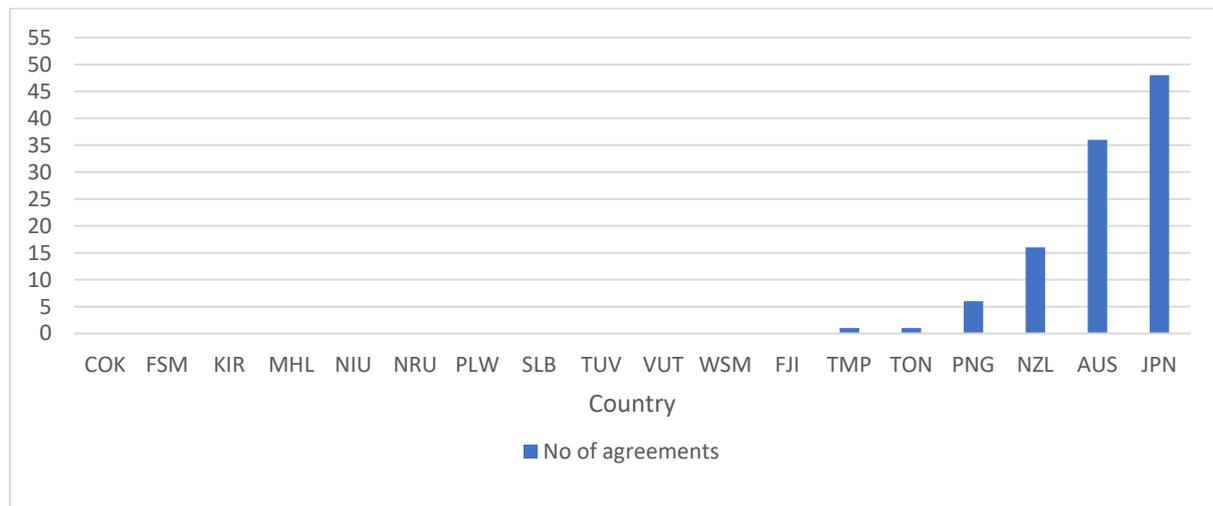


Figure 2 Number of concluded IIAs in force per economy (Pacific and key regional partners)²¹

¹⁹ Eric Kemp-Benedict, Crystal Drakes and Timothy Laing, 'Export-Led Growth, Global Integration, and the External Balance of Small Island Developing States' (2018) 6(2) *Economies* 35, 35-6.

²⁰As per UNCTAD, 'Mapping of IIA Contents' <available at <https://investmentpolicy.unctad.org/international-investment-agreements/ii-mapping>>.

²¹ World Bank Country codes: New Zealand (NZL); Australia (AUS); Japan (JPN)

Sources of economic growth broadly rely on macroeconomic stability and favourable investment climates for the private sector –²² both intimately linked to the administration of IIA network. Despite this, integration carries political controversy.²³

Current IIAs in force

Despite the global economy seeing a relatively recent surge in the proliferation of IIAs, the Pacific saw its surge in agreements signed between 1980 and 2006. Of the 18 signed, eight are in force and within scope relevant for discussion here (Figure 3) with only three of 16 Pacific Island Countries represented as parties (PNG, Tonga, and Timor-Leste).

These agreements vary in their inclusion of references to key sustainable development

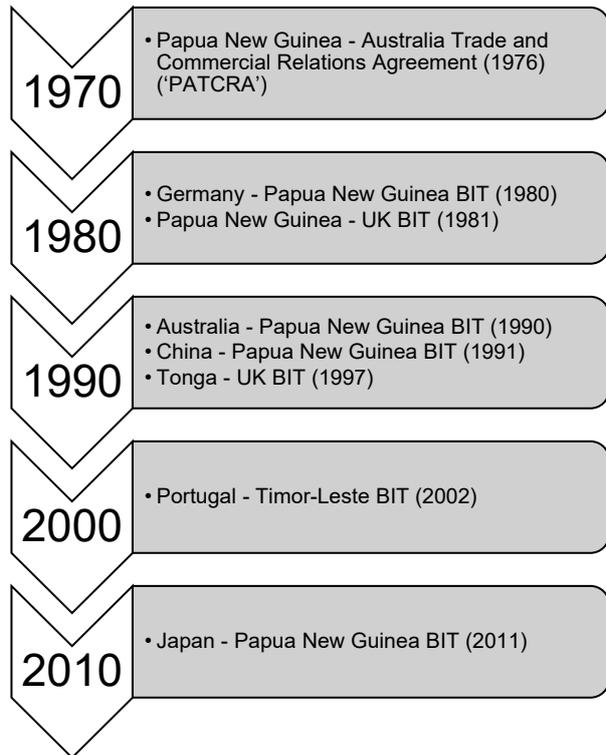


Figure 3 Timeline of agreements in scope

factors such as economic development, governance, health, and education. They also vary in their legal design with regard to scope of investments in receipt of protections, level of emphasis on investment promotion, provision for dispute resolution and balance of reciprocity in key areas such as MFN and FET. Each agreement in scope is briefly summarized below vis-à-vis these two key aspects and their key developmental correlations. These factors will later

²² Peter Osborne, Director, Trade & Investment Division, South Pacific Forum Secretariat, *Trade Issues and Development Prospects of Island Developing Countries of the Pacific*, ESC, Economic and Social Council Comm, 17 sess, Apr 1996 mtg, Agenda Item Commission on Sustainable Development: High-level Panel Meeting on Island Developing Countries, UN Doc E/CN.17/1996/IDC/Misc.2; UNCTAD/LLDC/IDC/Misc.2 (14 February 1996) (*Trade Issues and Development Prospects of Island Developing Countries of the Pacific*).

²³ Kemp-Benedict, Drakes and Laing (n

be analysed for their potential benefit to the design of future IIAs crafted with favourable conditions for the contexts of small Pacific Island States.

Papua New Guinea – Australia Trade and Commercial Relations Agreement (1976) ('PATCRA')

PNG exports heavily to Australia under PATCRA, which was the first TIP signed in the region and the first IIA signed by either contracting party.²⁴ This agreement undoubtedly contributed to the evolution of the mining sector in PNG, which now accounts for around 80% of foreign ownership in the country.²⁵ Inward FDI flows increased rapidly between 1980 and 1990 at an annual average rate of 10.4%. During the first half of 1990s, they grew at an even faster pace of 38.7%.²⁶

Article 14 on Investment and its subparagraphs directly address the issue of 'Australian direct investment... contribut[ing] to the social and economic development of Papua New Guinea in accordance with its foreign investment policies and priorities.'²⁷ The agreement gives preference to joint venture investments,²⁸ and emphasises the role of Australia, as the capital exporting State, in investment promotion; 'encourag[ing] Australian enterprises to participate in those specific fields... of development which [PNG] would particularly welcome Australian investment'.²⁹ It is unclear what consequential impact on Government behaviour the inclusion of these development-focussed provisions might be, however they provide an early model for the explicit inclusion of economic development in the fabric of TIPs. This is further reinforced throughout the trade provisions of the agreement which reference economic development as a

²⁴ John Howard, 'Papua New Guinea/Australia Trade And Commercial Relations Agreement' (Press Release, HPR10014328, 10 November 1976) 1 <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FHPR10014328%22>>; UNCTAD, *Mapping of IIA Contents* (n queries by economy, Australia and Papua New Guinea).

²⁵ UNCTAD United Nations Conference on Trade and Development, *Papua New Guinea Trade Policy Framework*, UN Doc UNCTAD/DITC/TNCD/2003/10) 10 (*Papua New Guinea Trade Policy Framework*).

²⁶ *Ibid.*

²⁷ *Agreement On Trade And Commercial Relations Between The Government Of Australia And The Government Of Papua New Guinea*, signed 6 November 1976, 14(1) (entered into force 1 February 1977) (*PACTRA*).

²⁸ *Ibid.*

²⁹ *Ibid* 14(2).

goal in three other instances.³⁰ The Agreement also includes provisions for non-reciprocal Most Favoured Nation Treatment (MFN) for Australian investments in PNG at Art 14 (4).³¹ PACTRA does not contain provision for dispute resolution, which was later included in the Australia – PNG BIT.³²

Papua New Guinea – Germany BIT (1980)

Given the economic context of the contracting parties to this agreement, it is noteworthy that neither the treaty text itself nor either party's national ratification documents mention PNG's developing status or any intended benefits to economic development as a result of the agreement. However, it does contain exceptions for expropriation and nationalisation for 'public benefit'.³³ This agreement was pre-Germany's routine inclusion of Investor-State Dispute Settlement (ISDS) in their BITs which began in the mid-1980s,³⁴ so does not contain ISDS provision. It allows for State-State Dispute Settlement (SSDS) but includes no provision for transparency of proceedings.

This early BIT uses a very broad definition of investment with no exceptions or carveouts in the text.³⁵ Given PNG's practice of enacting and amending domestic legislation relating to specific investments,³⁶ and the slow pace of actively considered legislative reform, the absence of a requirement that investments be "in accordance with host State laws" is not insignificant, and can be interpreted to reflect the negotiating power of Germany in the drafting as a major

³⁰ Ibid preamble, Arts 2, 15.

³¹ Ibid 14(4). NB that Art. 7 is titled 'Most Favoured Nation Treatment' but contains MFN in relation to trade rather than investment.

³² *Agreement for the Promotion and Protection of Investments*, Government of Australia and the Government of the Independent State of Papua New Guinea, signed 3 September 1990, arts 13-14 (entered into force 20 October 1991) (*Australia - PNG BIT*).

³³ *Treaty between the Independent State of Papua New Guinea and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments*, signed 12 November 1980, art 4(2), Protocol ad art 3(a) (entered into force 03 November 1983) (*PNG - Germany BIT*).

³⁴ Jason Webb Yackee, 'Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital' (Ph.D. Thesis, The University of North Carolina at Chapel Hill, 2007) 255. Germany did not operate with a model BIT until 1991.

³⁵ *PNG - Germany BIT* (n 33) art 1(1).

³⁶ E.g. *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea (Award)* (2013) ARB/13/33 ICSID (*PNGSDP v PNG*).

capital exporter. The BIT includes in its scope investments present before entry into force,³⁷ another example of a broad, sweeping approach to scope. Finally, the agreement contains a broad definition of expropriation, referencing indirect expropriation,³⁸ and a broad MFN provision with no exceptions except ‘public security, health and morality’ measures.³⁹ This is the only place in the agreement where social issues relating to key development outcomes are mentioned.

Papua New Guinea – United Kingdom BIT (1981)

The PNG-UK BIT marks the first regional agreement to incorporate International Centre for Settlement of Investment Disputes (ICSID) ISDS. Aside from this innovation for the Indo-Pacific the agreement is broadly consistent with later agreements in the region. While perhaps not surprising considering the international influence on standards of the UK’s later model BIT,⁴⁰ the UK did not have a model BIT in place at the time (the UK’s first model would be published in 1991). One incongruous feature, however, is this agreement’s silence on temporal scope, both for investments covered and the arbitration of disputes. Silence on such a central definitional issue is unusual in IIAs generally,⁴¹ and was remedied by the 1991 UK Model BIT.⁴²

Notable features of this agreement are: exclusion of jurisdiction for ICSID disputes where the investor is a company and a majority of shares are owned by nationals of the respondent State (later included in the 1991 Model BIT at article 8(2));⁴³ article 8(2)’s prohibition of the pursuit

³⁷ PNG - Germany BIT (n 35) art 9.

³⁸ Ibid art 4(2).

³⁹ Ibid Protocol ad art 3(a).

⁴⁰ Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19(3) *Journal of International Economic Law* 561-588, 576-7, 582-3.

⁴¹ Barton Legum; Obioma Ofoego; Catherine Gilfedder, 'Ratione Temporis or Temporal Scope' in Barton Legum (ed), *The Investment Treaty Arbitration Review* (Law Business Research, 5th ed, 2020), 38-9.

⁴² *United Kingdom Model Bilateral Investment Treaty*, art 1 ('UK Model BIT (1991)').

⁴³ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments*, signed 14 May 1981, art 8(1) (entered into force 22 December 1981) ('UK - PNG BIT').

of a dispute under ICSID consideration through parallel diplomatic challenges – serving to emphasise the role of rule of law in the event of a breach;⁴⁴ and, in relation to remedies, the presence of an absolute right to compensation in instances of State requisition or destruction of an investment.⁴⁵ This may be explained by the UK’s relatively small stake in mineral and resource investments in PNG.

The PNG-UK BIT contains no references to economic development or any of its key social drivers, or to PNG’s developing status.

Australia – Papua New Guinea BIT (1990)

‘Recognising the importance of promoting the flow of capital for economic activity and development,’⁴⁶ the Australia-PNG BIT builds on PACTRA’s ‘contribut[ion] to the social and economic development of Papua New Guinea’⁴⁷ to highlight development as a central motivation of the 1990 BIT in its opening paragraphs.⁴⁸

Beyond its relatively significant focus on development as a core value, the Australia-PNG BIT features a number of noteworthy drafting choices: firstly, the definition of investment used contains a ‘subject to [the Contracting Party’s] law and investment policies from time to time’ qualification.⁴⁹ This qualification is not common among similar agreements, but draws attention to the role of political pressures in foreign investment in both developing States and Australia. Secondly, dispute settlement options include a standard SSDS model and ISDS in domestic courts and before an ICSID tribunal.⁵⁰ This inclusion likely reflects the absence of a strong domestic arbitration culture in PNG, necessitating parties to invoke the use of

⁴⁴ Ibid art 8(2).

⁴⁵ Ibid art 4(2).

⁴⁶ *Australia - PNG BIT* (n 32) preamble.

⁴⁷ *PACTRA* (n 27).

⁴⁸ *Australia - PNG BIT* (n 46).

⁴⁹ Ibid art 1(d).

⁵⁰ Ibid arts 13-14.

international standards. Further, final remedies provisions include limits on compensation that an ICSID may grant: “a national or company of a Contracting Party involved in such a dispute shall not be entitled to compensation for more than the value, [...] of the investment which is the subject of the dispute, taking into account all sources of compensation within the territory of a Contracting Party liable to pay compensation.”⁵¹ This may protect PNG from the most burdensome awards that may otherwise be granted. Finally, the agreement incorporates a denial of benefits clause article 2(3) for third country nationals with control of a complainant investor – this provision may deter third country nationals without a real economic connection to the party on whose nationality they rely for a claim from incorporating companies in that state.⁵² However, given the close economic relationship between Australia and PNG, their proximity, and the contrast between their systems of economic governance, non-Australian foreign investors may still find incorporation in Australia for investments in PNG attractive. As such, this provision may have a meaningful relationship to the BIT’s suitability to support development outcomes for PNG – this will be explored further in Chapter III.

Papua New Guinea – China BIT (1991)

Like most agreements currently in force in the region, the China-PNG BIT does not include reference to sustainable development or social investment aspects, health, or the environment. It does reference the promotion of joint ventures as a specific type of encouraged investment, however given the PRC’s standard joint venture requirements for the admission of investment and the likely enforceability of this provision, it may not be of great utility to PNG’s development outcomes.

⁵¹ Ibid art 14(6).

⁵² Lindsay Gastrell and Paul-Jean Le Cannu, 'Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions' (2015) 30(1) *ICSID Review - Foreign Investment Law Journal* 78-97, 78.

This agreement's unusual features include that it does not contain a definition of 'investor' and limits the standard of relative compensation for protection from strife breaches to MFN levels. Most other agreements go up to the national treatment level. In terms of ISDS forums, it is also unusual that this BIT excludes the domestic courts of the host state as an available forum. However, the agreement gives access to ICSID after a six-month period of attempted settlement.⁵³

United Kingdom – Tonga BIT (1997)

The UK - Tonga BIT continues to exclude discussion of economic and social development results from FDI, or specific investment promotion activities. It largely mirrors the design of the UK's previously concluded BIT in the region with PNG. However, the provision at article 8(1) of the UK-PNG BIT (also at 8(2) of the UK's model BIT) does not appear in the Tonga agreement. Nor does the balance-of-payments exception found previously in the same. This latter shift may be explained by the UK's decision not to include a balance-of-payments exception in the 1991 model.

The full protection and security provisions of this BIT give strong rights for compensation to investors.⁵⁴ However, this is balanced by restrictions on which disputes may only be submitted to arbitration: this facility is limited to disputes which they fall directly under the BIT.⁵⁵ This BIT is otherwise unremarkable in its design, likely due to the significant influence of UK model BITs on trends in treaty design.

Portugal – Timor-Leste BIT (2002)⁵⁶

⁵³ *Agreement between the Government of the Independent State of Papua New Guinea and the Government of the People's Republic of China for the Promotion and Protection of Investments*, signed 12 April 1991, art 8(2) (entered into force 12 February 1993) (*PNG - China BIT*).

⁵⁴ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Tonga for the Promotion and Protection of Investments*, signed 22 October 1997, art 4 (entered into force 22 October 1997) (*UK - Tonga BIT*).

⁵⁵ *Ibid* art 8(1).

⁵⁶ It is worth noting that this agreement's authentic text is only available in Portuguese, limiting the author's ability to undertake interpretive analysis.

The Portugal-TL BIT offers an interesting example of a post-colonial IIA. Again, this agreement does not contain reference to TL's developing status, nor reference to social aspects of investment. A seldom seen but often discussed feature does appear in the Portugal-TL IIA: an 'in accordance with host State's laws' requirement within the definition of 'investment'. This creates a jurisdictional bar for investors seeking to use the agreement's varied ISDS forum options. Indeed, this is the only agreement within scope which offers a variety of arbitral fora with a 'fork in the road' relationship.

Japan – Papua New Guinea BIT (2011)

The preamble of the Japan-PNG BIT includes explicit reference to sustainable development: 'recognising that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars'.⁵⁷ This positions this agreement as the first BIT to reference development outcomes in its text, and the only IIA in the region where these references appear without Australia as a contracting party. Though Japan does not have an official model BIT, the design of the Japan – Cambodia BIT was in large part carried forward in subsequent practice.⁵⁸ This emphasis on development does not appear in the Cambodia agreement, or in any of Japan's other IIAs, contemporaneous or since – it is therefore possible to conclude that the inclusion is particular to the Japan / PNG relationship resulting from the coincidence of regional neighbourhood and distinct developmental stages.⁵⁹ Relatedly, this IIA also includes explicit provision to deter the roll-back of health or environmental standards,⁶⁰ and to 'ensure that measures and efforts are undertaken to prevent and combat corruption'⁶¹ –

⁵⁷ *Agreement Between the Government of Japan and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investment*, signed 26 April 2011, preamble (entered into force 17 January 2014) (*Japan - Papua New Guinea BIT*).

⁵⁸ See, e.g. agreements with Morocco, Mozambique, Kenya, Myanmar.

⁵⁹ Cf. Myanmar and Kenya.

⁶⁰ *Japan - Papua New Guinea BIT* (n 57) art 22.

⁶¹ *Ibid* art 9.

a rare reference to the development of governance in a contracting party with a poor corruption record.⁶²

The Japan-PNG Agreement also reflects a deliberate design choice in the relationship between available ISDS fora: most of Japan's IIAs use either a 'no u-turn'⁶³ or 'fork in the road'⁶⁴ provision to structure the choice of forum available to investors, but the PNG agreement, in contrast, preserves the right to arbitration after domestic court proceedings.⁶⁵ There may be some correlation to be drawn here between the use of this design for PNG, and its inclusion in the Japan-Mozambique BIT;⁶⁶ PNG and Mozambique share similar stages of economic development, and both are classified as Low Income by the World Bank.⁶⁷

Trends and features of treaties in scope

Only one of the IIAs in force in the Pacific includes any meaningful reference to promoting development outcomes for parties. This is notably also the only modern agreement between a PIC and a capital exporting economies with strong links to the region (Japan),⁶⁸ while significant economies like the UK continue to omit such language even in the 21st Century.⁶⁹ Another feature unique to the Japan-PNG BIT of the post GATS IIAs is the inclusion of provision for the entry and sojourn of foreign nationals. Provisions of this kind have become

⁶² Transparency International, 'Corruption Perceptions Index 2019' (2019), 4, 15 <https://images.transparencycdn.org/images/2019_CPI_Report_EN_200331_141425.pdf>. PNG scores 28/100 on the CPI and is ranked 137th globally. 100 is very clean and 0 is highly corrupt. The global average score is 43. By comparison, Japan receives a score of 73/100 and is ranked 20th in the world.

⁶³ E.g. *Agreement Between The State of Israel And Japan for the Liberalization, Promotion and Protection of Investment* signed 1 February 2017 (entered into force 5 October 2017) ('*Israel - Japan BIT*'); *Agreement Between Japan and The Sultanate Of Oman for the Reciprocal Promotion and Protection of Investment*, signed 19 June 2015 (entered into force 21 July 2017) ('*Japan - Oman BIT*'); *Agreement Between The Government Of Japan And The Government Of The Republic Of The Union Of Myanmar For The Liberalisation, Promotion And Protection Of Investment*, signed 15 December 2013 (entered into force 7 August 2014) ('*Japan - Myanmar BIT*').

⁶⁴ E.g. *Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment*, signed 5 February 2016 (entered into force 26 April 2017) ('*Iran - Japan BIT*'); *Agreement Between Japan And The Oriental Republic Of Uruguay For The Liberalization, Promotion And Protection Of Investment*, signed 26 January 2015 (entered into force 14 April 2017) ('*Japan - Uruguay BIT*').

⁶⁵ *Japan - Papua New Guinea BIT* (n 57) art 16(7)(a).

⁶⁶ *Agreement Between The Government of Japan And The Government of The Republic Of Mozambique on the Reciprocal Liberalisation, Promotion and Protection of Investment* signed 01 June 2013 (signed and entered into force 29 August 2014) ('*Japan - Mozambique BIT*').

⁶⁷ 'World Bank Data', *Data for Mozambique, Papua New Guinea* <<https://data.worldbank.org/?locations=MZ-PG>>.

⁶⁸ E.g. *PACER Plus* (n ; *Japan - Papua New Guinea BIT* (n 57)).

⁶⁹ E.g. *Agreement between UK and Vanuatu for the Promotion and Protection of Investments*, signed 22 December 2003, Vanuatu No.1 (entered into force not yet in force) ('*UK-Vanuatu BIT*').

increasingly uncommon globally and dealt with in relatively few BITs (though Japan displays a trend of inclusion across their treaty network).⁷⁰

Variations in design elsewhere in the Pacific Islands are largely uncommon, which reflects the general stasis globally on innovation in IIA design;⁷¹ of the factors mapped under the UNCTAD IIA mapping project, less than 8% of characteristics vary across the agreements in scope. Nonetheless, some occur in relation to dispute resolution fora: decisions about the jurisdiction of domestic courts in a host state and the relationship between fora represent the main points of divergence. However, the two agreements which exclude the use of domestic courts are the UK- and China- PNG BITs.⁷² This may suggest a reflection on the institutional strength of the Papua New Guinean justice system, or it may be a function of PNG being the most common contracting party among the PIC host economies.

A further point of variation is the inclusion of an ‘in accordance with host state laws’ requirement as part of the definition of investment. About half of the IIAs assessed include this limitation. Considering these factors, as well as the continuing volatility of international markets, the balance-of-payments exception is a technical economic

Agreement name	“Investment” contains “in accordance with host State laws” requirement
PATCRA	Not Applicable
Germany – PNG BIT	No
UK – PNG BIT	No
Australia – PNG BIT	Yes
China – PNG BIT	Yes
Tonga – UK BIT	No
Portugal – Timor-Leste BIT	Yes
Japan – PNG BIT	No

provision of IIAs which, in agreements where the promotion of development outcomes is a

Table 1
Inclusion of investment legality requirement in Pacific IIAs

⁷⁰ UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking' (Research Paper No UNCTAD/ITE/IIT/2006/5, UNCTAD, xii, 70-1 <https://unctad.org/en/Docs/iteiia20065_en.pdf>.

⁷¹ Ibid 140.

⁷² See UNCTAD, 'China - Papua New Guinea BIT (1991)', *International Investment Agreements Navigator* <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/953/china--papua-new-guinea-bit-1991->>>; UNCTAD, 'Papua New Guinea - United Kingdom BIT (1981)', *International Investment Agreements Navigator* <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2741/papua-new-guinea---united-kingdom-bit-1981->>>.

stated purpose, should be given careful consideration in line with the monetary policy of the contracting parties.

Considering these factors, as well as the continuing volatility of international markets, the balance-of-payments exception is a technical economic provision of IIAs which, in agreements where the promotion of development outcomes is a stated purpose, should be given careful consideration in line with the monetary policy of the contracting parties.

The designs of IIAs currently in force in the PIC focus economies suggest that, with the exception of the Japan- PNG BIT, strengthening development outcomes has not been a focus of the drafting and negotiation process. This narrowing of the definition of investment can often be used to reflect a country's development policy, for example by excluding certain assets from coverage under an IIA.⁷³ It may also be put in place to ensure a 'level playing field' between local and international investors in engagement with domestic regulations.⁷⁴

The balance-of-payments exception to transfer of funds obligations is another point of divergence within this treaty set. Balance-of-payment provisions are particularly relevant to developing states where, like several in the Pacific, economies have limited foreign currency exchange reserves and are subject to a rapid dip in trade deficit.⁷⁵ One of the key policies to end a balance-of-payment crisis is temporary halt of capital flight.⁷⁶ UNCTAD notes:

While the imposition of exchange restrictions may normally not be the preferred response to such a crisis, a country facing a sudden and severe depletion of foreign exchange reserves arising from massive capital

⁷³ UNCTAD, 'Definitions and Scope' (Issues Paper No UNCTAD/ITE/IIT/11, UNCTAD, 2, 23-4.

⁷⁴ Ibid 24.

⁷⁵ 'Balance-of-payments crisis', in John Black, Nigar Hashimzade and Gareth Myles (eds), *A Dictionary of Economics* (Oxford University Press, 4th ed, 2013).

⁷⁶ Ibid.

*outflows cannot rule out the possibility of imposing such restrictions for a temporary period while corrective economic policies take hold.*⁷⁷

During the Global Financial Crisis, the Pacific experienced an upsurge in costs of living, economic recession, a loss of key export market preferences, and appreciating real exchange rates which impacted adversely on balance-of-payments positions.⁷⁸ For two countries – Fiji and Solomon Islands – the crisis exposed deeper underlying structural balance-of-payments difficulties for which monetary policy changes were required to provide economic stabilization.⁷⁹ Considering these factors, as well as the continuing volatility of international markets, the balance-of-payments exception is a technical economic provision of IIAs which, in agreements where the promotion of development outcomes is a stated purpose, should be given careful consideration in line with the monetary policy of the contracting parties.

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⁷⁷ UNCTAD, 'Transfer of Funds' (Issues Paper No UNCTAD/ITE/IIT/20, Series on Issues in International Investment Agreements, 3.

⁷⁸ Richard Wood, 'Monetary and exchange rate policy issues in Pacific island countries' (Treasury Working Paper No 2010-05, Australian Government Treasury, September 2010) 2 <<https://treasury.gov.au/publication/monetary-and-exchange-rate-policy-issues-in-pacific-island-countries>>.

⁷⁹ Ibid 11, 13-14.

PACER Plus – a new model, or a red herring?

PACER Plus is, as its title suggests, an agreement on ‘closer economic relations’ across a broad range of areas, including trade in goods and services, customs regulation, product rules of origin, investment, movement of people, etc.⁸⁰ The agreement comes into force on 13 December 2020 after Cook Islands was the eighth ratification on 14 October 2020 triggering the 60 day countdown to enter into force. PACER Plus offers a significant number of innovative investment provisions (Figure 4), and has ‘sustainable economic development’⁸¹ and ‘the unique and particular vulnerabilities and development challenges of developing country and least-developed country Parties in the [Pacific] region’⁸² rhetorically at its core. However, the development merits of the agreement have not been without controversy. It has drawn mixed reviews from Pacific, New Zealand and Australian commentators. Many PICs have limited experience making binding commitments on their services and investment sectors, yet they have taken on extensive commitments in PACER Plus.⁸³

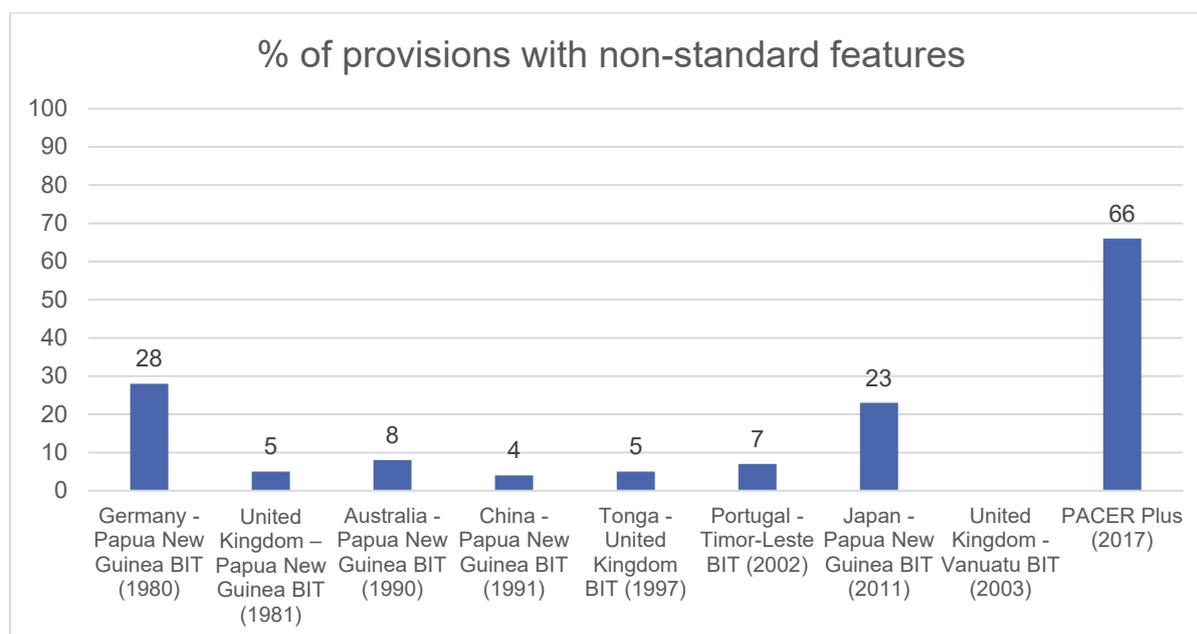
⁸⁰ *PACER Plus* (n 7) Contents, 2.

⁸¹ *Ibid.* Preamble.

⁸² *Ibid.*

⁸³ Adam Wolfenden, ‘PACER Plus: the case against’, *DevPolicy* (Blog Post, 25 November 2020) <<https://devpolicy.org/pacer-plus-the-case-against-20201125-2/>>.

Figure 4 Comparison of innovation in IIAs (PACER Plus to other in-scope agreements)



As an investment agreement, the preamble of PACER Plus is a strong statement of the parties' intentions, 'recognising the significant development relationship among the Parties',⁸⁴ offering important interpretive guidance for the later investment chapter.

But examples of development considerations persist in PACER Plus beyond the preambular text: Noting the prioritisation of meaningful employment among PICs' development strategies, the PACER Plus Investment Chapter is accompanied by an extensive Movement of Natural Persons Chapter,⁸⁵ with an explicit objective to 'protect the domestic labour force and permanent employment in the territories of the Parties.'⁸⁶ As recommended by IPFSD, the agreement excludes specific assets from the definition of investments,⁸⁷ and lists required characteristics of investments including the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.⁸⁸ The investment definition in PACER Plus further includes

⁸⁴ *PACER Plus* (n 7) Preamble.

⁸⁵ *Ibid* Chapter 8.

⁸⁶ *Ibid* Ch 8 Art 2(1)(d).

⁸⁷ *Ibid* Ch 8 Art 1.

⁸⁸ *Ibid*.

an "in accordance with host State laws" requirement.⁸⁹ In the same vein, PACER Plus protects developing parties from treaty shopping and vexatious claims by containing a denial of benefits clause which addresses a number of these issues, including the requirement to have substantial business activities in the relevant contracting party.⁹⁰ The substantive scope of the treaty and its key investor protections also exemplify UNCTAD endorsed best practice in IIA design for sustainable development.⁹¹

Despite the prevalence of particularised provisions and innovative design features in the investment protection chapter of PACER Plus, it does not branch much outside UNCTAD recommendations or simple statements of policy-based carve-outs in its stretch to support Pacific development outcomes. It will, however, be an experiment in development targeted IIA design; the empirical data from its implementation will offer significant sustenance for ongoing work in improving treaty design for sustainable development.

II GOALS OF IIAS AND DESIGNING AGREEMENTS TO MEET THEM

This section will examine the success of context-adapted IIAs (using economic data inc. investment flows and economic growth) for small island developing economies where longer histories of investment agreements are established to allow a picture of which, if any, features of these investment agreements could be appropriately adapted to Pacific island countries. It will address the role of IIAs in supporting development outcomes.

⁸⁹ Ibid.

⁹⁰ Ibid Ch 8 Art 18(1)(a).

⁹¹ See generally UNCTAD, *IPFSD*, UN Doc UNCTAD/DIAE/PCB/2015/5 (n 10).

‘The big problem to solve for treaty designers and adjudicators is to separate [in alleged breaches] opportunistic behavior [sic] of states from legitimate policies for Sustainable Development of host states being pursued by them’.⁹²

Are IIAs the right instrument to further development goals?

Reactions to the public visibility of arbitral awards against State parties, especially those with large and increasing amounts of damages payable, have provoked an argument that the conclusion of BITs is detrimental to a State's sovereignty and its right to regulate in the public interest.⁹³ Certainly principles of self-determination and democratic tenets should not be yielded in favour of indiscriminate investment incentivisation. The right to regulate in the public interest is one right of many which constitute State sovereignty. However, the conclusion of treaties and the creation of international legal obligations are also fundamental expressions of State sovereignty; as Aaken phrases it, ‘states trade credibility for sovereignty’.⁹⁴ They present one tool which can be used ‘in the public interest’, and the good faith argument that sovereignty serves a public interest purpose must logically extend to balancing unilateral regulation with other public interest outcomes; in this instance, effective fulfillment of the Sustainable Development Goals.

In considering whether IIAs are right for any particular State, governments should consider that the right to exercise regulatory powers is bounded both domestically and internationally by rule of law principles, including boundaries provided by treaty obligations.⁹⁵ In this context, the principle of consent reminds that the conclusion of an IIA is not mutually inclusive with

⁹² Anne Van Aaken, 'Smart Flexibility Clauses in International Investment Treaties and Sustainable Development Special Issue: Towards Better BITs - Making International Investment Law Responsive to Sustainable Development Objectives' (2014) 15 827, 828.

⁹³ Andreas R. J Ziegler, 'Special Issue: Towards Better BITs - Making International Investment Law Responsive to Sustainable Development Objectives: Introduction' (2014) 15 803, 804.

⁹⁴ Aaken (n 92) 829.

⁹⁵ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary* Award No ICSID Case No. ARB/03/16 2 October 2006) [423] (*ADC v. Hungary*).

ISDS. Though the approach of excluding an investor-state dispute mechanism from new IIAs, as done in the investment chapter of the Australia-United States Free Trade Agreement (AUSFTA), has not taken off, it is an available choice in agreement design.

Ababneh and others argue for rebalancing of the obligations and benefits between investors and host states' economic and development interests;⁹⁶ it is overly simplistic and inaccurate to suggest that the issue is constituted of such a binary. Rather, rebalancing IIAs should take in innovations which constitute win-win improvements for all parties, including contracting parties and investors, in addition to *some* more simplistic trade-offs made to support development outcomes, perhaps at the cost of some investment protections. Such a redesign will need to take a more complex analytical approach to the desired treaty outcomes, acknowledging economic effects as well as impacts on other important investment climate factors such as governance and fragility, environmental sustainability and human development factors.

Political sovereignty is an asset that States may exchange for whatever benefits it sees fit, including using its authority to attract or incentivise capital inflows for whatever purpose the State sees fit. This is one of the reasons that commentators will often note the imbalance in IIAs: IIAs are a mechanism by which a State can agree to alter the status quo, its full package of sovereign rights, including the inherent right to regulate, and to forfeit some of their rights/sovereignty in exchange for capital in-flows. As such, the agreements cannot *create* rights for the State parties, since in the absence of the agreement they hold the majority of the cards dealt. In the absence of the IIA, only the international minimum standard of treatment will protect a foreign investor. However, given the international legal personality of States vis-

⁹⁶ Ababneh (n 9) 254-5.

à-vis investors, questions of imposing (or refraining from imposing) obligations on investors are not straightforward.

At the very least IIAs should not generate additional barriers to development goals, which power imbalances between those in possession of foreign capital and host states may create, especially where governance is weak. Should we bring additional labour, environmental or human rights standards into IIAs? No. This may be the place of an umbrella clause but is not the place of IIAs or the experts involved in their negotiation. They should address the complexities of the flow of capital through financial markets and investment environments, which is complex enough without addressing entirely separate and equally complex areas of international and domestic law.⁹⁷

Have concluded IIAs traditionally benefited Small Island Developing States?

As discussed above, small island developing States have distinctive economic conditions which require a higher degree of treaty customisation in their IIAs than may be required for other developing economies. In order to offer significant benefit to Pacific Island Countries, treaty provisions must consider, among other factors: key domestic sector investment priorities; monetary and exchange policy unique to small, undiversified economies; the development status and priorities of the State; and, exposure to liabilities, especially from investor-state dispute claims.

Small island developing States outside the Pacific are, in many cases, more advanced in grappling with the challenges of establishing optimal IIA networks. Small island states in the African and Caribbean regions commonly grew their investment networks from colonial connections, and many have moved through several generations of IIA designs. These more

⁹⁷ Alexandre J De Gramont, 'J. Anthony VanDuzer, Penelope Simons and Graham Mayeda; Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators Book Review' (2014) 15(1-2) *Journal of World Investment & Trade* 351, 356.

extensively established networks have facilitated the development of domestic administrative capabilities in foreign investment governance, domestic legislation, treaty negotiation, monitoring and evaluation. It is therefore useful to consider a selection of examples from these States to collect their lessons in IIAs which optimally meet their distinct needs and goals in both economic investment and sustainable development.

For the purposes of a surface enquiry of comparable States, I have selected below three small island developing States at different stages of treaty network expansion and maturity. Mauritius and Cabo Verde offer the Pacific experiences of comparable proximity to major capital exporting markets, limitations on arable land and small populations.⁹⁸ Cabo Verde also resembles several Pacific nations as an archipelago with few natural resources.⁹⁹

The Dominican Republic offers an analogous experience with island-neighbour regionalisation, and access to larger markets more closely mirroring that of PNG and Fiji. It is also an example of a State without negotiating power amplified by one of the world's major economic blocs (Cabo Verde benefits from the African Union while Mauritius sends nearly a third of its total exports to the European Union)¹⁰⁰. This is reflected in its smaller IIA network and more extensive needs in governance strengthening.

***Mauritius*¹⁰¹ (30+ IIAs in force)**

Mauritius has been aggressive in expanding its network of IIAs, especially in comparison with other small island states.¹⁰² This is in line with the States' policy of encouraging FDI in key sectors, while implicitly discouraging it in others.¹⁰³ In particular, Mauritius has strongly

⁹⁸ Joel Negin, 'What the Pacific can learn from African Small Island States', *Devpolicy* (Blog Post, January 19 2012), archived at <https://devpolicy.org/pacific_africa_small_island_states20120119/>.

⁹⁹ *Ibid.*

¹⁰⁰ 'The World Factbook: Mauritius', *Mauritius*, 2020) <https://www.cia.gov/library/publications/the-world-factbook/docs/contributor_copyright.html>.

¹⁰¹ Mauritius is a small island nation to the West of Madagascar in East Africa.

¹⁰² UNCTAD, *Mauritius Investment Policy Review*, UN Doc UNCTAD/ITE/IPC/Misc. I) 18 ('*Mauritius Investment Policy Review*').

¹⁰³ *Ibid* 16-7.

encouraged investment in financial and investment services sectors, and has become a popular incorporation destination for investment in India and Africa. As such, IIAs form an essential part of Mauritius' attractive investment environment and have been key to facilitating growth in the financial services sector, accounting for about 10% of GDP.¹⁰⁴

Mauritius' BIT network offers investors FET as a standard protection but does not offer national treatment in most agreements.¹⁰⁵ Agreements generally provide for broad free transfer of funds subject to prevailing domestic law,¹⁰⁶ a significant qualification is key to allowing Mauritius to regulate its monetary policy in an economy which seeks to attract a significant proportion of external financing. However, the general ease of repatriation of funds (subject to balance-of-payment challenges) has been a key attraction for investment in Mauritius.¹⁰⁷ Mauritius BITs provide that expropriation will only take place for public purposes, in accordance with due process and will result in prompt, adequate and effective compensation.

Mauritius' BITs generally do not include sustainable development provisions or references, and have been criticised for the omission of provisions preventing (or discouraging) the relaxation of labour and environmental standards.¹⁰⁸ Agreements are designed to facilitate investment in priority sectors, with provisions relating to non-priority sectors and markets where investment is discouraged excluded from agreements. In particular, as a small island nation Mauritius has avoided the incentivisation of foreign investment in real property, given its limited geographic size. This approach offers lessons for PICs in tailoring IIAs to incentivise particular sectors as appropriate.

¹⁰⁴ 'BDO Mauritius: Industries', *Financial Services* (Webpage) <<https://www.bdo.mu/en-gb/industries/financial-services>>.

¹⁰⁵ UNCTAD, *Mauritius Investment Policy Review*, UN Doc UNCTAD/ITE/IPC/Misc. I (n 102) 18.

¹⁰⁶ Ibid.

¹⁰⁷ Anupam Basu and Krishna Srinivasan, 'Foreign Direct Investment in Africa - Some Case Studies' (Working Paper No WP/02/61, International Monetary Fund, March 2002) <<https://www.imf.org/external/pubs/ft/wp/2002/wp0261.pdf>>.

¹⁰⁸ Ambareen Beebejjaun, 'The role of international investment agreements in attracting FDI to developing countries: An assessment of Mauritius' (Pt Emerald Group Publishing Limited) (2018) 60(1) *International Journal of Law and Management* 150-171, 159.

***Dominican Republic*¹⁰⁹ (12 IIAs in force)**

The Dominican Republic's IIA network features wide variation in the design of key provisions, including FET, ISDS, MFN, and definitions of investor and investment.¹¹⁰ The frequency of variation across the BIT network is attributable to the variation in the Republic's negotiating positions relative to its treaty partners,¹¹¹ a factor also relevant for Pacific Island nations.

At the intersection between domestic constitutional law and international investment, the Dominican Republic's constitution includes a right to private property and compensation for State expropriation. This is an important note for the development of model BITs in younger States, where constitutional guarantees may hold some sway over the wording of treaty provisions. Dominican Republic also has a history of expropriation involving foreign investors, and UNCTAD notes that consequentially, domestic law reflecting the international minimum standard is all the more important.¹¹²

In its Investment Policy Review of the Dominican Republic, UNCTAD recommended that a model BIT be designed for forthcoming negotiations,¹¹³ to reduce inconsistencies and improve network coherence and regulatory burden.

***Cabo Verde*¹¹⁴ (8 IIAs in force)**

Cabo Verde is a member of the African Union with its currency, the Cabo Verdean Escudo, pegged to the Euro. Given Cabo Verde's ties to Africa and the European Union (as a former Portuguese colony) and its economic weight (see Figure 5 GDP per Capita World Bank 2019 (Current US\$)), Cabo Verde's position is analogous to Pacific nations with ties to Southeast Asia and Oceania.

¹⁰⁹ The Dominican Republic is a Caribbean Island nation that shares the island of Hispaniola with Haiti.

¹¹⁰ UNCTAD, *Investment Policy Review of Dominican Republic*, UN Doc UNCTAD/ITE/IPC/2007/9) 32 (*Investment Policy Review of Dominican Republic*).

¹¹¹ *Ibid.*; See generally, Alschner and Skougarevskiy (n 40).

¹¹² UNCTAD, *Investment Policy Review of Dominican Republic*, UN Doc UNCTAD/ITE/IPC/2007/9 (n **Error! Bookmark not defined.**) 35.

¹¹³ *Ibid.* 32.

¹¹⁴ Cabo Verde is an island state in the Atlantic of the West African coast, close to Senegal.

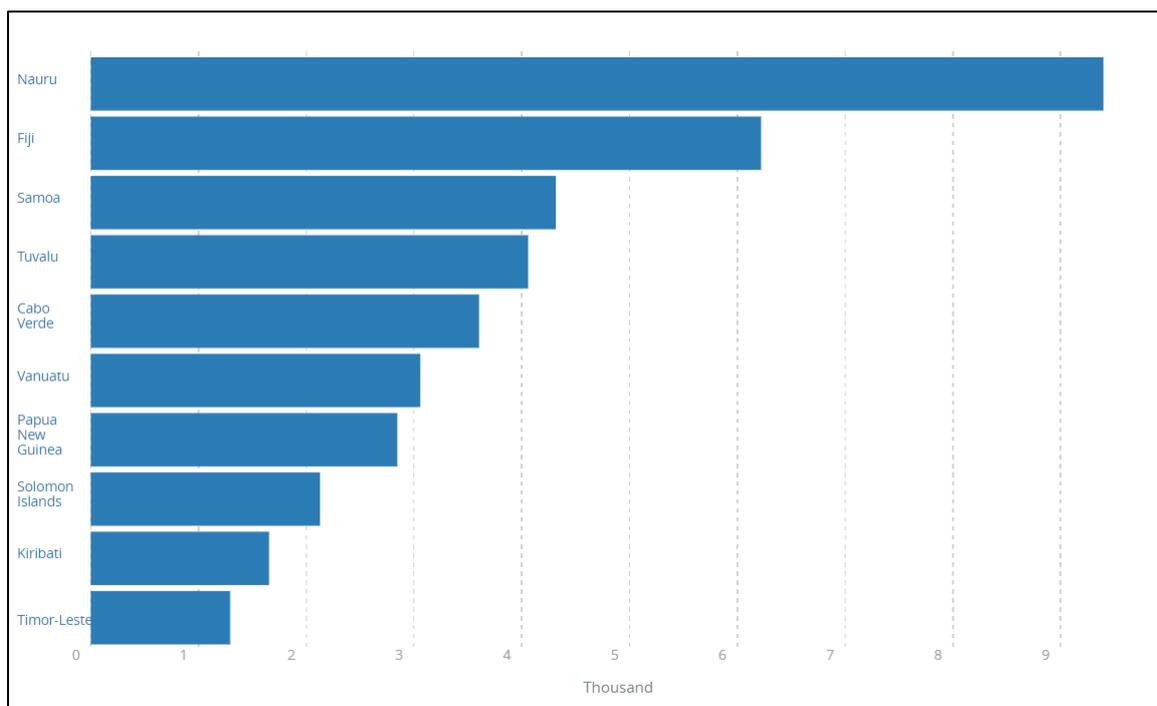


Figure 5 GDP per Capita World Bank 2019 (Current US\$)

These links make balance-of-payment provisions and monetary policy essential for the stability of investments in Cabo Verde. Its IIAs offer foreign investors the right to convert the proceeds of their investment into any other freely convertible currency and transfer abroad all resulting income.¹¹⁵ This free transfer of funds, however, interacts with a definition of investment subject to domestic legislation. Whenever the amount to be transferred is likely to cause serious disturbances in the balance-of-payments, the Governor of the Reserve Bank guarantees due process with set timelines publicised in legislation. This link between payment provisions and monetary policy is pertinent for small Pacific island nations where currency fluctuations can have considerable impacts on their small economies.

In its Investment Policy Review of Cabo Verde, UNCTAD recommended that modernisations for the States IIA Network should prioritise a sustainable development agenda and reducing

¹¹⁵ [Insert sample provision reference](#)

exposure to ISDS claims.¹¹⁶ Cabo Verde has recently concluded a BIT with Hungary, which featured preamble references to sustainable development targets, and detailed exceptions from the free-transfer-of-funds obligation, including for balance-of-payments difficulties and/or enforcement of national laws.¹¹⁷

Other design innovations in IIAs

Other innovations in the most recent concluded agreements also include more consistent reference to the protection of health and safety, labour rights, and environment or sustainable development, and many provide for general exceptions for disputes concerning regulatory measures of those kinds.¹¹⁸ A number of agreements from outside the Pacific offer examples to be drawn on.

In 2019 Morocco's model BIT featured an innovative provision 'specifying that a required economic contribution to the host State economy – itself not an unusual practice in the definition of investment – be made towards **sustainable development and providing indicators** for measuring such a contribution.'¹¹⁹ Given the weaker statistical capacities and difficulties in collecting development data in Pacific island states, this provision might be highly beneficial to host states in supporting their development outcomes. In interpreting this provision, it is important to distinguish between 'providing indicators' and monitoring the progress of those indicators. In development practice, the adage 'what is measured gets funded' is significant, particularly in times of domestic protectionism and austerity. However, it is a significant burden to impose the monitoring of development indicators. Conversely, the Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda

¹¹⁶ UNCTAD, *Investment Policy Review of Cabo Verde*, UN Doc UNCTAD/DIAE/PCB/2018/2) 16 (*Investment Policy Review of Cabo Verde*).

¹¹⁷ UNCTAD, 'The changing IIA landscape: New treaties and recent policy developments' (Issues Note No Issue 1, UNCTAD, July 2020) 9.

¹¹⁸ *Ibid* 6.

¹¹⁹ *Ibid*.

for Sustainable Development are freely available and accessible.¹²⁰ While a protocol outlining the scope of this obligation would be essential to prevent its development benefits being outweighed by its deterrent power to investment exporting states and investors, the inclusion of explicit links to sustainable development indicators provide administrators assessing foreign investment proposals support in aligning domestic development policy priorities with FDI.

The 2020 Brazil–India BIT also featured novel provisions allowing the parties to adopt or maintain **affirmative action measures towards vulnerable groups**, and prohibiting the parties from subjecting investments to measures that constitute targeted discrimination based on race, gender or religious beliefs. The former measure may be useful in particular for Pacific nations where policies to promote the rights of indigenous peoples, the active development of gender equality and other marginalised communities are essential development goals. Where actions are adopted for the maintenance of cultural and linguistic diversity, the Canada–Thailand BIT offers an example provision, excluding cultural industries from the scope of the agreement:

Article VI

Miscellaneous Exceptions [...]

3. Investments in cultural industries are exempt from the provisions of this Agreement. “Cultural industries” means persons engaged in any of the following activities:

- (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine-readable form but not including the sole activity of printing or typesetting any of the foregoing;*
- (b) the production, distribution, sale or exhibition of film or video recordings;*
- (c) the production, distribution, sale or exhibition of audio or video music recordings;*
- (d) the publication, distribution, sale or exhibition of music in print or machine-readable form;*

¹²⁰ United Nations Department of Economic and Social Affairs Statistics Division, 'Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development', *SDG Indicators*) <<https://unstats.un.org/sdgs/indicators/indicators-list/>>.

or

*(e) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.*¹²¹

In recent years, the inclusion of specific proactive provisions on **investment promotion** has consistently risen, with 12 of the agreements in 2019 featuring such provisions.¹²² However, investment promotion provisions are typically constructed as normative rather than strict obligations – PACTRA features such a provision at art. 14(2):

Article 14 Investment [...]

*2. The Papua New Guinea Government will draw to the attention of the Australian Government those specific fields of development in which it would particularly welcome Australian investment. The Australian Government will endeavour to interest and encourage Australian enterprises to participate in those specific fields except where such investment would not be in the interests of both countries.*¹²³

Including investors as subjects of treaty obligations

Why not obligations on investors

Investors in the context of IIAs are most often going to be corporations. Corporations are not traditionally subjects of international law.

Academic work, developing field, continued debate.

Robert McCorquodale – the protection and rights are only exercisable in relation to corporations that meet the following standards.

However, while investors are unlikely to become subjects of international law in the near future, the domestic sovereignty of their contracting party of nationality can be brought to bear indirectly through the treaty negotiation process. It is worth briefly examining some of the

¹²¹ Canada and Thailand BIT (1997)

¹²² UNCTAD, 'The changing IIA landscape: New treaties and recent policy developments' (n

¹²³ PACTRA (n

options available to States seeking to set sustainable development standards for investors seeking to profit from entry into Pacific markets.

A mechanism could be designed to secure investors consent to sustainability obligations. In the context of an investment agreement, States may agree for corporate conduct to be attributable to a state in the event of a breach of a mutually negotiated sustainable development obligation, but this would be risky and uncharted territory.

It would also be open to Pacific island countries to place sustainable development obligations in their national legislation as a condition of investment admission. This could result in either: a lack of protection for investors who violate these conditions, or, an option for state-state dispute resolution in the event of breaches by investors. The latter option may result in investors from more powerful States having more scope to commit breaches than inter-Pacific investors or south-south investors.

In principle, exporting States can also legislate to prosecute or penalize corporate nationals for extra-territorial acts established as wrongful under a treaty. Legal technical obstacles in ascribing international obligations to corporations have previously prevented this approach (e.g. Rome Statute negotiations) but it may be more plausible on a bilateral basis than in a multilateral negotiation of that kind.

However, ascribing significant obligations would likely defeat the purpose of IIAs in creating a more attractive investment environment by creating additional liabilities. In particular, such a new and untested legal mechanism would pose significant insurance challenges in an already risk-ridden venture (cross-border investment).

III AGREEMENTS FOR THE PACIFIC: PACIFIC DEVELOPMENT AND INVESTMENT POLICIES

Having identified some of the design features and key provisions of the current Pacific IIA network in the earlier chapter, this chapter will use development policy considerations assess where lessons from pre-existing agreements can inform future IIAs in the Pacific to support the stated development goals of selected case study economies. Development aims will be drawn from the national development and investment policies of the focus economies.

IIAs' theoretical utility includes access to capital for the benefit the capital importing State, with States' development goals in mind. Proposed future IIAs should reflect the stated development goals of Pacific Island States. While all focus countries have agreed to pursue the Sustainable Development Goals, prioritisation among those goals as dictated by the social, economic and political context of the State will inform IIA negotiating choices. Unfortunately for the purpose of this analysis, up to date publications of development policies are not easily accessible for some focus economies.

Available focus economies' development and foreign investment policies prioritise different development goals, but cover a number of overlapping focuses which reflect the particular characteristics of the region: marine resources, tourism and renewable energy sectors are consistently included as sectors of priority for private sector expansion (see Table 2).¹²⁴ Climate resilience is also a recurring concern.

¹²⁴ 'Cook Islands National Report for the 2014 Small Islands Developing States (SIDS) Conference and post 2015 Sustainable Development Goals (SDGs)', (2013) *"Navigating Stormy Seas through Changing winds" - Developing an Economy whilst preserving a National Identity and the modern challenges of a Small Island Developing State* <<https://sustainabledevelopment.un.org/content/documents/1074217Cook%20Is%20%20Final%20NATIONAL%20SIDS%20Report.pdf>>; Commonwealth Secretariat, 'Helping Kiribati improve its business environment for investment', *News and Events* (Blog Post, 23 February 2018) <<https://thecommonwealth.org/media/news/blog-helping-kiribati-improve-its-business-environment-investment>>; Department of Economic Affairs, *Strategic Development Plan 2004-2023 - The Next 20 Years: Achieving Economic Growth and Self-Reliance* (Government of the Federated States of Micronesia, 2004) Volume I, 47; 'Investment Opportunities', *Niue Chamber of Commerce Matakau Faahi Gahua Lagomatai ke he tau Pisinisi ha Niue* <<https://www.niuechamber.com/investment-opportunities/>>; Tonga Ministry of Finance and National Planning, 'Tonga Strategic Development Framework 2015-2025 - A More Progressive Tonga: Enhancing Our Inheritance' (2015), 13, 18; Government of Tuvalu, 'Te Kakeega III: Tuvalu National Development Strategy 2016-2020' (2016)

Table 2 Stated development goals of selected focus economies

State	Development Priorities	Notes
COK	energy and food security, and social sector investment. ¹²⁵ (Other Potential Growth Sectors: Black pearls and fishing – marine resources.)	There are not currently any strong indications of what the next Development Policy, or the formulation of the announced Economic Development Policy, ¹²⁶ may focus on or aim to shift.
FJI	private sector investment, improving service delivery and economic opportunities, and building resilience	Fiji's development goals focus on encouraging. Fiji has one of the most developed economies in the Pacific, with tourism as its main driver of economic activity and foreign direct investment. ¹²⁷ The country has also seen a shift in exports from agricultural commodities to manufactured goods. ¹²⁸
KIR	20-year development plan (KV20) to boost the country's prosperity, in part by improving levels of foreign direct investment and developing key sectors such as fisheries and tourism.	
FSM	(Other Potential Growth Sectors: Tourism facilities, fisheries, and air connections. ¹²⁹)	
NIU	(Other Potential Growth Sectors: Tourism and agriculture. ¹³⁰)	
PLW	Priorities include new enterprises, import substitutes, aquaculture and fisheries, and high-end tourism.	
PNG	Resources sector	
WSM	diversification of foreign investment sectors. Renewable energy projects, telecommunications.	

Due to the early stage of private sector development in many States, PICs broadly take a 'pre-establishment' approach to national investment regulation, indicating that, as this approach is

<<https://www.theprif.org/sites/default/files/2020-08/Tuvalu%20National%20Development%20Strategy%202016-2020.pdf>>; Planning and Aid Coordination Department of Strategic Policy, 'Vanuatu 2030: The People's Plan - National Sustainable Development Plan 2016 to 2030' (2016) <<https://www.gov.vu/images/publications/Vanuatu2030-EN-FINAL-sf.pdf>>.

¹²⁵ , *Cook Islands National Report for the 2014 Small Islands Developing States (SIDS) Conference and post 2015 Sustainable Development Goals (SDGs)* (n 124).

¹²⁶ Cook Islands Ministry of Finance and Economic Management, 'Cook Islands Economic Development Strategy' (Media Release, 29 July 2019) <http://www.mfem.gov.ck/images/MFEM_Documents/CEO_Docs-from23Aug16/20190730_EDS_Media_Release_July_2019.pdf>.

¹²⁷ 'Overview', *ADB's Work in Fiji* (Fact Sheet) <<https://www.adb.org/countries/fiji/overview>>.

¹²⁸ Ibid.

¹²⁹ Department of Economic Affairs (n 124) Volume I, 47.

¹³⁰ 'Investment Opportunities' (n 124)

described in the IPFSD, a ‘pre-establishment IIA’¹³¹ network will likely be the most desirable for the social and political context. This may become a key strategy for PICs strategic choice of contracting partners in a developing IIA network. Most PIC focus economies have a cumbersome investment admission process, so exemptions from some admission requirements may form a fundamental part of the benefits offered to capital exporting partners.

Self Determination and traditional values

Another recurring concern among a sub-group of PICs is the protection of cultural values and traditions. For some, this is reflected in the Christian religious nature of national constitutions. With respect to international investment, protection is articulated as selectivity in terms of the volume, sector and partners desired for inward investment. The current Cook Islands National Sustainable Development Policy 2016-2020 (NSDP) emphasises that Cook Islanders place significant value on ‘true self-determination... inherent in the ownership of our country’s assets and equity in our economy’.¹³² National ownership is a key indicator of the policy’s success at indicator 15.2: Percentage of Cook Islands investment (versus foreign investment) in the Cook Islands.¹³³ Vanuatu’s Sustainable Development Plan emphasises the value placed on cultural heritage, and community values.¹³⁴ Protection of cultural values based on Christian traditions is strongly and repeatedly emphasised as a non-negotiable basis for Tonga’s development strategy.¹³⁵

Economic openness

A by-product of Pacific Islands’ geographical remoteness is historical social and economic isolation. Island States now have variable openness to foreign investment and participation in

¹³¹ UNCTAD, *IPFSD*, UN Doc UNCTAD/DIAE/PCB/2015/5 (n 10) 8.

¹³² Government of the Cook Islands, ‘Te Kaveinga Nui: National Sustainable Development Plan 2016 - 2020’ (2016) *Cook Islands Development Policy*. 49.

¹³³ *Ibid.*

¹³⁴ Department of Strategic Policy (n 124).

¹³⁵ Tonga Ministry of Finance and National Planning (n 124).

their economies. The Cook Islands defines 'foreign enterprise' as business with more than one-third foreign ownership,¹³⁶ and s 17 of the Development Investment Act states: 'No foreign enterprise shall carry on business in the Cook Islands in any activity unless that foreign enterprise is registered in respect of that activity pursuant to this Act'.¹³⁷ Fiji's investment policy statement highlights the State's restrictive approach towards admission of investments, subject to a severely outlined national interest test.¹³⁸ A foreign investment is defined as an investment with any level of shareholding or ownership held by a foreign citizen.¹³⁹ Tonga's resolved prioritization of cultural preservation and Christian values is clearly articulated as foremost in its development strategy.¹⁴⁰

On the other end of the spectrum, the FSM Strategic Development Plan 2004-2023 outlines significant growth predictions based on a reform for a more streamlined, liberalized and transparent foreign investment climate.¹⁴¹ The Private Sector Strategic Planning Matrix includes the conclusion of additional IIAs as a strategic goal.¹⁴² Samoa's Development Strategy prioritises diversification of foreign investment sectors as an approach to economic development.¹⁴³ The Strategy explicitly gives focus to overall investment inflows, with parallel focus on responsible sustainable investment practices for the natural environment and technology transfer. Samoa demonstrates a liberal approach to investment admission, with specific targets to admit higher numbers of foreign investors.¹⁴⁴

Environment and climate

¹³⁶ *Development Investment Act 1995-1996* (Cook Islands) s 2 ('*Development Investment Act*').

¹³⁷ *Ibid* s 17.

¹³⁸ 'Investment Policy Statement', *Fiji Ministry of Commerce, Trade, Tourism & Transport* (Policy Statement, 2020) <[¹³⁹ 'Investment Fiji', *For Investors: Investment Policies* <\[>\]\(http://www.investmentfiji.org.fj/pages.cfm/for-investors/doing-business-in-fiji/policies.html\).](https://www.mcttt.gov.fj/divisions/trade-unit/investment-policy-statement/#:~:text=In%20order%20to%20achieve%20the,of%20the%20GDP%20by%202036.>.</p></div><div data-bbox=)

¹⁴⁰ Tonga Ministry of Finance and National Planning (n 124).

¹⁴¹ Department of Economic Affairs (n 124) Volume I, 51-53.

¹⁴² *Ibid* Volume II, 21.

¹⁴³ Samoa Ministry of Finance, 'Strategy For The Development Of Samoa 2016-20' (2016), 5-6.

¹⁴⁴ *Ibid*.

In line with the climate vulnerability of the region, a number of PICs highlight climate responsible and environmentally sustainable development as a top-tier priority. For Tonga, climate risk, health, infrastructure and technology transfer are foundational and intertwined strategic development goals.¹⁴⁵ Tuvalu links the environmental impacts of increased economic activity with investment promotion.¹⁴⁶

Vanuatu's development strategy pitches the natural environment as a driver for investment and security of human development needs like food and health security – this makes environmental maintenance and dispersion of economic activity throughout urban and rural contexts core to development aspirations.¹⁴⁷

***Pacific IIAs and a development perspective: Conclusions
on possible future agreements and design features***

This section will address where specific design features might be beneficially incorporated into key provisions of a model BIT for small Pacific Island States. A Draft Model Investment Agreement (DMIA) has been appended to this paper to demonstrate how some of these benefits might be sought in drafting practice. These key draft provisions have largely been drawn from existing agreements which demonstrate appropriately analogous development goals, innovative best practice in IIA design globally, or previously used example provisions from the agreements within the scope of this paper. Some core IIA provisions have not been examined in detail, including expropriation, and umbrella clause. The design of these provisions is not significantly influenced by the unique economic factors present in the Pacific to the same extent as other articles, and so will best be designed with advice from the IPFSD.

¹⁴⁵ Tonga Ministry of Finance and National Planning (n 124).

¹⁴⁶ Government of Tuvalu (n 124).

¹⁴⁷ Department of Strategic Policy (n 124).

Preambles

Federico Cortino argues ‘the open-textured nature of the various standards provided in an investment treaty makes the identification of the ‘object and purpose’ a crucial element in imparting meaning to those standards’.¹⁴⁸ Though not binding provisions, and indeed for that very reason, the construction of an IIA preamble can be one of the most individual aspects of an agreement, giving actual insight into the negotiating intentions of the parties, rather than cookie-cutter repetition of previously tried-and-tested wordings found commonly in substantive provisions.¹⁴⁹ The preamble is often one key source, for an arbitral tribunal’s inference in particular of the agreement’s overarching purpose,¹⁵⁰ and references to sustainable development in preambles will influence interpretations of the object and purpose of the treaty when read as a whole.

UNCTAD, in its *Investment Policy Framework for Sustainable Development* (IPFSD) advises that developing State parties would benefit from agreements ‘stating that attracting responsible foreign investment that fosters sustainable development is a key aim of the treaty’¹⁵¹ For Pacific Island States, there is also benefit in specifically referring to particularly relevant factors which affect development, which might also be relevant to any government action that gives rise to a dispute under the agreement. As included in PACER Plus,¹⁵² some of these include small and/or disparate population and land size, remoteness and consequent efficiency and skills transfer challenges, access to substantial markets and environmental vulnerabilities linked to climate change and natural disasters. Each of these factors has been incorporated into the DMIA.

¹⁴⁸ Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (Pt Cambridge University Press) (2017) 30(1) (2016/10/19) *Leiden Journal of International Law* 71-91. 75.

¹⁴⁹ See generally Alschner and Skougarevskiy (n 40).

¹⁵⁰ Ortino (n 76; *LG&E v. the Argentine Republic*, Decision on Liability, 3 October 2006, [124].

¹⁵¹ UNCTAD, *IPFSD*, UN Doc UNCTAD/DIAE/PCB/2015/5 (n 10) 85.

¹⁵² *PACER Plus* (n 7) preamble.

The DMIA also includes a reference to fair and equitable (FET) treatment in the preamble text. The inclusion of a binding FET obligation in an IIA may contribute to domestic governance development outcomes, rule of law, an independent judiciary, etc. However, due to the highly legally uncertain scope of binding FET obligations, and their ubiquitous appearance in claims brought by investors, PICs could be advised to include FET as a political commitment only. This allows inclusion to inform the interpretation of binding standards of protection, rather than create a broad standard of treatment providing extensive investor protections which are likely not justified in the Pacific by their utility in attracting additional contracting parties or investments. Alternatively, where this becomes a negotiating impasse, annexes and protocols with presumptions against certain breaches and an investor's onus of proof (similar to the US model BIT) may find an appropriate balance.¹⁵³

Scope and Definitions

a) Investment

A narrow, asset-based definition of investment will provide PICs with more moderate levels of obligation and susceptibility to claims for breach, as well as preserving regulatory space to manage small and narrowly based economies. Given the small and narrow sectoral distribution in Pacific Island countries' economies, interactions between the definitions for 'investor' and 'investment' and substantive protection provisions will form an aggregate risk of liability to claims for award in the event of breach. As such, it would be prudent for most of the Pacific focus economies to include an 'in accordance with host state laws' requirement, with efforts to ensure that domestic legislation best reflects the country's development policy.

In addition, PICs should consider UNCTAD's IPFSD recommendation that developing States generally exclude certain types of investment, such as portfolio investment, or short-term

¹⁵³Annex B, (Expropriation), Article 4(b) [emphasis added]. See also Article IX(3)(c) of the BIT between Belgium-Luxemburg Economic Union and Colombia.

contracts or investments that do not meet certain minimum capital requirements, or that are in certain industries of the economy.

The DMIA appended excludes portfolio investment on the basis that resilience to global economic shocks is a stated goal in several focus economies' development policies. In the Pacific, IIAs with regional neighbours may welcome more small to medium investments, while it might be appropriate that IIAs with high volume capital exporters only protect large investments with significant development contributions. An example of such a provision can be found between central African nations, in article 15 of the Community Investment Code of the Economic Community of the Great Lakes Countries. The provision states that, for purposes of inclusion within certain provisions of the code, "[t]he minimum volume of investments is set at one million United States dollars or the equivalent".¹⁵⁴ PACER Plus uses an 'investment'/'covered investment' distinction to delineate between investments protected under the agreement and the VCLT article 31(1) ordinary meaning interpretations available of simple 'investment'.¹⁵⁵

Alternatively (and a negotiating option which is available for a number of provisions discussed below), States may use national legislation or regulation to list reserve sectors, minimum investment volumes. This approach offers PICs the negotiation option of exemptions from certain national admission requirements as a potential concession in negotiation of bilateral agreements with strategically selected contracting partners. This approach has two additional advantages: firstly, it relieves the pressure on Pacific Island States to rapidly reform domestic investment regulations by circumventing parts of their requirements in treaty arrangements,

¹⁵⁴ *Community Investment Code of the Economic Community of the Great Lakes Countries*, Burundi, Democratic Republic of the Congo, Rwanda, signed 31 January 1982 (entered into force 4 October 1987) ('CEPGL').

¹⁵⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31(1) (entered into force 27 January 1980) ('VCLT'); *PACER Plus* (n 7) Ch 9 art 1.

and secondly, this combination of national and international law diverts some of the costs and technical capacities required for treaty negotiation by creating flexibility for national regulation. UNCTAD recommends that developing States ensure that a ‘right to regulate’, or adequate regulatory space, is maintained when concluding IIAs, and provisions which explicitly maintain regulatory space are defining features of newer generation IIAs globally.¹⁵⁶

Finally, ‘investment’ definitions may include tailored characteristics which have the effect of granting protections only to investments which bring concrete development benefits to the host State, such as long-term capital commitment or employment generation. The DMIA draws some specific characteristics from PACER Plus, with the addition of activities which generate employment, as indicative characteristics for this purpose.

b) Investor

Investment agreements usually define ‘investor’ to include both natural persons and legal entities incorporated in a State party. To prevent treaty shopping, States should consider whether it will be appropriate to exclude classes of investors elsewhere in the treaty by use of a Denial of Benefits Provision.

National Treatment and Most Favoured Nation

Given the nascent IIA networks in the region, according national treatment to select investment agreement partners has the potential to strengthen regional integration in the Pacific: by offering national treatment to regional partners, e.g. in a Fiji-Tonga BIT, States could be able to create a mutually beneficial pool of capital available for sectors with interests across the region, like tourism, fisheries and marine resources.

¹⁵⁶ UNCTAD, *IPFSD*, UN Doc UNCTAD/DIAE/PCB/2015/5 (n 10) 8-10.

The MFN standard is also one of the key tools that smaller developing countries have at their disposal, offering the opportunity to benefit from the stronger bargaining power of third countries.¹⁵⁷ As such, PICs might seek a non-reciprocal MFN provision with high volume capital exporting States.

Full Protection and Security

Pacific Island States have distinct historical and present states of peace and security in terms of domestic law and order. Given the active role that governments in the region take in ensuring climate resilience for the economy and physical assets within their jurisdictions, it is also worth noting that some of the greatest risks to assets are presented by natural disaster. As such, full protection and security in Pacific IIAs should: specify that the standard refers only to physical security and protection, and link the standard to that provided by customary international law;¹⁵⁸ specify that the standard does not cover protection from climate events; provide that the expected level of police protection should be commensurate with the country's national security capabilities. A draft article for this protection is not included in the DMIA, due to the lack of comparably suited provisions currently available in State practice.

Transfer of Funds

Transfer of funds and balance-of-payment provisions are essential focal points for careful drafting in the Pacific context. Where some States use the currency of their Compact of Free Association or other close partner (COK, FSM, MHL, NIU, NRU, PLW), others use their own national currency (FJI, KIR, PNG, SLB, TMP, TUV, VUT). States which use a non-major currency are particularly subject to balance-of-payments difficulties in the event of economic distress. In the case of Pacific States which use a unique national currency, delays in transfers to other major currencies into, but especially out of, the contracting party's jurisdiction have

¹⁵⁷ UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking' (n 70) 38.

¹⁵⁸ UNCTAD, *IPFSD*, UN Doc UNCTAD/DIAE/PCB/2015/5 (n 10) 86.

the potential to exacerbate balance-of-payment and other monetary policy difficulties when they arise. For this reason, a detailed transfer of funds provision, with a balance-of-payments exception designed to support small island States' monetary policy without presenting them as an unfavourable treaty partner, has been included

Other Clauses

While it is not necessary to provide standard drafting examples, there are a selection of provisions available for inclusion in Pacific IIAs that speak directly to supporting specific development outcomes.

Provision	Development Goal	Reasons
Publication of Laws (including public consultations thereon)	Equality before the law, democratic participation and governance.	Failure to publish may shift the balance in disputes by giving investors reasonable opportunity to object, notice of changes, etc.
Dispute Transparency	Governance	Political hurdles can be lessened with use of transparency clauses. The recently signed investment treaty between Canada and China provides that host State laws on access to information will trump a tribunal's confidentiality orders to the extent they conflict. ¹⁵⁹
Limitations on award damages and compensation	All SDGs – Economic Stability	The DMIA includes a limit to awards for compensation to the real value of the investment, without further award for punitive damages, as per Australia-PNG BIT. ¹⁶⁰ This acknowledges the ability to pay of respondent developing states, and the individual currency and national accounts issues which may arise in the instance of a claim against a PIC.

Carve-outs and Defences

Treaty exceptions and carve-outs are likely to be increasingly used by Contracting Parties as published case law highlights the vulnerability of States to the unintended consequences of customary international law in sensitive industries such as mineral resources, public health and infrastructure. For example, in 2016 Australia and Singapore updated their Free Trade

¹⁵⁹ Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, signed 9 September 2012, Art. 28(5), cited in Lawrence Boisson de McGarry Chazournes, Brian, 'What Roles Can Constitutional Law Play in Investment Arbitration ' (2014) 15(Special Issue: Towards Better BITs - Making International Investment Law Responsive to Sustainable Development Objectives) 862.

¹⁶⁰ *Australia - PNG BIT* (n 51).

Agreement to include a carveout for tobacco control measures¹⁶¹ following the conclusion of the *Phillip Morris Asia v. Australia* UNCITRAL arbitration.¹⁶²

Such amendments, designed to clearly delineate the liability of States at the time of contracting into international investment obligations, are an attempt in some instances to contract around the application of customary international law in arbitration proceedings. In the above case, the carve-out prevents the tribunal from considering other defences, such as Police Powers, by simply removing the sensitive industry from arbitral jurisdiction. In this way, investment treaty drafting creates a push-and-pull interaction between explicit treaty exceptions and the expansive tendency of customary law to fill gaps left silent by contracting parties.

The other side of the coin to explicit carve-outs is defences. Defences do not impact on primary norms, in either treaty agreements or custom, but remove responsibility for legal breaches or reparations. As such, they operate differently to a carve-out, which precludes a breach arising. The difference in operation mechanism means that relying on defences under customary law, or indeed codifications such as the ILC's Draft Articles on State Responsibility,¹⁶³ offers a strategic choice for States in responding to claims. Utilising customary law allows States to carefully craft relationships with particular partner countries, while protecting the overarching interests of their own capital exporting investors by avoiding adversarial arguments under particular treaty provisions. Arguing for limited readings of treaty provisions has knock on effects on diplomatic relationships between contracting State parties, where use of customary law defences alleviates relationship damage and retaliation against respondent State investors.

¹⁶¹ *Agreement to Amend the Singapore-Australia Free Trade Agreement*; opened for signature 13 October 2016, (entered into force 1 December 2017), Article 22.

¹⁶² *Phillip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12

¹⁶³ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001).

States should carefully consider the strategic relationship between use of treaty exceptions and customary international law, all the way from travaux to arbitration.

CONCLUSION

As the small developing Pacific Island economies pursue their Sustainable Development Goals, the network of economic treaties, including international investment agreements, which intersect the islands and atolls will play an important role in founding an attractive and efficient business environment. Creating such an environment is not an outcome for its own sake, but rather an intermediary between governments and the resources for improved outcomes in health, education and climate resilience. The economies of small island developing states cannot slot neatly into the investment law framework designed by larger, more developed and more diverse economies – the economic and social conditions, simply, are not analogous. Small Pacific economies have the opportunity to build strategic, context-adapted, carefully negotiated IIA networks almost from scratch. Other States would envy such an opportunity. More than that, they can build these networks on the backs of older generations of IIAs which jurists have learned from and refined in the aftermath of disputes and awards. The access to capital available from a small regional network, a la PACER Plus, or agreements with major European capital exporters has the potential to significantly transform Pacific Island states and their standards of living. Now, that benefit can be pursued with care to preserve the unique cultural and natural resources of the Pacific, and with deference to the self-determination and priorities of Pacific Islanders.

APPENDIX: DRAFT MODEL INVESTMENT AGREEMENT

PROVISIONS FOR SMALL PACIFIC ISLAND STATES

These draft model provisions are not meant to constitute fully consulted technical drafting. They are designed to provide some examples of provisions which may form the basis of an IIA adapted to the particular needs of small Pacific Island Developing States, noting that each State has a unique context and goals.

Preamble

The Government of [contracting party A] and the Government of [contracting party B],

Recognising the importance of improved foreign investment for national development, economic growth and general welfare of the citizens in [A] and the [B] (hereinafter referred to as “the Contracting Parties”);

Desiring to promote investment in order to strengthen the economic relationship between the Contracting Parties;

Taking into account the significant differences in the size of the Parties; the unique and particular vulnerabilities and development challenges of [developing country and/or least-developed country] Parties; the need to build their capacities with a view to fostering their enhanced participation in international investment, inter alia, through the strengthening of their domestic capacity, efficiency and competitiveness;

Intending to create stable, equitable and favourable conditions for greater investment by investors of a Contracting Party in the Area of the other Contracting Party;

Recognising that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development and;

Affirming that their commitment is to make a significant and sustainable contribution to the economic and social development of [Parties];

Reaffirming their commitments to multilateral environmental, labour and sustainable development agreements to which they are a Party;

Sharing a common aspiration to promote high standards of environmental and labour protection and, to uphold these in the context of sustainable development;

Committing to treat investors and investments fairly, equitably and mindful of the obligations to do so under international law;

Recognising their right to regulate and their resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals and

Convinced that this Agreement will strengthen economic partnerships, support sustainable economic development, and serve as an important building block towards economic integration, and contribute to the further development of the overall relationship between the Contracting Parties;

Have agreed as follows:

Definitions

1. 'Investment' means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, or activities which generate employment. Forms that an investment may take include:

(a) an enterprise;

(b) tangible or intangible, movable or immovable property and related property rights such as mortgages, liens or pledges;

(c) shares, stock and other forms of equity participation in an enterprise;

(d) bonds, debentures, other debt instruments, and loans;

(e) futures, options, and other derivatives;

(f) intellectual property rights;

(g) turnkey, construction, management, production and revenue sharing contracts, concessions and other similar contracts; and

(h) licences, authorisations, permits and similar rights conferred pursuant to a Party's domestic law.

2. An investment does not, however, include:

(a) claims to payment resulting solely from the commercial sale of goods and services unless it is a loan that has the characteristics of an investment;

(b) a bank letter of credit;

(c) the extension of credit in connection with a commercial transaction, such as trade financing; or

(d) portfolio investment.

National Treatment

To be included in treaties between PICs and other strategically selected small economies:

In the sectors specified in [Annex] of this Agreement, and subject to any conditions and qualifications set out therein, each Party shall accord to investors and [covered investments / investments] of investors of [Party] treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to [the acquisition, establishment, expansion, management, conduct, operation, and sale or other disposition of] investments in its territory.

Most Favoured Nation

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any third State with respect to the management, conduct, operation, and sale or other disposition of investments in its territory.

2. Notwithstanding paragraph 1, the Parties reserve the right to adopt or maintain any measure that accords differential treatment:

(a) to socially or economically disadvantaged minorities and ethnic groups; or

(b) involving cultural industries related to the production of books, magazines, periodical publications, or printed or electronic newspapers and music scores.

Transfer of Funds

1. Each Party shall allow all transfers relating to an investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital, including the initial contribution;

(b) profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any investment;

(c) proceeds from the total or partial sale or liquidation of any investment;

(d) payments made under a contract, including a loan agreement;

(e) earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2. Each Party shall allow such transfers relating to an investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offences and the recovery of the proceeds of crime;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;

(f) taxation;

(g) social security, public retirement, or compulsory savings schemes;

(h) severance entitlements of employees

(i) serious balance-of-payments and external financial difficulties or threat thereof; or

(j) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

2. Measures referred to in paragraph 3:

- (a) shall not exceed those necessary to deal with the circumstances set out in paragraph 3;*
- (b) shall be temporary and shall be eliminated as soon as conditions permit;*
- (c) shall be promptly notified to the other Contracting Party; and*
- (d) shall avoid unnecessary damages to the commercial, economic and financial interests of the other Contracting Party.*

Limitations on award damages and compensation

1. A national or company of a Contracting Party involved in such a dispute shall not be entitled to compensation for more than the value, of the investment which is the subject of the dispute, taking into account all sources of compensation within the territory of a Contracting Party liable to pay compensation.

Miscellaneous Exceptions

- 1. Investments in cultural industries are exempt from the provisions of this Agreement.*
- 2. "Cultural industries" means the following activities where they relate to the traditional cultural practices of the Contracting parties:*
 - (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine-readable form;*
 - (b) the production, distribution, sale or exhibition of film or video recordings, audio or video music recordings, music in print or machine-readable form;¹⁶⁴*

or

- (e) the demonstration, teaching or exhibition of traditional cultural or religious practices.*

¹⁶⁴ Canada and Thailand BIT (1997)

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