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A LAW AND DEVELOPMENT PERSPECTIVE ON SERVICES LIBERALISATION IN THE PACIFIC ISLAND COUNTRIES WITH PARTICULAR REFERENCE TO TOURISM

BY

YOLINDA YOK YEE CHAN

Pacific island governments embraced the concept of reciprocal free trade agreements in the late 1990s in response to shifts in their historical relationships with their major donors and the ascendancy of neoliberal globalisation as the dominant model of development. Since then, they have placed a great deal of faith in this model as a pathway to sustainable development to generate economic growth, employment and as a means to achieve development goals such as poverty alleviation.


The thesis also explores how the liberalisation efforts on trade in services have been rationalised and advanced at the international level through the General Agreement on Trade in Services (GATS) and at the regional level through the negotiations of regional free trade agreements such as the Economic Partnership Agreement (EPA) and the Pacific Agreement on Closer Economic Relations (PACER Plus), and the implications for policy and regulatory decisions at the national level in the PICs, especially those who are members of the World Trade Organization.

The thesis supports two main conclusions. First, the prevailing neoliberal model of development, embodied in the Second Moment of Law and Development, is not appropriate for the PICs in their pursuit of sustainable development. Second, there are signs of a possible shift towards a Third Moment in the region, but this potential is constrained by the instruments of international economic law, as well as political pressure from the PICs’ key trading partners who are also major donors.
ACKNOWLEDGEMENT

I would like to express my most sincere gratitude to my main supervisor, Professor Jane Kelsey, for her dedicated guidance, patience and encouragement throughout my candidature. Her expertise, enthusiasm and thought provoking advice have been instrumental in the completion of this thesis. I thank and acknowledge the helpful advice of my co-supervisor, Amokura Kawharu for her useful comments on WTO law, suggestions on the general structure and editing of the thesis. Special thanks also to Suranjika Tittawella, manager of postgraduate studies, for her tireless facilitation in ensuring all the administrative matters relating to my studies are taken care of during my stay at the law school.

I extend my heartfelt thanks to the Ministry of Foreign Affairs and the Ministry of Industry, Trade and Tourism of Fiji for releasing me of my official duties to undertake my doctoral studies in New Zealand. I am especially grateful to the Ministers, Permanent Secretaries, and colleagues at Headquarters in Suva and other diplomatic missions; Ambassador Peter Thomson and his team in New York, for their encouragement and understanding.

I acknowledge the invaluable support of my family, particularly Helen and Imran for their unconditional love and generous support in providing me a home during my stay in New Zealand. My beautiful little niece, Aida and nephew Kadin have been a source of joy and optimism. My special appreciation is also due to the rest of my family in Australia, my dad, Sam, Jackie and their lovely families whose support and faith in me have been a pillar of strength. I would also like to thank my special sister Ma Wanlu, and good friends - Stella, Zhang Lumei, An and Dominic for their support and kind words of encouragement. Special thanks goes to Joann and Mrs Young for their generosity and warm hospitality on my numerous visits to Suva.

I dedicate this thesis to my loving mum and grandparents whom I missed dearly.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACP</td>
<td>African, Caribbean, and Pacific</td>
</tr>
<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
</tr>
<tr>
<td>ANZ</td>
<td>Australia and New Zealand</td>
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<tr>
<td>AusAid</td>
<td>Australian Agency for International Development</td>
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<tr>
<td>CA</td>
<td>Cotonou Agreement</td>
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<tr>
<td>CAP</td>
<td>Common Agriculture Policy</td>
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<tr>
<td>CDF</td>
<td>Comprehensive Development Framework</td>
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<tr>
<td>CESCR</td>
<td>UN Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>CPC</td>
<td>Central Product Classification</td>
</tr>
<tr>
<td>CTA</td>
<td>Chief Trade Advisor</td>
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<tr>
<td>DDA</td>
<td>Doha Development Agenda</td>
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<tr>
<td>DRTD</td>
<td>Declaration on the Right to Development</td>
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<tr>
<td>ECOSOC</td>
<td>Economic and Social Council</td>
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<tr>
<td>EDF</td>
<td>European Development Fund</td>
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<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
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<tr>
<td>EPA</td>
<td>Economic Partnership Agreement</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FACT</td>
<td>Facilitating Agricultural Commodity Trade</td>
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<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td>FEMM</td>
<td>Forum Economic Ministers Meeting</td>
</tr>
<tr>
<td>FSM</td>
<td>Federated States of Micronesia</td>
</tr>
<tr>
<td>FTIB</td>
<td>Fiji Trade and Investment Bureau</td>
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<tr>
<td>FTMM</td>
<td>Forum Trade Ministers Meeting</td>
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<td>FTA</td>
<td>Free Trade Agreement</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>GGF</td>
<td>Green Growth Framework</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>GNP</td>
<td>Gross National Product</td>
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<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>IEL</td>
<td>International Economic Law</td>
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<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>ISI</td>
<td>Import Substitution Industrialisation</td>
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<tr>
<td>LDC</td>
<td>Least Developed Countries</td>
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<tr>
<td>MAI</td>
<td>Multilateral Agreement on Investment</td>
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<tr>
<td>MDG</td>
<td>Millennium Development Goal</td>
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<tr>
<td>MFN</td>
<td>Most Favoured Nation</td>
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<tr>
<td>MOU</td>
<td>Memorandum of Understand</td>
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<td>MSG</td>
<td>Melanesian Spearhead Group</td>
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<td>MSGTA</td>
<td>Melanesian Spearhead Group Trade Agreement</td>
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<tr>
<td>NCD</td>
<td>Non Communicable Disease</td>
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<td>NTDC</td>
<td>National Trade and Development Council</td>
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<td>NZAID</td>
<td>New Zealand Aid</td>
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<td>NT</td>
<td>National Treatment</td>
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<tr>
<td>NGO</td>
<td>Non Governmental Organisation</td>
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<tr>
<td>OCTA</td>
<td>Office of the Chief Trade Advisor</td>
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<tr>
<td>ODA</td>
<td>Overseas Development Assistance</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OWG</td>
<td>Open Working Group</td>
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<tr>
<td>PACER</td>
<td>Pacific Agreement on Closer Economic Relations (Framework Agreement)</td>
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<tr>
<td>PACER Plus</td>
<td>A Free Trade Agreement emanating from PACER</td>
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<td>PACP</td>
<td>Pacific ACP</td>
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<tr>
<td>PARTA</td>
<td>Pacific Regional Trade Agreement</td>
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<tr>
<td>PIC</td>
<td>Pacific Island Country</td>
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<tr>
<td>PICTA</td>
<td>Pacific Island Countries Trade Agreement</td>
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<tr>
<td>PIDF</td>
<td>Pacific Islands Development Forum</td>
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</table>
PIF - Pacific Islands Forum
PIFS - Pacific Islands Forum Secretariat
PNG - Papua New Guinea
PSIDS - Pacific Small Island Developing Countries
RTA - Regional Trade Agreement
RTD - Right to Development
SDT - Special and Differential Treatment
SDG - Sustainable Development Goal
SIA - Social Impact Assessment
SIDS - Small Island Developing Countries
SME - Small and Medium Enterprises
SOEs - State Owned Enterprises
SP - Sugar Protocol
SPARTECA - South Pacific Regional Trade and Economic Cooperation Agreement
SPREP - Secretariat of the Pacific Regional Environment Programme
TDC - Trade and Development Committee
TIS - Trade in Services
TMNP - Temporary Movement of Natural Persons
TOR - Terms of Reference
TPR - Trade Policy Review
TRIPS - Trade Related Intellectual Property Rights
TSA - Tourism Satellite Account
UN - United Nations
UNCTAD - United Nations Conference on Trade and Development
US - United States
UNWTO - United Nations World Tourism Organisation
UN - United Nations
WSSD - World Summit on Sustainable Development
WTO - World Trade Organisation
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INTRODUCTION

Pacific island governments embraced the concept of reciprocal free trade agreements in the late 1990s in response to shifts in their historical relationships with their major donors and the ascendancy of neoliberal globalisation as the dominant model of development. Since then, they have placed a great deal of faith in the benefits of trade liberalisation as a pathway to generate economic growth and as a means to achieve development goals such as poverty alleviation.

The objective of this thesis is to examine whether international economic treaties constrain development strategies and policy choices of the fourteen Pacific Islands Countries (PICs) - Cook Islands, Federated States of Micronesia (FSM), Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea (PNG), Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu - as they respond to the challenges of economic globalisation in the 21st century and explore alternatives to a one-size-fits-all model of development.

The thesis focuses on services liberalisation with special reference to tourism services, using as its analytical framework the theory of ‘Three Moments’ in law and development doctrine, as advanced in 2006 by Trubek and Santos in The New Law and Economic Development: A Critical Appraisal.¹ It examines how the liberalisation efforts on trade in services have been rationalised and advanced at the international level through the World Trade Organisation’s (WTO) General Agreement on Trade in Services (GATS); at the regional level through the negotiations of regional free trade agreements (FTAs); and at the national level, using the case of Fiji. It also examines signs of a change of attitude to the negotiation of agreements among some Pacific islands governments and whether that signals a ‘Third Moment’ of law and development in the region.

At the international level, the thesis explores the core principles and rules of the GATS which govern the conduct of international trade in services and how they might impact on people and policies along the economic, social, environmental, and

institutional axes of the PICs. By using the internationally accepted sustainable tourism principles as a normative framework, it points out how this could affect a vital sector of the PICs’ economy and society. It also considers how these rules impact on different PICs because even though only six are WTO members,\(^2\) with three of them acceding since 2007, the fourteen PICs are collectively negotiating FTAs with their major trading partners who are WTO Members.

At the regional level, the thesis examines the relationships between the PICs and their major donors – the European Union (EU),\(^3\) and Australia and New Zealand – through the lens of FTA negotiations. Understanding the history and politics of these relationships sheds light on why the PICs are negotiating WTO-compatible or WTO-plus services agreements with each other, the EU, and Australia and New Zealand.

The fourteen PICs are members of the Pacific Islands Forum, a regional organisation whose membership also includes Australia and New Zealand. As a collective group, they are negotiating three major regional free trade agreements that currently or potentially include services, while a sub-group of Melanesian countries have negotiated a services protocol to their own agreement.

The first is an agreement amongst the PICs themselves called the Pacific Islands Countries Trade Agreement (PICTA). It was signed in 2001, but only seven of the signatories were ready to trade under the agreement when it entered into force on 1 January 2007. Initially, PICTA only applied to trade in goods. A Services Protocol was included in the FTA from 2012. As of 2014, nine PICs (Cook Islands, FSM, Kiribati, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu) have signed the Protocol. PICTA was portrayed as a ‘stepping stone’ that would consolidate the PICs as a collective force and lay the economic and political

\(^2\) Fiji, PNG and Solomon Islands are Founding Members of the WTO. These three PICs joined the WTO on 14 January 1996; 9 June 1996; and 26 July 1996 respectively. Samoa, Tonga and Vanuatu are newly acceded Pacific Members of the WTO. They acceded to the WTO on 10 May 2002; 27 July 2007; and 24 August 2012 respectively. See, WTO website for the full list of membership. Available [https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last accessed 20 August 2015).

\(^3\) For ease of reference, the term EU is used throughout the thesis even though the European Commission (EC) is the responsible body for the EPA negotiations with the ACP states. The EU is an institutional framework for the construction of a united Europe. The EC (a body attached to the EU) proposes policies and legislation, is responsible for administration, trade negotiations and ensures that the provisions of the Treaties and the decisions of the institutions are properly implemented.
foundations for the negotiations of FTAs with their larger trading partners under the legal framework of the WTO.

The second is a proposed Economic Partnership Agreement (EPA) with the EU, which is currently under negotiation. It is envisaged that the EPA will be a WTO-compatible arrangement to replace preferential trade and aid relations under successive versions of the Lomé Convention between African Caribbean and Pacific (ACP) countries and the former colonial powers. The PICs (with the inclusion of Timor-Leste) are referred to as Pacific ACP countries for the purpose of the EPA negotiations.

The third, a negotiation with Australia and New Zealand, builds on a framework agreement known as the Pacific Agreement on Closer Economic Relations (PACER). In 1999, even before the PICs began their negotiations with the EU for the EPA, Australia and New Zealand demanded an arrangement that would ensure ‘most favoured nation’ status in any PIC market and that the PICs would negotiate a similar agreement with them. The resulting PACER is a reactive framework for such negotiations, designed to protect Australia and New Zealand’s trading interests in the region against other developed countries and ensure that they would not be disadvantaged relative to the PICs’ trading relations with other trading partners. PACER entered into force in 2002, a year ahead of PICTA.

The ‘PACER Plus’ agreement negotiations began in 2009, triggered by the PICs’ formal negotiations for the EPA with the EU. Ten sessions of PACER Plus Officials Meetings had been held by August 2015. Initially, priority areas of negotiations identified by Forum members focused on rules of origin for goods; labour mobility; development assistance, focusing on physical infrastructure for trade, trade development and promotion; and trade facilitation, including sanitary and phytosanitary measures, technical barriers to trade, standards and custom procedures.

Within the region, the Melanesian states have led the way in economic regionalism with the formation of the Melanesian Spearhead Group Trade Agreement (MSGTA)
in 1993.⁴ The MSGTA is a reciprocal free trade agreement for trade in goods among PNG, Solomon Islands, Fiji and Vanuatu. In recent years, the MSGTA has been broadened to include trade in services, labour mobility and membership from other interest Pacific countries.⁵ In March 2012, the MSG Summit approved the introduction of a labour mobility scheme allowing at least 400 people from each of the member countries to work in another MSG country.⁶ The negotiations on MSGTA 2 were concluded at the 5th MSG Trade Ministers Meeting. It was agreed at that meeting that the newly negotiated MSGTA 2 is to be signed by the MSG Heads of Government later in the year and be subjected to national ratification processes before the agreement enters into force by 1st January 2017.⁷

At the national level, the thesis looks at Fiji’s contemporary tourism liberalisation under the trade in services framework. With a special focus on its tourism sector, it provides a national perspective on the impacts and implications of trade in services liberalisation as embodied in the GATS and regional FTAs.

Fiji is chosen as a case study for two main reasons. First, tourism is Fiji’s biggest and fastest growing industry. Until recently it has been based on a market-driven model, but a new tourism development plan focuses on sustainable tourism, posing at least a rhetorical shift.⁸ To the extent that other PICs’ economies are in a similar situation, Fiji’s experience can provide potential relevance to Pacific-wide analysis.

Second, Fiji has been a WTO Member since 1996 and has undertaken commitments under the GATS in tourism services only, covering two sub-sectors.⁹ Over the recent past, Samoa, Tonga and Vanuatu joined the WTO as newly acceded members and

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⁴ The Melanesian Spearhead Group (MSG) was conceived in 1986 between PNG, Vanuatu and Solomon Islands as a means of advancing common political goals. Over time, the interests of the Group evolved. The Group is now most prominently promoting free trade between member countries. Fiji was an observer of the Group in 1993. It became a full member in 1996 and joined the MSGTA in 1998.


⁷ MSG Secretariat, MSG Trade Ministers Approve New MSG Trade Agreement, (MSG Secretariat: Port Vila, 26 May 2016). Because MSGTA2 is yet to come into force, it is not discuss in this thesis.

⁸ According to a report prepared by the Fijian Ministry of Tourism, the tourism sector is Fiji’s largest source of foreign exchange and generated F$1.074 billion in tourism earnings in 2011, which accounted for 56.3% of total service exports. See, Fiji Ministry of Tourism (2012), Tourism Performance 2012, Suva, Fiji. Author has a copy of the report on file.

⁹ Fiji, Papua New Guinea and Solomon Islands are ‘original members’ of the WTO due to their association with the UK and their decision to join the WTO when it was first created in 1995. Fiji, PNG and Solomon Islands joined the WTO in January, June and July 1996 respectively.
have respectively made substantial commitments under the GATS.\(^{10}\) The Fiji case study reveals how WTO-compliant rules and GATS commitments entail pressures towards services liberalisation and domestic deregulation.

**Methodology and Epistemology**

The thesis uses triangulation in its assembling of information and presentation of findings and arguments. The notion of ‘triangulation’, developed by Donald Davidson, significantly changed understandings of the relationship between the subjective, intersubjective and objective, and differentiated between concepts of externalism, internalism, communication, interpretation and language.\(^{11}\) For example, the concept of internalism holds that a researcher either does or can have a form of *access* to the basis for knowledge or justified belief, and that the person either is or can be aware of this basis. Externalists, by contrast, deny that one always can have this sort of access to the basis for one's knowledge and justified belief.

The process of triangulation explains how our beliefs about the external world acquire their objective content. Triangulation is not just about validation but about deepening and widening our understanding. It can be used to produce innovative conceptual framing of ideas and explain more fully, the complexity of human behavior by studying it from more than just one standpoint.

According to Denzin, methodological triangulation refers to the use of more than one method of gathering data in research so as to enhance confidence.\(^{12}\) Using more than one method to gather data identifies gaps in perspective or knowledge among various stakeholders and identifies contextual and systemic factors to assist in understanding an outcome. It can be used to enhance both the analysis and the interpretation of findings. ‘Participant observation’ or ‘insider knowledge’, for example, can add insights and a more in-depth understanding of the eventual outcomes of trade negotiations in the Pacific.

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\(^{10}\) Tonga joined the WTO on 27 July 2007; Samoa became a member on 10 May 2012; while Vanuatu joined on 24 August 2012.


As the thesis relates to public policy analysis within the context of international economic law, one of the central problems of advancing such analysis has been to find new ways of assessing issues of increasing complexity and uncertainty. Using the technique of triangulation it employs various methods, theories, sources and approaches to examine the complex question of which economic model may be most suitable for the PICs to promote sustainable development, as well as the role of government and law in the development process. Specifically, this thesis uses the theory of ‘Three Moments’ in law and development advanced by Trubek and Santos; the two competing development paradigms of neoliberalism and right to development; and the insights of an ‘insider’ approach in order to reconsider conventional wisdom about service liberalisation in the Pacific.

The research combines personal experience with evidence gathered from documentary sources, both primary and secondary official documents, and participant observation over a period of over five years. Documentary sources that were reviewed for the thesis included confidential Cabinet Papers, internal policy papers, Decrees, development plans, as well as official reports and documents published by the governments of Fiji, selected PICs and Australia and New Zealand. Reports and studies commissioned and published by the Pacific Forum Islands Secretariat, the United Nations (UN), the WTO, the World Bank, the Internaitonal Monetary Fund (IMF), the Asian Development Bank, and other development or academic institutions were drawn on, in addition to books, journal and newspaper articles. Other electronically published articles were accessed via the Internet.

The ‘Insider’ Perspective

Additional information and knowledge were acquired through my work and during the course of my studies. My interest in trade liberalisation in the Pacific derives

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13 In 2011 and 2014, I conducted a number of guest lectures at the Law School in the University of Auckland. I was a Visiting Fellow at the Fiji University in 2012 and presented a number of intensive lectures on international trade. In my capacity as a doctoral student, I also attended many workshops, seminars and panel discussions relating to law and development, Pacific affairs and tourism-related events organised by academic institutions, including the University of the South Pacific in Fiji, the Australia and New Zealand Society of International Law, the University of Auckland, Tsinghua University in China, Kyoto University in Japan and the University of Indonesia.
from a long-held concern with the inter-related issues of WTO law, economics, politics of negotiations, sustainable tourism development, and social justice in the region.

Growing up in Fiji as a Chinese immigrant and working as a senior government official in the Ministry of Foreign Affairs and International Cooperation since 1998, my personal background and work experience have provided a unique perspective on the development issues facing the PICs in general and Fiji in particular. Prior to taking up my doctoral research, I was an active participant in an official capacity, as well as an observer, of Fiji and the region’s economic reforms and trade liberalisation efforts.

Over the years as a trade official, I was a member of Fiji’s Trade and Development Committee. This Committee is an intra-ministerial body in Fiji that brings together relevant stakeholders to discuss trade and development related issues, including the formulation of national positions and strategies on the negotiation of trade treaties. My job also required me to travel extensively within the region and around the world to participate in various meetings and negotiating sessions. I was a member of Fiji’s technical team in the negotiations of the PICTA and PACER when the PICs were negotiating these two regional FTAs. I was also a Fiji delegate to the WTO Ministerial Conferences in Cancun (2003) and Hong Kong (2005).

I was posted to Brussels as a trade diplomat from 2003-2006. While on post, I assisted the ambassador and permanent representative of Fiji in the EPA negotiations. I was also responsible for covering WTO, the United Nations Conference on Trade and Development (UNCTAD), World Intellectual Property Organization (WIPO) and Food and Agriculture Organization (FAO) meetings and negotiations in Geneva and Rome. In 2010, I was appointed as Manager to take charge of the Fiji Pavilion at the World Expo in Shanghai.

In late 2012, I was recalled temporarily to duty by the Foreign Ministry to become Counsellor at the Fiji Mission in New York and assumed the responsibility for coordinating negotiating efforts of the Group of 77 and China within the United
Nations General Assembly’s Second Committee,\textsuperscript{14} and the Economic and Social Council\textsuperscript{15} when Fiji assumed Chairmanship of the Group at the United Nations.\textsuperscript{16} This experience gave me direct insights into contemporary global development issues and better understanding of how the competing development models relate to the real world.

I approached this thesis as an ‘insider’ and from a perspective that is critical of reciprocal free trade and services liberalisation in the region, especially in the tourism sector, using existing international trade rules. My position as an ‘insider’ has both pros and cons. The advantage of being an ‘insider’ allows me to have access to many sources of information and material, including negotiating positions and confidential documents. It also offers inside knowledge of the way in which the various trade negotiations have developed and the power politics behind the eventual outcomes. The strength of an ‘insider’ researched paper lies in its authenticity and authority, as my work experience and background give me direct insights into contemporary development issues affecting the PICs. Being an ‘insider’ also has the disadvantage that it is sometimes difficult or impossible to expose sensitive or confidential information which make it necessary to provide circumstantial evidence in support of an observation or analysis.

My critical analytical perspective has been informed by my various engagements in the WTO, PICTA, PACER and EPA negotiations over the years as outlined above. Although the analysis has drawn on my involvement, experience and knowledge acquired by virtue of my job, I have taken an independent analytical approach rather than a partisan position in approaching the research.

This thesis seeks to make a unique contribution to the existing literature on law and

\textsuperscript{14} The Economic and Financial Committee (known as the Second Committee) is one of the six main UN Committees. It deals with issues relating to economic growth and development such as macroeconomic policy questions (including international trade, international financial system, debt and commodities), financing for development, sustainable development, human settlements, poverty eradication, globalization and interdependence, operational activities for development, and information and communication technologies for development.

\textsuperscript{15} The UN Economic and Social Council (ECOSOC) is the United Nations’ central platform for reflection, debate, and innovative thinking on sustainable development. It is the principal body for coordination, policy review, policy dialogue and recommendations on economic, social and environmental issues, as well as for implementation of the internationally agreed development goals.

\textsuperscript{16} The Group of 77 is a major negotiating bloc of developing countries at the United Nations. It currently has 133 members, including most of the PICs as well as large economies like China and India.
development issues in the Pacific region. It brings together my concerns about economic globalisation forces in the region; the role of law in development; the future of the PICs as they confront the many development challenges; the future of the tourism sector as a leading contributor to the Pacific economies; the rights, social justice and voice of the Pacific people; and the accountability of their leaders and policy-makers. These concerns are shared by many people across the region.

The Structure of the Thesis

The thesis is divided into eight substantive chapters, plus the introduction. Chapter one explains the context, dynamics and legal framework for trade in services negotiations in the PICs. It traces the shift in thinking on the PICs’ policy choices about development and the role that law, especially international economic law, plays in advancing or impeding it. The chapter explains the political context within which the PICs are changing from preferential to reciprocal trade with their major trading partners, namely, the EU, Australia and New Zealand. This political context influences the dynamics of the EPA and PACER Plus negotiations and ushers the PICs towards a path of services liberalisation, including the liberalisation of tourism, under the trade in services framework.

Chapter two explains the analytical framework for this thesis, which argues that the norms, objectives and focus of law and development doctrine change over time and are aligned to the prevailing views of the state, the economy and international economic law. The framework draws on the typology advanced by Trubek and Santos in their 2006 book *The New Law and Economic Development: A Critical Appraisal*.\(^{17}\) Trubek and Santos believed that both the theory and the practice of law and development are shaped by, and at the same time shape, the spheres of economic theory, legal theory and institutional practice. They used the term ‘Moment’ to refer to a period in which law and development has crystallised into an orthodoxy that was relatively common and widely accepted.

Chapter three expands this argument by examining the evolving concept of development and contrasts two competing paradigms of development (neoliberalism

versus the right to development) in the context of law and development. It explains the preference in this thesis for development as a manifestation of the right to development, rather than a growth-led model of development. Within that framework it explores the relationship between these competing paradigms and the Moments in law and development theory advanced by Trubek and Santos, and provides the analytical basis for examining whether the Third Moment has surfaced in the PICs.

It argues that, despite rhetorical change about embracing a new conception of development, actions by the region’s major donors still place primary faith in markets and stick to the core ideas of the Second Moment. The chapter begins with an evaluation of the parallels between Sen’s concept of ‘development as freedom’ and the PICs’ efforts to achieve the United Nations’ Millenium Development Goals (MDGs), so as to highlight the theoretical deficiencies of both. Exploring MDG 8 from a Pacific perspective leads us to reflect on the two different paradigms (the right to development and neoliberalism), and illustrates the tensions that are intrinsic in the Second Moment that are creating conditions for the Third Moment, and in particular the role of international law and institutions as the vehicle through which they are promoted.

Chapter four locates the GATS as a services liberalisation instrument within the context of the Second Moment. It begins with an analysis of the legal framework and core rules of the GATS. To help assess the application to and implications of these rules for the PICs, the chapter contrasts the WTO services commitments of Samoa, Tonga and Vanuatu as newly acceded members against those commitments made by Fiji as a founding member, with particular reference to the liberalisation of tourism. This study of the services commitments also demonstrates the inherent bias of the WTO accession process against small economies. The chapter thus exposes how the complex trade regime put in place by the GATS constrains development options and policy space of the PICs.

Chapter five looks at the relationship between sustainable tourism, the GATS and the Pacific. It demonstrates that any services policy or efforts to commit to services liberalisation through the multilateral trading system may effectively constrain the ability of the PICs to pursue sustainable tourism consistent with the internationally accepted guiding principles, such as those advanced by the World Tourism
Organisation. The chapter assesses the specific GATS tourism commitments of Fiji, Samoa, Tonga and Vanuatu. It also highlights the implications of Fiji’s scheduling errors of its original GATS offers, as well as the deficiencies of its current deregulated investment regime through the examination of a tourism project. The chapter finds Fiji’s tourism industry remains in the Second Moment despite pronounced changes in policies and development framework.

Chapter six examines recent developments in the region relating to the negotiation of FTAs and contemplates whether increasing ambivalence by the PICs to conclude WTO-plus FTA negotiations offers any evidence of the emergence of a Third Moment in the Pacific. The chapter begins by examining the interpretation of WTO compatibility under GATS Article V that sets the terms and conditions for regional trade agreements the PICs are negotiating, and how their major trading partners interpret them for the comprehensive EPA and PACER Plus. It also provides some insights into the politics of those negotiations.

Chapter seven reflects on the central question of this thesis on whether international economic treaties and trade in services rules constrain development strategies and policy choices of the fourteen PICs as they respond to the challenges of economic globalisation. In rejecting neoliberalism as an appropriate model of development for the PICs, this chapter draws on the Equations\textsuperscript{18} model to offer a Third Moment approach to sustainable tourism in the Pacific. This alternative model underscores the importance of adopting a holistic and people-centred approach such as the RTD, in order to ensure the industry develops sustainably while the benefits of tourism are spread equitably to all stakeholders.

Chapter eight sums up the main arguments of the thesis and concludes that the PICs’ ambivalence in trade negotiations and regional initiatives to adopt an alternative path to sustainable development suggest there are signs of a possible shift towards a Third Moment in the Pacific region. However, this potential is constrained by the instruments of international economic law, as well as political pressure from the PICs’ key trading partners who are also major donors. The thesis argues that, despite the

\textsuperscript{18} Equations, established in 1985, is an Indian-based research, campaign and advocacy organisation. Its work focuses on studying the social, cultural, economic and environmental impact of tourism on local communities. Its official website is available [http://www.equitabletourism.org/about.php](http://www.equitabletourism.org/about.php).
rhetoric of political leaders and development institutions in the region which espouse the virtues of sustainable development, the neoliberal model embodied in the Second Moment remains dominant in the PICs. The chapter concludes that as long as major regional donors like Australia and New Zealand remain committed to the underlying concept of neoliberalism and continue to push the PICs toward trade liberalisation, the prospects for achieving the Pacific leaders’ vision\textsuperscript{19} of development for the region will remain remote.

\textsuperscript{19} According to the \textit{Auckland Declaration} adopted by Forum Leaders in 2004, ‘…the Pacific region can, should and will be a region of peace, harmony, security and economic prosperity, so that all its people can lead free and worthwhile lives’. See, PIFS, \textit{Auckland Declaration}, (Suva, PIFS, 2004). p.2. Available \url{http://www.forumsec.org/resources/uploads/attachments/documents/AUCKLAND%20Declaration1.pdf} (last accessed 20 August 2015).
CHAPTER 1: THE CONTEXT OF TRADE IN SERVICES NEGOTIATIONS IN THE PACIFIC

1.1. Introduction

This chapter explains the context, dynamics and legal framework for trade in services negotiations in the PICs. It stresses the importance of context in influencing the PICs’ policy choices about development and the role that law, especially international economic law, plays in advancing or impeding it.

The chapter consists of four sections. The first section explores the vision and development challenges facing the PICs in the 21st Century. The second section explains the political context in which the PICs have to shift from preference to reciprocity in trade with their major donors. The third section discusses briefly the ongoing regional economic integration initiatives that are taking place in the Pacific region and the status of negotiations as of 2015. The fourth section introduces the PICs’ approach to services liberalisation, particularly in tourism, under the GATS framework. The section includes an explanation on the rationale for choosing tourism as a focus of this thesis.

1.2 Vision and Development Challenges Facing the PICs in the 21st Century

The attractions of the South Pacific are well known. Since early contacts with Europeans, Pacific islands have been viewed as ‘latter-day Gardens of Eden’ and ‘surviving authentic Paradises’.20 The richness of their natural and cultural resources projects images of white sandy beaches, gently swaying palm trees, clear water and blue skies, unspoiled coral atolls, and friendly people. These images have been reinforced by tourism marketing strategies that emphasise the idyllic and peaceful life style of a problem-free paradise in Oceania.

The Pacific islands region is distinguished by its geography and environment as well as its diverse and unique cultures and traditions. The fourteen PICs covered by this thesis are not a homogeneous group. They differ significantly in size, population,

resource endowments and development constraints. Ethnologically, the PICs are divided into three distinct groups: Melanesian, Polynesian and Micronesian.\textsuperscript{21} Except for PNG, all the PICs have a population under one million. Seven have a population of around 100,000 or under, and four have a population of 20,000 or less.\textsuperscript{22} According to the United Nations’ criteria and the \textit{Least Developed Countries Report 2014}, four of these fourteen PICs are least developed countries (LDCs).\textsuperscript{23}

Despite their vast differences, the PICs share many common interests and face many serious development challenges in the 21\textsuperscript{st} century. Some of the mounting challenges include the threats of civil unrest and political instability; poverty; climate change; environmental degradation; rapid population growth and high unemployment; economic stagnation; and health burdens, such as the spread of HIV/AIDS and other non-communicable diseases.

If this depressing trend as mentioned above is not reversed, it could trigger an explosive social and political situation in many PICs, as a number of island states have already experienced significant civil turmoil and political stability in the recent past.\textsuperscript{24} As observed by Duncan and Chand, Fiji has experienced four coups since 1987 with the latest in December 2006. In PNG, despite the cessation of hostilities in Bougainville in 1990, volatility continued with army mutinies in March 1997 and March 2001. In Vanuatu, an armed rebellion took place in 1996. Major conflicts broke out in Solomon Islands in 2003 which required interventions by a multinational peace-keeping force (led by Australia and New Zealand) to re-establish the rule of law. In Tonga, according to Langa’oi, ‘hundreds of rampaging youths looted and rioted through the commercial business district of Nuku’alofa on 16 November 2006,

\begin{itemize}
\item \textsuperscript{21} The Melanesian states (Fiji, PNG, the Solomon Islands and Vanuatu) account for the vast majority of the collective population and land mass of the PICs; the Polynesian states (Cook Islands, Niue, Samoa, Tonga and Tuvalu) have fewer people and less land, while the Micronesian states (FSM, Kiribati, Marshall Islands, Nauru and Palau) are small, scattered and generally have low resource potential.
\item \textsuperscript{22} Niue has the smallest population among the PICs. According to official figures released on 30 June 2010 by the Economic, Planning, Development and Statistics Department of Niue, the estimated population in Niue was 1,496 people. \url{http://www.spc.int/prism/country/nz/stats/Publications/Population_Estimates/POPEST_June%202010.pdf}
\item \textsuperscript{23} The four LDCs among the PICs are: Kiribati, Solomon Islands, Tuvalu and Vanuatu. See, UNCTAD, \textit{Least Developed Countries Report 2014}, (UN: Geneva, 2014). \url{http://unctad.org/en/PublicationsLibrary/ldc2014_en.pdf}
\item \textsuperscript{24} Duncan, R. and Chand, S., The Economics of the ‘Arc of Instability’. \textit{Asian-Pacific Economic Literature}, (2002), 16: 1–9
\end{itemize}
reducing shops and government buildings to smouldering ashes’.\(^{25}\)

For many PICs, poverty remains one of the most challenging development problems. According to AusAID’s 2009 assessment of poverty in the Pacific region, approximately 2.7 million people, or around one-third of the region’s total population, do not have the income or access to subsistence production to meet their basic human needs.\(^{26}\)

While climate change affects all countries and undermines their ability to achieve sustainable development objectives, its gravity threatens the viability and survival of many PICs. For instance, Tuvalu is one of the places on earth that is most vulnerable to the effects of global warming. The threat of sea level rise may submerge the country and displace the 10,000 residents living on nine extremely low-lying coral atolls. According to Tuvalu’s Prime Minister Saufatu Sopoanga, ‘the threat (of climate change) is real and serious, and is of no difference to a slow and insidious form of terrorism against us’.\(^{27}\)

Environmental degradation is another major challenge confronting many PICs. For example, in Fiji, the increase in population, urbanization, industrial and economic development over the years has placed increasing pressure on coastal resources leading to environmental problems such as loss of habitats from coastal development, improper waste disposal, increased water demand from freshwater lenses, and depleted fisheries.\(^{28}\)

On the economic front, many of the PICs are facing slow economic growth or even


\(^{26}\) AusAID, Tracking Development and Governance in the Pacific, (Canberra: AusAID, 2009).


stagnation. According to recent IMF statistics, the economic performance of the PICs has been relatively poor. The growth rate of the ten ‘small Pacific island countries’ mentioned,\(^2^9\) real GDP growth averaged 1.7% from 2010-2013 with a projected growth rate of 2.8% in 2015.\(^3^0\)

Rapid population growth in the region puts additional pressure on the PICs’ economies. A 2006 World Bank Report, for example, found that with persistently high population growth and the youth population reaching 40%, finding productive employment was a huge challenge for the PICs.\(^3^1\)

One measure of the gravity of the above-mentioned pressing challenges facing the PICs is their lack of progress against the Millennium Development Goals (MDGs).\(^3^2\) A 2006 UN report pointed out that the South Pacific region was ‘off track for nearly every Goal, and falling back in some areas … only sub-Saharan Africa is off-track with more indicators than Oceania.’\(^3^3\) By 2013, the achievement of MDG 1 (reducing poverty) still remains the key regional challenge, with only two PICs, on track to achieving this goal.\(^3^4\)

### 1.3 From Preference to Reciprocity

Traditionally, the PICs had depended for market access for commodities, development assistance and investment on their former colonial powers, principally Australia, New Zealand, and the UK – as well as the United States of America (USA) for the Compact States of Palau, Marshall Islands, and Federated States of Micronesia. These historical economic relationships were sustained through a number of

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\(^2^9\) Fiji, Kiribati, the Marshall Islands, Micronesia, Palau, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

\(^3^0\) IMF, Asia & Pacific Small States Monitor, Quarterly Bulletin, Issue 01/2015, April 2015.


\(^3^2\) The eight Millennium Development Goals (MDGs) – which range from halving extreme poverty to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015 – were agreed to by all the UN members and leading development institutions at the Millennium Summit in 2000.

\(^3^3\) See, UN, A Practical Plan to Achieve the Millennium Development Goals, UN Millennium Project (2002-2006), ch.2. [www.unmillenniumproject.org/reports/fullreport.htm](http://www.unmillenniumproject.org/reports/fullreport.htm) (last accessed 8 December 2014).

\(^3^4\) The two PICs which are on track to achieve MDG 1 are Niue and the Cook Islands. See, PIFS, 2013 Pacific Regional MDGs Tracking Report (Suva: PIFS, August 2013), available at PIFS [http://www.forumsec.org](http://www.forumsec.org) (last accessed 20 May 2014).
preferential arrangements that generally provided the PICs with duty-free market access for most of their exports.

The South Pacific Trade and Economic Cooperation Agreement (SPARTECA),\(^{35}\) signed in 1981, was an important non-reciprocal trade agreement between the PICs and Australia and New Zealand. Subject to a set of stringent rules of origin, this agreement gave preferential market access to goods from the PICs into the Australian and New Zealand markets.

The relationship between the EU and the ACP\(^{36}\) has evolved through succeeding agreements. The Yaoundé First (1963) and Second (1969) Convention – a trade agreement between the EEC and the mainly former French and Belgian colonies in Africa was replaced by the Lomé Convention of 1975. As the European powers sought to redefine relations with their former colonies in the post-WWII era, preferential trade arrangements granted to the African states were extended to the Caribbean and the Pacific states in the Lomé Convention of 1975.\(^{37}\) In 1975, the EU granted a preferential trade regime to ACP nations within the framework of cooperation agreements. Trade preferences, commodity protocols and instruments of trade cooperation were part of the four successive Lomé Conventions.\(^{38}\)

However, the establishment of the WTO in 1995 and the ascendency of the neoliberal agenda of globalisation, signalled the end of the preferential system. The PICs trading partners, particularly in the EU and Australia and New Zealand, made commitments during the Uruguay Round of negotiations which undermined the value of preferential and non-reciprocal economic arrangements within the PICs. The WTO’s strengthened compliance mechanisms also meant that non-reciprocal preferences were increasingly exposed to legal challenge by other states. In particular, as noted above, the WTO Dispute Settlement Body (DSB) found that the EU’s trade preferences to the ACP on


\(^{36}\) See [http://ec.europa.eu/trade/issues/bilateral/regions/acp/plcg_en.htm](http://ec.europa.eu/trade/issues/bilateral/regions/acp/plcg_en.htm) for a list of ACP regional grouping.

\(^{37}\) To better understand the history of the Lome preferences and the impact of the four Lome Conventions (1975-2000), see for example, Laaksonen, K., Maki-Franti, P. & Virolainen, M. *Lomé Convention, Agriculture and Trade Relations between the EU and the ACP Countries in 1975-2000*, (2006), Working Paper 06/20, TRADEAG.

\(^{38}\) See the European Commission’s official website, [http://ec.europa.eu/development/](http://ec.europa.eu/development/), for a background review of the ACP-EU cooperation, from Lomé I to Lomé IV.
banana,\(^{39}\) and later sugar,\(^{40}\) breached the WTO rules on non-discrimination against other Members. These rulings gave impetus to the EU’s determination to end preferential trade with its former colonies. The expiry of Lomé IV in February 2000 provided the catalyst for the EC and the ACP countries to rethink the future of ACP-EU trade relations.

The *Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21st Century*, issued by the EU in 1996, sent out a strong message to the ACP states of its intention to replace trade preferences under Lomé IV with WTO-compatible reciprocal regional agreements known as Economic Partnership Agreements (EPAs).\(^{41}\) The new ACP-EU agreement was signed on 23\(^{rd}\) of June 2000 in Cotonou, Benin (known as the ‘Cotonou Agreement’). The Agreement is to last for a twenty-year period from March 2000 to February 2020.

The Cotonou Agreement established a comprehensive framework for ACP-EU relations, and called for fundamental changes in longstanding non-reciprocal trade preferences granted unilaterally by the EU. In particular, the ACP countries would have to negotiate trade agreements compatible with rules of the WTO, based on reciprocity.\(^{42}\) The Cotonou Agreement was a transitional agreement aiming to minimise the adverse impacts of that loss of preferences to the ACP countries. It extended trade preferences for a further eight years from 2000,\(^{43}\) and defined the negotiating framework to enable ACP and the EU to conclude new trade agreements that were compatible with WTO rules by 31 December 2007. At the EU’s insistence,


\(^{42}\) Article 36 of the Cotonou Agreement states that ‘….the Parties agree to conclude new World Trade Organisation (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade’.

the ACP countries were divided for the first time into six regions, each of which would negotiate a reciprocal trade agreement with the EU.

Sustained pressure from the EU saw Fiji and PNG reluctantly sign interim EPAs on trade in goods with the EU in order to secure their preferential trade in sugar and fishery products. This required them to liberalise substantially all trade in goods over a specified period of fifteen years. The decision to sign interim EPAs was critical for these two PICs because, even though Pacific-ACP share of EU trade is only 0.06%, it allowed longstanding preferences to continue in a moderated form. Fiji and PNG together accounted for 90% of the Pacific ACP exports to the EU, and 41% of the total imports from the EU.

1.4 The Pacific Islands Forum Secretariat and Pacific Regional Economic Integration Initiatives

As noted by Slatter, the Pacific Islands Forum (PIF) played a key role in regional economic restructuring, functioning as a platform for the diffusion of neoliberal economic ideas and thinking among Pacific island leaders. The Pacific Islands Forum (PIF) is the region’s first and foremost political regional mechanism. It was founded in 1971 as the South Pacific Forum and had its name changed in 2000. Its sixteen members include the fourteen PICs as well as Australia and New Zealand. Its Fiji-based secretariat acts as the principal implementing agency in what has become an externally driven programme of economic restructuring in the PICs.

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44 The six sub-regions negotiating separate EPAs with the EU are: West Africa, Central Africa, Eastern and Southern Africa, East African Community, Southern African Development Community, Caribbean, and the Pacific.

45 PNG has committed to liberalise 88% of EU imports on the date of application of the agreement. Fiji has committed itself to liberalise 87% of EU imports over 15 years, 14% on the date of application, another 2.5% by the end of year five, 60% by the end of year ten and a final 11% by the end of year fifteen.


49 For further discussions on the role of the Forum Secretariat and how it implements those externally-driven programmes, see also Slatter, C., The Politics of Economic Restructuring in the Pacific with a Case Study of Fiji, PhD thesis, Massey University, 2004.
Starting in the late 1990s, the Forum convened three key meetings a year where important regional trade and economic issues were discussed: the Forum Leaders Meeting (Leaders’ Summit), the Forum Economic Ministers Meeting (FEMM), and the Forum Trade Ministers Meeting (FTMM).

The FEMM was established in 1997 to improve regional and sub-regional cooperation. It was at the first FEMM that Forum Economic Ministers endorsed a proposal for a two-stage free trade agreement (FTA), which would incorporate all the PICs over an initial ten year period, followed by Australia and New Zealand during the second ten year period. Later that year, the Forum leaders discussed these new developments at their annual meeting and formally embraced the concept of reciprocal free trade agreements. They mandated the PIFS to commission a study to explore the feasibility and options of implementing the proposed free trade agreement in the region.

From 1999, the work of the PIFS began to focus increasingly on trade liberalisation and in ensuring the PICs were complying with the WTO principles and trade rules. Urged by the PIFS, two regional trade agreements emerged from the secretariat process, namely the Pacific Island Countries Trade Agreement (PICTA) amongst the islands; and the Pacific Agreement on Closer Economic Relations (PACER) with Australia and New Zealand.

Conscious of the above development challenges, the Forum leaders reaffirmed their commitment to cooperate regionally in 2004 through the Auckland Declaration, in which they adopted the following vision:

Leaders believe the Pacific region can, should and will be a region of peace, harmony, security and economic property, so that all its people can lead free and worthwhile lives. We treasure the diversity of the Pacific and seek a future in which its cultures, traditions and religious beliefs are valued, honoured and developed.

We seek a Pacific region that is respected for the quality of its


governance, the sustainable management of its resources, the full observance of democratic values, and for its defence and promotion of human rights. We seek partnerships with our neighbours and beyond to develop our knowledge, to improve our communications and to ensure a sustainable economic existence for all.

To achieve this vision and overcome the challenges facing the region, leaders of the PICS plus Australia and New Zealand concluded that significant changes and improvements were needed in how development in the PICs is pursued. In the Auckland Declaration, the Forum leaders decided to develop a Pacific Plan to create stronger links between countries of the region.

The Pacific Plan consolidated existing arrangements for regional cooperation and proposed a new approach to the unique development challenges facing the PICs through a framework of greater regional cooperation and integration.\textsuperscript{51} It was developed around four pillars: economic growth; sustainable development; good governance; and security. The concept of the Pacific Plan was consistent with the values and principles of the United Nations Millennium Declaration, in particular MDG 8 Target 12 which aims to ‘develop further an open, rule-based, predictable, non-discriminatory trading and financial system (includes commitment to good governance, development, and poverty reduction, both nationally and internationally)’. The emphasis on economic integration through free trade thus aimed to progressively co-opt what Baxi termed a ‘trade-related’ paradigm\textsuperscript{52} into the development discourse in the South Pacific.

Under the framework of the Pacific Plan, the Pacific Trade Ministers agreed at their annual meeting in 2005 to move beyond the 1981 SPARTECA towards a more comprehensive framework for trade and economic cooperation between the PICs and Australia and New Zealand as provided under PACER. In October 2005, the Forum Leaders endorsed the Pacific Plan at their 36th Meeting in Papua New Guinea. It


\textsuperscript{52} In the mid 1990s, renowned scholars such Upendra Baxi have observed and commented on the emergence of a market-friendly (or specifically trade-related) human rights paradigm that replaced ‘human-centred’ human rights. See, Baxi, U., ‘Voices of Suffering and the Future of Human Rights’, 8 \textit{Transnational Law and Contemporary Problems} (1998), 163-164, pp. 125-169.
signalled a shift away from preferential market access to reciprocal legal obligations governing much more than trade in goods. The key interest of the Pacific Plan, endorsed by all Pacific governments, was to promote economic integration through an expanded PACER, known as PACER-Plus.

1.4.1 Negotiations as of 2015

As illustrated by the diagram below, over the last decade, the PICs have been immersed in a complex array of WTO-compatible obligations and negotiations.

*Figure 1: Multilatral and Regional Trade Agreements in the South Pacific Sub-region as of 2015*

Out of all trade agreements that the PICs are involved in, PACER Plus stood out to be the most important regional economic integration initiative because of the special relations between the PICs and Australia and New Zealand and the two large economies in the region. Whereas there is no requirement under the Cotonou Agreement to negotiate a trade in services agreement, the 5th annual meeting of
Forum Trade Ministers (including Australia and New Zealand) in 2013 endorsed the PACER Plus ‘roadmap’, which includes the liberalisation of trade in goods, trade in services and investment as top priority issues for negotiations. Its outcome document asserts that ‘PACER Plus will be mutually beneficial and demonstrably improve the ability of PICs to benefit from investment and expanded market access opportunities in Australia and New Zealand’. The PICs are therefore ‘committed to liberalising trade in services’, building on the GATS and the PICTA Services Protocol. Specifically, ‘there would not be a priori exclusion of any services sector or mode of supply’ and there will be an ‘obligation to respect the non-discrimination principle and commitment to adopting measures which would enhance transparency and create an enabling environment for service suppliers to operate across borders’.

The stated aim of PACER Plus was to achieve the interlinked objectives of sustainable development, poverty eradication and the gradual integration of the PICs into the international economy. Despite that rhetoric, there was growing reticence among Pacific negotiators as negotiations progressed and they began to understand more about the implications of PACER Plus as a neoliberal instrument. However, due to the vast imbalance in political, economic and negotiating powers between the parties (Australia and New Zealand on one side, wearing two hats as Forum members as well as significant donors; and the PICs on the other), few Pacific governments could in practice resist the Australian and New Zealand governments’ pressure to fast-track PACER Plus negotiations.

Thus, as observed by Noonan, the former Chief Trade Adviser responsible for providing legal and technical advice to the Pacific governments on PACER Plus, the general pro-development promises, such as those agreed by Forum Trade Ministers before the commencement of the negotiations, have been hard to turn into concrete

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55 Ibid.
legal provisions. Despite the lack of an agreed vision of the type of regional economic integration that should be supportive of sustainable development and poverty eradication for the PICs, the 6th Forum Trade Ministers Meeting in May 2014 decided to finalise a legal text on PACER Plus by December 2014. In view of the slow progress on the negotiations on a number of substantive issues, including chapters on trade in services, trade in goods, investment, labour mobility and development assistance, the deadline for concluding the negotiations was tentatively shifted to mid-2016.

1.5 Services Liberalisation under the GATS Framework

The globalisation and liberalisation of trade in services has been driven by many factors. Advances in technology and communication have allowed capital mobility as well as the provision of better services at lower prices. Similarly, improved and cheaper travel enabled greater mobility for service suppliers across national borders.

The massive expansion of the services economy is also a direct result of the transformation of capitalism in the late twentieth century where transnational corporations expanded their subsidiaries and branches through partnerships, joint ventures, franchises, licensed and subcontracting across the world, notably relocating them to low-cost developing countries.

Trade in services is defined in Article 1:2 of the GATS as transactions that involve a provider from one country and a consumer from another. It ranges from foreign direct investment to provision of services across borders by the temporary presence of providers in the consumer’s territory. Services are now considered to be one of the world’s most important and fastest growing economic sectors. According to the WTO,

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world trade in services accounts for two thirds of global output, one third of global employment and nearly 20% of global trade.\(^6^2\) Based on past growth, it has been forecast that world services trade could reach the level of world merchandise trade by 2020.\(^6^3\)

In the Pacific, with the gradual erosion of preferences on commodity exports, trade in services is increasingly becoming an important economic sector for many of the PICs. According to World Bank statistics in 2012, trade in services\(^6^4\) accounted for 46% of GDP in Fiji, 32.4% in PNG, 46.1% in Samoa, 34.4% in Solomon Islands, 31.9% in Tonga and 59.4% in Vanuatu.\(^6^5\) Within trade in services, tourism plays a vital role in the economies of the PICs. The 2012 Economic Impact report by the World Travel and Tourism Council showed the total contribution of tourism (direct, indirect and induced) to the PICs in 2011 ranged from 35% to 53% of GDP for countries with higher tourism arrival numbers like Fiji, Cook Islands, Samoa and Vanuatu.\(^6^6\) These figures are projected to rise to 45% and 60% by the year 2020.\(^6^7\)

The conduct of international trade in services is governed by the GATS. While the GATS has the same broad liberalisation objective as the General Agreement on Trade and Tariffs (GATT) whose rules govern the trade in goods, the peculiar characteristics of trade in services demand a different process of liberalisation. Whereas the GATT entails the reduction of tariffs and other non-tariff trade barriers, the nature of trade in services renders the negotiation of liberalisation a much more complex process because a large portion of trade in services penetrates deeply inside national borders. Trade liberalisation in services is largely about managing the divergent regulatory regimes across national sovereignties. Essentially, the GATS rules aim at reducing barriers to foreign services and service suppliers in those various modes of delivery and imposing disciplines on domestic regulation.

Specifically the GATS aims to ensure that national measures do not discriminate (and

\(^6^4\) Trade in services is the sum of service exports and imports divided by the value of GDP.
\(^6^6\) SPTO, Tourism and Sustainable Development in Pacific Islands, Sustainable Development Brief, 15 April 2013.
\(^6^7\) Ibid.
thus do not fall under the national treatment obligation of GATS Art. XVII) or constitute quantitative limitations (and thus do not come under the market access obligation of GATS Art. XVI), and that the burdens of regulation are limited, especially for licensing, professional qualifications and technical standards (GATS Art VI).

The PICs’ major donors and the PIFS advocate the benefits of trade liberalisation in both goods and services under the multilateral trading system. While some scholars hold the view that GATS has played little or no role in services liberalisation and regulatory reform internationally in the past decade,68 the obligations for the PICs are very significant, particularly for Tonga, Samoa and Vanuatu. It is important to note that the levels of services liberalisation commitments of these PICs resulting from their accession to the WTO differ significantly from the three original Pacific WTO members. For example, Tonga has undertaken commitments in all eleven categories of the services classification (W/120 list) used for scheduling such commitments,69 while Solomon Islands and Fiji have commitments in only four and one sector respectively.70

The GATS not only provides a legal framework of rules for services at the multilateral level; its scope, structure and content have also been adapted and expanded through bilateral and regional trade agreements, making them GATS-plus. Far from being an alternative to the WTO, regional trade agreements or FTAs co-exist alongside the multilateral trading system, and are governed by its rules. A WTO-compatible FTA must satisfy the conditions stipulated in Article V of the GATS requiring ‘substantial sectoral coverage’ in terms of number of sectors, volume of trade affected and modes

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69 The services sectoral classification list (W/120) is a comprehensive list of services sectors and sub-sectors covered under the GATS. It was compiled by the WTO in July 1991 and its purpose was to facilitate the Uruguay Round negotiations, ensuring cross-country comparability and consistency of the commitments undertaken. The 160 sub-sectors are defined as aggregate of the more detailed categories contained in the United Nations provisional Central Product Classification (CPC). The list is available at the WTO website at: http://tsdb.wto.org/Includes/docs/W120_E.doc (last accessed 15 August 2015).
of supply.\footnote{See footnote of Article V:1 (a) of the GATS. In order to meet the condition of ‘substantial sectoral coverage’, it specifies that services agreements should not provide for the \textit{a priori} exclusion of any mode of supply.} Nonetheless, there is a mandatory flexibility for developing countries in Article V: 3, which allows them to liberalise service sectors in accordance with their level of development. Chapter 6 shows how the EU, Australia and New Zealand have used the rules of the GATS to their advantage and insisted on their own interpretation of Article V.

The WTO cannot impose any legal obligation on those PICs that are not WTO Members. However, all WTO members must comply with their obligations, even when negotiating with non-WTO members. The latter, in turn, have an obligation under international law to negotiate a treaty in good faith,\footnote{Article 31, the \textit{United Nations Convention on the Law of Treaties}, signed at Vienna 23 May 1969, which entered into force on 27 January 1980. Available \url{www.jus.uio.no/lm/un.law.of.treaties.convention.1969/toc.html} (last accessed 15 August 2015).} which includes respect for the legal obligations of parties that are WTO Members. This makes it especially important to give a pro-development interpretation of GATS Article V to ensure development flexibilities for the PICs in any FTAs with the EU and Australia and New Zealand that include trade in services.

The very notion of including services in a WTO-compatible regional FTA remains controversial because the rules of the GATS can limit the scope and content of government regulation in virtually all service sectors. According to Kelsey, this market-approach to services liberalisation replaces a social paradigm of services with one based on market relations and is an integral element of ‘a new hegemonic ideology of neoliberalism’.\footnote{Kelsey, J., \textit{Serving Whose Interest? The Political Economy of Trade in Services Agreements}, (Oxon: Routledge-Cavendish, 2008), p. 2.}

The GATS-plus FTAs have the potential to further constrain the policy choices of the PICs, making it much harder for Pacific governments to exercise their sovereign right and duty to regulate or to introduce new regulations to promote and protect human rights and sustainable development. As pointed out by Kelsey, these treaties are not mere legal texts but must be understood as ‘hegemonic constructs’ aiming to ‘reshape economic and social relations in ways that reflect the contemporary requirements of transnational corporations’.\footnote{Ibid. p.22.}
plus FTAs are explored in depth in chapters 4, 5 and 6 respectively.

### 1.5.1 Trade in Tourism Services in the Pacific

The growing importance of the services sector in the Pacific, and the findings of some donor-funded studies over the last decade,\(^{75}\) have prompted the PIFS to spearhead services liberalisation efforts in the region. At their various annual meetings, with the advice of the PIFS, the Forum Trade Ministers have collectively identified a number of common priority areas in the economic liberalisation of services. These areas include regional labour mobility, shipping, aviation, telecommunication and tourism.\(^{76}\)

Among internationally traded services, ‘tourism’ is an area of special interest to the PICs. This is because tourism is increasingly viewed as a lever to growth and an important source of foreign exchange earnings.\(^{77}\) According to the 2013 South Pacific Tourism Organisation report, tourism accounts for 90% of foreign exchange earnings in the Cook Islands and has now passed all other export industries to become the leading income earner for Samoa, Fiji and Vanuatu.\(^{78}\)

The economic rationale behind encouraging tourism is that, through its linkages with other sectors of the economy, the revenues generated from tourism activities can contribute substantially to poverty alleviation, employment and capital investment in the economy.\(^{79}\) This argument would not necessarily hold if extensive fiscal concessions are offered to tourism activities and related investment projects or if revenue generated from tourism were not retained within the local economy but

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\(^{79}\) Ibid.
instead leaked out through repatriation or other means. The argument also reflects the neoliberal model of tourism development, which focuses primarily on economic factors such as increased tourist arrivals. Therefore, while the UN’s Tourism Satellite Account provides data on the contribution of tourism to a nation’s GDP, the actual benefits and potential socio-economic and environmental costs to the local economy can only be assessed through a ‘cost and benefit’ analysis of the linkage vis-à-vis the leakage effects of tourism.

The impacts of tourism activities are multi-dimensional. Tourism is a social, economic and cultural phenomenon which entails the movement of people to countries or places outside their usual environment for personal, professional or business reasons. As such, tourism has implications for the economy, for the environment, and for the local communities and people at the destinations. Environmental impacts include increased pressure on land resources and wildlife; increased demand on the use of freshwater resources, and degradation of coastal areas, adversely affecting mangroves and coral reefs. Socio-economic and cultural impacts include the conservation of living cultural heritage and traditional values.

This thesis argues that these multiple impacts and the involvement of a wide spectrum of stakeholders in the tourism industry mean that raising the quality of tourism products and increasing the number of tourist arrivals should not be the preoccupation of policy makers. Rather, the economic benefits of tourism must be balanced by its social and environmental impacts if it is to lead to sustainable tourism and sustainable development in the South Pacific.

Within the GATS framework the explicit scope of ‘tourism’ is distinctly limited. Commitments on services liberalisation are made using the W/120. Category 9, headed ‘tourism and travel-related services’, is divided into four sub-sectors: hotels and restaurants; travel agencies and tour operators services; tourist guide services; and

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80 Leakages can be associated to both exports and imports in the tourism sector. For example, an export leakage arises when a foreign hotel investor repatriates the profits back to the country of origin. An import leakage happens if the supply of services (e.g. the employment of an expatriate chef) or goods (such as food) need to be imported, causing a drain of revenue.

81 TSA is a statistical instrument designed to measure the impacts of tourism goods and services on national economies using an international standard endorsed by the UN Statistical Commission. The TSA concept is being implemented across countries by the World Travel and Tourism Council.

other services. The first three sub-sectors have associated listings under the UN’s ‘Provisional Central Product Classification’ (CPC). Additional tourism activities, most notably transport services, business services, distribution services, recreational, cultural and sporting services fall outside the WTO’s tourism services classification, but are covered by other services categories from the W/120 list. This classification or later versions of it are used in most FTAs.

Finding the right balance of environmental, social and economic conditions is critical for the PICs to foster sustainable development in the long run. As the PICs are highly vulnerable to natural hazards and human-induced environmental degradation. According to the former UN Secretary-General, Kofi Annan, ‘the (neoliberal) model of development that we are accustomed to has been fruitful for the few, but flawed for the many’... and has the potential to deliver ‘a path to prosperity that ravages the environment and leaves a majority of humankind behind in squalor (which) will soon prove to be a dead-end road for everyone’. The thesis highlights the risks of this approach, both in the WTO as well as in any services agreements under regional FTAs, especially for small vulnerable economies and small island developing states in the Pacific.

1.5.2 Rationale for Choosing Tourism as a Focus of Analysis

Tourism as an industry is increasing rapidly in the Pacific island countries. The embrace of tourism by the PICs can be attributed to two key factors. First, the PICs are small islands endowed with rich natural and cultural diversity such as scenic landscapes, beautiful beaches, exotic cultures and fascinating histories. Second, the terrorist attacks on 9/11 in the US, and other subsequent bombings in popular tourist destinations such as Bali, London and Madrid diverted many security conscious travellers to the relatively peaceful shores of the Pacific. This change of preference in destination has led to a rapid growth in the tourism sector for all the PICs.

Tourism is chosen as a particular area of focus for this thesis for three reasons. Firstly, tourism plays a vital role in the PICs and is the major driver of economic

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83 Ibid.
growth and foreign exchange earnings for most of the island economies. For example, tourism in recent years has become Fiji’s lead economic sector and largest earner of foreign exchange. Tourism replaced sugar as the main source of foreign exchange in 1982. By 2008, receipts from tourism were more than 50% higher than the combined total receipts from Fiji’s next five major sources of foreign exchange – notably, sugar, garments, gold, timber and fishing. Earnings from tourism in 2013 and 2014 stood at F$1.318 billion and F$1.405 billion respectively. Remittance, on the other hand is Fiji’s second major foreign exchange earner, which is steadily increasing in recent years.

In addition, tourism has been identified as a major sector for liberalisation in the Pacific Plan and was singled out as a key development opportunity in the EU’s 10th European Development Fund (EDF10) Regional Strategy Paper 2008-2013 for the Pacific. The promotion of tourism and the liberalisation of related services have been central to the ongoing FTAs negotiations.

Secondly, as explained later in chapter 5, the impacts of tourism are not confined to commercial considerations but cut across all spheres to include the economic, social, environmental, and institutional aspects of development. Over the years, various studies in the Pacific region have pointed out that tourism can provide opportunities for economic development, including generating income and employment through the development of natural and cultural resources. However, proper management of the

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87 Based on exchange rate as of August 2015, F$1.318 billion is approximately US$612 million.
90 The European Development Fund (EDF) was created in 1957 by the Treaty of Rome. It was launched in 1959. The EDF is the main instrument for providing EU development aid in the African, Caribbean and Pacific (ACP) countries and the Community’s overseas countries and territories. The 10th EDF (2008-2013) is governed by the ACP-EU Partnership Agreement, which was signed in 2000 and revised in 2005.
91 The EU was the first donor to support the tourism sector in the Pacific and for quite some time it was the only one. For example, the SPTO’s Pacific Regional Tourism Capacity Building Programme (PRTCBP) was funded under the EU’s 10th EDF which will be completed in 2015.
tourism industry involves maximising the benefits to local people and the economy, while minimising negative externalities associated with tourism such as social, environmental and cultural costs.

In a case study of Vanuatu’s tourism industry, Slatter has observed that the Vanuatu tourism liberalisation model was ‘one where most of the benefits from the tourism boom are flowing to foreign investors and expatriate residents, with ni-Vanuatu scrambling for the crumbs from the table’. Slatter further pointed out that the Vanuatu government must preserve its policy space so that it could make any changes to laws and regulations that might be necessary for the provision of livelihoods for ni-Vanuatu, particularly in terms of land ownership issues. She concluded that signing up to obligations at the WTO, or under a FTA could deprive Vanuatu of the possibility of moving towards a better model for its tourism industry. Reflecting on Vanuatu’s experience, it is critical for other PICs, including Fiji, to ensure that tourism develops in a sustainable manner, supported by proper planning, effective institutional coordination and a robust regulatory framework, in order to achieve the development objectives of economic growth, social equity and protection of the environment.

Thirdly, the current six Pacific WTO Members have all made varied GATS commitments in tourism services. As the PICs negotiate GATS Plus FTAs with services chapters under PICTA and PACER Plus, it is necessary to understand the full legal implications of what this might entail on regulatory and policy autonomy for the Pacific governments. For example, Fiji joined the WTO in 1996 and as part of the Uruguay Round of commitments, has bound all its agricultural tariffs; 43% of industrial lines and undertaken commitments under the GATS in tourism services only. By committing to liberalise only hotels and restaurants, Fiji adopted a highly cautious approach to tourism liberalisation under the GATS framework during the Uruguay Round of negotiations. This was typical of developing countries who were nervous about the unknown implications of the GATS and took advantage of the positive list approach to minimise their exposure.

[accessed 15 June 2015]

94 Ibid.
95 Ibid.
However, a closer examination of the commitments revealed problems in the schedule of specific commitments under hotels and restaurants that left open the possibility that the Fijian government could face legal challenges under the WTO dispute settlement system. This was presumably a drafting error but it also revealed the risks of the then Fijian government’s willingness to go along with the liberalising agenda of the GATS without properly understanding its implications. The mistakes in the GATS embodied the impacts of the Second Moment on Fiji. The Fijian government’s subsequent attempt to fix this error through the GATS 2000 negotiations, and to protect itself as far as possible from repeating it in the PICTA Services Protocol draft offer, could be seen as embryonic signs of a new development thinking.
CHAPTER 2: THE ANALYTICAL FRAMEWORK

2.1 Introduction

Scholarly interest in law and development has a long pedigree and goes back to at least the nineteenth century.\(^{97}\) Newton observed that works of early voices were often ignored, at least in North American academic discourse, until in the post Second World War period which witnessed the emergence of new development theories.\(^{98}\)

This chapter explains the analytical framework for the thesis utilising the law and development doctrine advanced in a 2006 book edited by Trubek and Santos, *The New Law and Economic Development: A Critical Appraisal*.\(^{99}\) This book is a compilation of seven chapters on law and development by six authors. It chronicles the history and resilience of the law and development field and analyses and compares shifts in development practitioners’ perception of law since the 1950s to the mid-1990s. Trubek and Santos categorise the discourse of law and development since the end of World War II in terms of ‘Three Moments’. The First Moment emerged from the early 1950s till early 1970s, a period during which laws were needed to create the formal structure of macroeconomic control during the post decolonisation period. In the First Moment, law used the state to foster development. The Second Moment emerged from the early 1980s to the mid-1990s, a period embodied by the ascendency of neoliberalism when the ‘Washington Consensus’ prevailed\(^{100}\) and where law was used to limit the state and facilitate the markets. The Third Moment emerged from the late 1990s where law was used not only to create and protect markets, but also to

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curb market excess, support the social, and provide relief to the poor. The Third Moment acknowledges the market’s inadequacies and failure to attain substantive development. Though not abolishing the market’s role, the Third Moment requires that law facilitate development by being sensitive to social and human rights, with the ‘rule of law’ as a new and central objective.  

2.2 ‘Three Moments’ in Law and Development

The theoretical framework of Trubek and Santos was chosen because the law and development doctrine was ‘more than a blueprint and less than a robust theory’ and could ‘best be understood if it is seen as the intersection of current ideas in the spheres of economic theory, legal ideas, and the policies and practices of development institutions’.  

The thesis, using real case studies in the Pacific, attempts to demonstrate that both the theory and the practice of law and development are shaped by, and at the same time shape, the spheres of economic theory, legal ideas and institutional practices. Drawing the three spheres together as demonstrated by Figure 2, provides, for example, a better understanding of why Fiji adopted trade liberalisation and export-oriented policies in the late 1980s and why in recent years the Fijian government began to question the neoliberal approach to development.


\[\text{footnote}{102}\text{ Ibid. p.4.}\]
Trubek and Santos saw the three spheres (economics, law and institutions) as analytically separate but practically intertwined with each sphere influencing the other in complex and reciprocal ways, as shown in Figure 2. In short, they believed that both the theory and the practice of law and development are shaped by, and at the same time shape, the spheres of economic theory, legal theory and institutional practice. The law and development doctrine crystallises when the three spheres come together. The relationship between law and development changes over time. To chart this change, they used the term ‘moment’ to refer to a period in which law and development has crystallised into an orthodoxy that was relatively common and widely accepted. Figure 3 sets out the three Moments they identified since the end of World War II.

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103 Ibid.
104 Ibid. p.2
The typology of the ‘Three Moments’ is used in this thesis as a conceptual and analytical device, rather than a rigid theoretical framework and chronology for the clearcut transition from one Moment and model of development to another. This allows the thesis to compare and contrast competing development paradigms over different periods and their changes over time, while adapting them to the particular conditions of the PICs. Its focus on the intersection of the three spheres of economic theory, legal ideas and institutional practices offers a holistic approach to law and development as the basis for an alternative analysis of the complex issues confronting the PICs, as well as providing insights into the rationale of Pacific leaders in making
public policy choices within a political economy context. It is the conceptual ideas of the Three Moments, rather than its theoretical structure, that are most relevant to this thesis.

2.2.1 First Moment

The ‘First Moment’ was referred to as ‘Law and the Developmental State’ which drew on ideas from modernisation theory.\(^{105}\) The theory was articulated by Rostow\(^{106}\) in 1960 and based on the idea that all societies follow an evitable linear path of development, from the traditional to modern. The path was characterised by a transformation from a primarily agrarian society to an industrialised one. Progress along this evolutionary path was considered to depend upon economic growth as the basis of development.

Drawing on the modernisation theory of development, the First Moment was characterised by a concentration on the role of law as a state instrument for economic management and a lever for social change. As noted by Trubek and Santos, the primary use of law in the development state was as a tool to remove traditional barriers to growth and change economic behaviour.\(^{107}\) Laws were needed to translate policy objectives into action by directing economic behaviour in accordance with national development plans. Using law as a tool for effective state interventionism in the economy, this period of forced modernisation was done predominantly through state planning and state-owned enterprises (SOEs), state allocation of investment in strategic sectors, detailed regulation, high tariffs, and import-substitution industrialization (ISI).\(^{108}\)

The adoption of import substitution industrialisation policies in the PICs was

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\(^{105}\) Ibid. p.5.  
\(^{106}\) Modernisation theory proposed that the path to development and modernity could be achieved through a series of five stages: the traditional society; the pre-take-off society; take-off; the road to maturity; and the mass-consumption society. See, Rostow, W., *The Stages of Economic Growth: A Non-Communist Manifesto*, Cambridge: Cambridge University Press, 1960.  
\(^{107}\) Ibid. p.5  
\(^{108}\) Ibid.
influenced by well-known economists such as Rosenstein-Rodan and Raul Prebisch who believed that the only way Third World countries could break the ties that had bound them for so long to their old colonial masters was through concerted state action.\textsuperscript{109} The import substitution industry strategy was common throughout Latin America after World War II. This strategy, as discussed later in Fiji’s case study, was also used in the Pacific up to the early 1980s.

### 2.2.2 Second Moment

During the 1980s, the ‘Second Moment’ began to take shape through the emergence of the neoliberal development agenda.\textsuperscript{110} ‘Development’ was identified with the growth of Gross National Product (GNP) or technological progress or industrialisation. ‘Neoliberalism’ is not a unified economic theory but a label denoting a platform often referred to as the ‘Washington Consensus’\textsuperscript{111} - which supports, among other policies, a liberal trade agenda of rapid market liberalisation, privatisation and deregulation. Consistent with the dominant economic theory which stressed the role of the market on economic growth and perceived the state as a hindrance to efficient markets and economic development, law became an instrument for market relations and as a \textit{limit} on the state.\textsuperscript{112} The law reforms in developing countries were focused on the core institutions of private law and the need to change local laws to facilitate integration into the world economy.\textsuperscript{113}

The neoliberal ideology became so entrenched that its views were embodied in the policies of the international agencies such as the World Bank and IMF, and through them, the functioning of the global economy.

\textsuperscript{109} In Asia, Latin America and Africa, the process of decolonisation in the wake of World War II lent force to the call for new theoretical work as those former colonies of Western powers were eager to speed up their development to consolidate their new-found independence. See for example, Kay, C., \textit{Latin American Theories of Development and Underdevelopment}, (New York: Routledge, 2011).


\textsuperscript{111} The term ‘Washington Consensus’ was codified by John Williamson in 1989 to describe a set of ten specific policies advice commonly prescribed to developing countries to restructure their economies by Washington-based institutions, such as the IMF, World Bank, and the US Treasury Department. See, Williamson, J., ‘A Short History of the Washington Consensus’, conference paper presented at the \textit{From the Washington Consensus towards a new Global Governance}, Barcelona, September 24–25, 2004.


\textsuperscript{113} Ibid.
The PICs abandoned the import-substitution based industry development policies and embraced structural economic reforms in the late 1980s. As observed by Slatter, structural adjustment policies were first advocated in the Pacific in 1988 by Australian economists based at the Australian National University. The subjecting of the PICs to the one-size-fits-all economic model and donor-driven trade liberalisation constitutes, according to Slatter, a ‘disciplining of island states in the post-Cold War era, where the free market ideology reigns supreme’.

The dominance of neoliberalism in development thought also contributed to a huge increase in international agreements and treaties, which primarily focused on the law of the market and the loosening of regulatory controls. For instance, the outcomes of the Uruguay Round of multilateral trade negotiations resulted in the establishment of the WTO, with separate agreements that cover trade in goods (GATT) and services (GATS), as well as an agreement on the protection of trade-related intellectual property rights (TRIPS).

International Economic Law (IEL) became the most important field of international law under the neoliberal era. This importance, as observed by Faundez, was confirmed by three measures: the volume, scope and efficacy of international economic law.

*Volume* was reflected in the large number of multilateral and bilateral treaties on matters relating to trade, finance and investment, and in the numerous decisions by international economic organisations that set standards and voluntary codes in areas as varied as banking, corporate governance and food standards. The *scope* of the IEL rules extended to areas that were regarded as part of the exclusive domestic jurisdiction of the states, such as the intrusion of the GATS into domestic regulation. The greater *efficacy* of the IEL rules was reflected in significant improvements in their enforceability, due to the establishment of numerous international tribunals with

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115 Ibid.
jurisdiction to resolve international economic law disputes. These included the WTO’s
dispute settlement mechanism and the World Bank’s International Centre for
Settlement of Investment Disputes (ICSID).\footnote{The Washington-based ICSID is considered to be the leading
international arbitration institution devoted to resolving disputes between States and foreign investors, also known as BIT arbitrations. It was established in 1965 and over 150 countries have signed the ICSID Convention.}{117}

With the ascendancy of the neoliberal agenda in the 1990s and the creation of the
WTO in 1995, the PICs came under heavy pressure from their former colonial powers
to adapt themselves to ‘open and free trade’ through making binding and reciprocal
commitments in the WTO and negotiating WTO-compatible trading arrangements on
a regional basis. These arrangements were legally required to comply with WTO rules
because Fiji, Papua New Guinea and Solomon Islands were WTO Members, even
though the remaining PICs at that time were not. The subsequent accession of Tonga
(2007), Samoa and Vanuatu (2012) to the WTO after a long and tortuous process of
negotiations seems to further move the PICs rapidly down the path of liberalisation.

To prepare the PICs for this fundamental shift from preferential arrangements to a
reciprocal regime of trade liberalisation, policy advice from the World Bank, IMF, the
Asian Development Bank (ADB) and the WTO predominantly focused on the
theoretical gains of a free-trade driven development strategy. Inspired by two World
Vol. 1: Regional Overview; Vol. 2: Country Survey; and World Bank, \textit{Pacific Island Economies: Toward efficient and
and academics in the Pacific produced a number of studies in support of this agenda
as a means to solve development problems facing the PICs. Sometimes the reports
have been commissioned or otherwise supported by the governments of Australia and
New Zealand. For example, authors of an Australian National University sponsored
1993 report entitled \textit{Pacific 2010: Challenging the Future} contended that economic
growth would make all the challenges facing the PICs disappear.\footnote{Cole, R.V. (ed.), \textit{Pacific 2010: Challenging the Future}, National Centre for Development Studies, Research
School of Pacific Studies, (Canberra: Australian National University, 1993), p.30.}{119} This assertion was
echoed by the Australian Minister for Pacific Island Affairs in 1994 who claimed
there was ‘no realistic alternative to competition and the pursuit of comparative
advantage (free trade), no matter how daunting these concepts may appear’.\footnote{Fry, G., ‘Climbing Back onto the Map? The South Pacific Forum and the New Development Orthodoxy’,
Ten years later, the push for this ‘global free trade’ agenda was reiterated in 2007 by the authors of *Pacific 2020: Challenges and Opportunities for Growth*. The Pacific 2020 project was an initiative of the former Australian Minister for Foreign Affairs, the Hon. Alexander Downer and was developed and implemented by AusAID. The report specifically recognised regionalism, and the development of a Pacific Plan, as a necessary strategy for addressing many of the common issues facing the small Pacific island countries.

Under the conceptual paradigm of development associated with the Second Moment, the PICs have been politically pressured or financially enticed by their donors to embrace the idea that gradual integration into the global economy under the principles of the WTO and through free trade agreements such as PACER Plus and the EPAs were essential to the PICs’ ‘growth and development’.

This perception was reinforced by Australian Trade Minister Warren Truss who remarked in 2007 that ‘the new so-called PACER Plus would foster economic opportunities and competitiveness for countries in the region and help Pacific Island countries secure the benefits from liberalisation and integration while operating within the WTO rules.’

2.2.3 Third Moment

According to Trubek and Santos, a significant shift occurred in the law and development field during the 1990s in response to the failures of neoliberalism. Neoliberal ideas were revised and additional elements added to the definition of development. This revision included new attention to the limits of markets, efforts to redefine development beyond economic growth, the stress on the local, the interest in

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participatory decision-making, and the focus on poverty reduction.\textsuperscript{124}

This new paradigm, according to Trubek and Santos, was shaped by two key ideas: the importance of the role of state intervention when market fails; and the redefinition of ‘development’ to encompass not only economic growth, but also social goals such as human freedom.\textsuperscript{125} In this regard, Trubek and Santos suggested that this shift might presage the emergence of a new development paradigm and the inauguration of the Third Moment in law and development.

For evidence of the emergence of the Third Moment paradigm, Trubek and Santos turned to some of the apparent changes in perception within the World Bank, noting the Bank’s explicit recognition of the failure of neoliberalism and the rejection of the one-size-fits all approach to development.\textsuperscript{126} On this view, the Third Moment is an opportunity to review, reflect, critique and perfect the role of law in the service of development. It reflects and adopts some normative assumptions that underpin the First Moment, such as the ‘right to development’, while rejecting some conventional practices closely associated with neoliberalism as in the Second Moment.

Other scholars and economic commentators were expressing similar views. By the end of the 20\textsuperscript{th} century, criticism that neoliberal policies were not delivering the growth that had been promised, but instead led to severe economic crises in developing countries, grew louder.\textsuperscript{127} Critics questioned the underlying assumption that economic growth necessarily leads to poverty reduction or that the idea of development should even be viewed in terms of economic growth but instead as a way to enhance human capacities. For instance, Amartya Sen, a leading thinker on development issues, argued that substantive freedoms\textsuperscript{128} should be viewed as ‘constituent components of development’ and that law, democracy and freedom

\textsuperscript{125} Ibid. p. 8.
\textsuperscript{126} Ibid., p.92.
\textsuperscript{128} Sen’s definition of ‘freedom’ includes five instrumental freedoms: political freedom, economic facilities, social opportunities, transparency guarantees, and protective security.
should be included in the very definition of ‘development’. ¹²₉

For the PICs, a progression of this kind from the Second to the Third moment in law and development could not only move law to the centre of development policy making; it could also change the rationale for moving down the path of economic globalisation. As discussed in more detail in chapter seven, there are signs of a Third Moment in the Pacific, exemplified by the changing attitudes of key Pacific governments, notably the MSG countries, to pursue a cautious and precautionary approach to services negotiations in the EPA and PACER Plus negotiations.

For example, despite more than ten years of difficult negotiations with the EU, the deadline for a Pacific-EU EPA lapsed in 2012 without a regional agreement, except for a goods-only interim EPA signed by Fiji and PNG. Both Fiji and PNG were forced to sign an interim EPA with the EU to avoid market access disruption for their exports in reaction to the EU’s Market Access Regulation 1528/2007. According to the Regulation, both Fiji and PNG would lose their preferential market access to the EU if they were not signatories to an interim EPA. The interim EPAs were ‘initialled’ by Fiji and PNG in 2007 to qualify for the concessions and were subsequently signed in 2009. PNG and the EU ratified the interim agreement in 2011. The Government of Fiji notified the European Union in July 2014 of its decision to apply the interim Economic Partnership Agreement (EPA) with the European Union. ¹³₀

Though there are signs of a Third Moment in the region, the difficulty confronting Pacific leaders remains a matter of political will to embrace an alternative model of development and be able to resist mounting pressure from their major donors. For example, the EU’s 2013 decision to impose a sunset clause on its Market Access Regulation 1528/2007 put Fiji in a very difficult situation. ¹³₁ As admitted by Fiji’s

¹³₁ Frustrated with the lack of progress in the EPA negotiations, the EU decided to step up the pressure on the ACP countries. On 30th September 2013, the European Commission adopted a proposal amending Regulation 1528/2007 governing the market access of 36 ACP countries to the EU. The proposal for amendment provides that, unless the 36 countries listed in the Annex ratify and implement EPAs by January 2014, they will be removed from the list. This means that they will lose the duty/quota free access of their goods (in Fiji’s case, sugar) to the European market.
Attorney-General and Minister for Finance, Fiji was forced to ratify and provisionally apply the Interim EPA from July 2014 to safeguard its sugar exports to the EU.\textsuperscript{132}

The PACER Plus negotiations stalled in 2009 after Fiji suspended the operation of Part Two of PACER in October 2009\textsuperscript{133} in protest over its exclusion from participation in the negotiations.\textsuperscript{134} Fiji’s decision stemmed from its forced suspension from the Pacific Islands Forum as a result of its latest military coup in 2006. Until the suspension, Fiji had played a leading role in both the EPA and PACER Plus negotiations. Following Fiji’s withdrawal from the latter, having challenged the legality of its exclusion,\textsuperscript{135} negotiating sessions among the remaining parties had been limited with little progress on the negotiations.

Fiji’s return to the negotiating table four years later after its successful election in September 2014 seemed to give impetus to efforts to concluding the PACER Plus negotiations over the next two years.\textsuperscript{136} Fiji’s main objective for returning to the negotiating table, according to its Trade Minister, was ‘to ensure that PACER-Plus lives up to its purpose as a development agreement, and not as an unbalanced agreement that provides New Zealand and Australia unprecedented access to the Pacific markets without giving anything tangible and binding in return’.\textsuperscript{137} Chapter six contains an elaborated discussion on PACER Plus negotiations.

\textsuperscript{132}Fiji Government, \textit{Opening Remarks by the Acting Prime Minister, Attorney-General and Minister for Finance, Hon. Aiyaz Sayed-Khaiyum, the Pacific ACP Fisheries and Trade Ministers Meeting, 17 July 2015, Suva, Fiji.}

\textsuperscript{133}The suspension of Part Two of PACER has occurred as a consequence of a material breach of Fiji’s interests by the inadequate response of Parties to Fiji’s request for consultations under Article 15 of PACER and the continued illegal exclusion of Fiji from participation in trade discussions and negotiations relating to the PACER Agreement, despite Fiji being a State Party to the Agreement.


\textsuperscript{136}In a Press Release after a high-level meeting on PACER Plus held in Auckland on 24-25 September 2014, the Chief Trade Advisor voiced optimism that it should be possible to conclude the negotiations in December 2015 or by July 2016 at the latest. See, OCTA, \textit{High Level Meeting on PACER Plus}, Press Release, 25 September 2014. Available http://www.octapic.org/high-level-meeting-on-pacer-plus/ (accessed 5 November 2014)

2.3 The Ascendency of International Economic Law

Whilst the thesis explores the development challenges facing the PICs and examines their policy responses within the context of the law and development model, the objective is not to revisit the ‘development’ or ‘economic globalisation’ debates in general. Rather, it aims to examine how contemporary IEL is shaping development models, constraining policy options and impacting on development strategies in the Pacific island economies through the lens of trade in services with a particular reference to tourism.

The analysis of IEL is grounded in the debate between two competing paradigms of development – 1) the right to development (RTD) and 2) neoliberalism - to demonstrate two radically different approaches that are associated with the Moments identified by Trubeck and Santos. As mentioned earlier, the RTD emerged from the First Moment while neoliberalism is closely associated with the Second Moment. Reflecting on these two competing development paradigm sheds light on the role of IEL in influencing the course of progress on the emergence of the Third Moment in the Pacific.

Trubek and Santos did not formally identify the relationship between the RTD and the First Moment as an integral part of their theory, their discussion on the ‘postwar modest interventionist consensus’138 – shows the political ideas and economic policies advocated by the RTD approach reflected the thinking of the First Moment. Santos’s chapter139 provides an insightful analysis of the economic ideas, development theories and legal thoughts of the World Bank that played a prominent role in advancing neoliberal ideas and practices denoted by the Second Moment.

The Right to Development concept, aligned with the First Moment, was elaborated in the UN Declaration on the Right to Development (DRTD) and adopted by General

Assembly Resolution 41/128 on 4 December 1986. The DRTD identifies the human person as the central subject of development and should be the active participant and beneficiary of the right to development. The RTD paradigm approaches development as a multi-dimensional concept. Both the process and outcome of the development endeavour are considered human rights, with the human person as the subject and not the object of the development process. The RTD views economic growth as a part of this vector, being both an end and a means of the development process. However, growth itself must be realised in accordance with human rights standards, ensuring equity or the reduction of disparities.

The idea of the right to development and its formal acknowledgement as an internationally recognised human right pre-date the adoption of the Declaration. The first formal reference to the right of development surfaced during debates at the thirty-third session of the Commission of the Human Rights in 1977 which adopted resolution 4 (XXXIII) without a vote. A subsequent 1978 report of the Secretary-General, called for by the resolution, stated that ‘the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirement of the New International Economic Order (NIEO) and the fundamental human needs’. As observed by Kennedy, despite global attention on the NIEO initiatives, it was not successful, either politically or economically mainly due to strong resistance from across the developed world.

Between the mid-1970s and mid-1980s, the postwar consensus was swept away by a new set of economic ideas about development, which came to be termed ‘neoliberalism’, a phenomenon associated with the Second Moment. As its name

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suggests, neoliberalism is a term referring to the re-emergence of economic liberalism, the prevailing doctrine of the late nineteenth and the early twentieth century. The neoliberal economic ideas were devoid of social and political relations and were implemented in the name of ‘globalisation’. It is based on an economic ideology centred on the values of unregulated trade and markets, and the expanded business horizons provided by the forces of economic globalisation. The goal of the neoliberal approach to development is to establish capitalism through laissez-faire on a global scale. Specifically, neoliberalism has three key components: it elevates the role of markets over government (through free trade and the elimination of trade barriers); strengthens the role of the private sector (through privatisation or deregulation) and promotes ‘sound’ economic policies (such as through balanced budgets, flexible labour markets).

The aim of using these two competing paradigms for analysis is to determine whether the rights approach to development, particularly the concept of RTD and its attendant principles, can be used as the basis for assessing the prospects for a Third Moment in the Pacific. That approach would recognize the inter-dependence of the world today by recognizing that development efforts at the national level require appropriate supportive international conditions and environment. However, an updated understanding of RTD would condition the process of economic globalization in the PICs and harness the positive impact of globalization while minimising the negative consequences at the national level.

2.3.1 The Three Levels of IEL

By examining the role of the IEL on development in the PICs, this thesis addresses the development challenges they face and critically examines the international economic law (IEL) discourse at three levels. First, at the international level, world

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146 Globalisation is a complex phenomenon that encompasses a variety of economic, social and cultural dimensions. The term is often used to describe the increasing interdependence between countries driven by trade and investment liberalisation; technological innovation, the reduction of communication and transportation costs; entrepreneurship and the pivotal role of national governments, international organisations and the global network of NGOs.
leaders acknowledged the gravity of global poverty and came together in 2000 to collectively agree on eight MDGs. These goals indicate a broad approach to development, embracing, among other things, the challenges of poverty, hunger, education, equality, health and environmental sustainability as parameters for measuring development. However, the prescribed roadmap for achieving the first seven MDGs is premised on Goal 8, which calls for ‘a global partnership for development’. One of the means to this global partnership is to ‘develop further an open, rule-based, predicable, non-discriminatory trading and financial system’. In other words, international economic law, particularly WTO law, has been promoted as a benign medium for achieving development goals.

These implications are evident in the discourse of development at the second, regional level. The Pacific Plan, as adopted by Forum Leaders in 2005, for instance, was supposed to be a blueprint to assist the PICs to achieve their MDGs. However, the vehicle to achieve these development goals emphasised deeper economic integration through a new generation of WTO-compatible free trade agreements (FTAs). A critical issue for the PICs to consider was whether the complex international trade rules, which the PICs were urged to adhere to, were necessarily essential instruments to a new pathway for achieving development goals.

Third, by embracing economic globalisation and trade liberalisation, the PICs’ national legal order is increasingly affected by norms originating outside of their borders. According to Trubek and Santos, the dramatic expansion of the scope of international law into domestic jurisdiction is influenced by at least three major forces.

Firstly, there is the availability of global models, such as the formulae for law and development promoted by the World Bank. As noted by Faundez, the World Bank’s 1999 notion of a ‘Comprehensive Development Framework’ (CDF) implicitly guaranteed a place for law in the development process. Its rhetoric of empowerment and participation suggested that the Bank was moving away from a

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147 MDG 8, Target 12.
conception of legal systems as passive receptacles of economic policies towards a conception that regard law and legal institutions as essential instruments to further the interests of the poor and the disadvantaged groups. However, the Bank’s determination to limit the scope of legal reforms to serve the narrowly construed objectives of the Washington Consensus was inconsistent with the ideals of its vision of development as empowerment, as embodied in the CDF.

Secondly, national lawmakers use laws and regulations to determine national competitiveness. The more a country’s development strategy depends on foreign investment, the more likely its national laws and regulation favour foreign investors. For example, Fiji’s tourism industry depends heavily on foreign investment to build hotels and resorts. To attract foreign investment, its Hotel Aid Act offers generous incentives and concessions to hotel developers. In this regard, favourable treatment is rendered to foreign investors vis-à-vis local investors through the enactment of domestic regulation.

Thirdly, there has been a huge increase in international agreements, treaties and institutions since World War II, including the large number of bilateral and regional agreements on a wide range of issues including trade and investment. According to the WTO, in the period 1948-1994 the GATT received 124 notifications of Regional Trade Agreements (relating to trade in goods). Since the creation of the WTO in 1995 over 400 additional arrangements covering trade and services have been notified.

The right to development (First Moment) and neoliberalism (Second Moment) are competing paradigms of development with fundamental different conception of development and different approaches towards realising the goals. The following chapter uses these two competing paradigms to ascertain the possibility of a Third Moment in the Pacific and argue that the prevailing neoliberal model of development, embodied in the Second Moment of law and development, is not appropriate for the PICs in their pursuit of sustainable development.

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CHAPTER 3: COMPETING PARADIGMS OF LAW AND DEVELOPMENT

3.1 Introduction

As a concept, ‘development’ is sufficiently vague and inclusive that it can be thought to embrace a variety of different approaches and theories. In order to appreciate the ideology and practices associated with the concept at a particular time, it is important to understand the meanings of ‘development’ and how it relates to law.

The objective of this chapter is not to revisit the law and development debate in general. Rather, the chapter explores in more detail the two radically different and potentially competing paradigms of development referred to in chapter 2. The first, the right to development (RTD) is a human rights-based approach elaborated in the UN Declaration on the Right to Development (DRTD). The Declaration identifies the human person as the central subject of development and should be the active participant and beneficiary of the right to development. It was subsequently expanded to include the notion of sustainable development. The second, neoliberalism, is based on an economic ideology centred upon the values of unregulated trade and markets as reflected in the approach of the Bretton Woods institutions since the 1980s, and the

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expanded business horizons provided by the forces of economic globalization.\textsuperscript{154}

These two models can be seen to pull the development debate, and its application in the Pacific, in different directions. On one hand, neoliberalism has been the prevailing model of development in the Pacific for several decades. All significant aid donors and important sources of advice for economic policy-makers in the region have been prescribing the globalisation agenda as a vehicle for development and a cure for all ills facing the PICs. For example, the two World Bank reports in 1991 and 1993 on economies in the Pacific advised the PICs to adopt neoliberal ‘economic reforms’ to establish a favourable environment for investment and growth.\textsuperscript{155} The EU’s 1996 Green Paper on relations with the African, Caribbean and Pacific (ACP) nations called for ‘structural adjustment’, ‘integration into the global trading system’ and ‘good governance’.\textsuperscript{156} The 1993 Australian report by the National Centre for Development Studies in Canberra, \textit{Pacific 2010: Challenging the Future},\textsuperscript{157} urged the PICs to reduce their public sectors, promote private enterprise, cut tariffs, and allow maximum freedom to foreign investors to compete with local businesses.\textsuperscript{158}

On the other hand, efforts to pursue a human rights based approach to development at the national level in an inter-dependent world require appropriate supportive international conditions and environment. While the Declaration on the Right to Development is recommendatory in nature,\textsuperscript{159} it was adopted by an overwhelming majority of UN Members.\textsuperscript{160} By accepting a progressive obligation to formulate international development policies in an effort to ‘promote a new international economic order based on interdependence and mutual interest’,\textsuperscript{161} states have the duty

\textsuperscript{154} In some countries, neoliberalism is sometimes labeled as Thatcherism (United Kingdom), Reaganomics (United States of America), Economic Rationalism (Australia) or Rogernomics (New Zealand).


\textsuperscript{156} Firth, S., ‘The Pacific Islands and the Globalisation Agenda’, \textit{The Contemporary Pacific}, Vol. 12, No. 1, Spring 2000, p. 185


\textsuperscript{159} The DRTD is a General Assembly resolution, and thus a non-binding document.

\textsuperscript{160} The DRTD was adopted by the UNGA Resolution 41/128 with 149 votes in favour, 8 abstentions (Denmark, Finland, Germany, Ireland, Israel, Japan, Sweden and the United Kingdom) and with the US casting the only dissenting vote.

\textsuperscript{161} DRTD, Article 3, para. 3
to take steps to formulate appropriate international development policies. This means
developed countries have an obligation to engage in development cooperation efforts
to assist the less developed countries to realise their development aspirations.

In this context, the collective right to development owned by the population of the
PICs rests not only on the island governments, but also on the international
community, donors and the more advanced trading partners such as the European
Union, Australia and New Zealand. This implies that treaties and binding decisions,
including regional trade agreements such as the EPA, promoted by the EU, and
PACER Plus with Australia and New Zealand, must be negotiated fairly and in good
faith, with the full participation of all parties. It also implies that the outcomes of such
binding agreements must not become new asymmetrical tools of contemporary global
capitalism to further the interests of the advanced economies. They must be real
instruments of development with the aim of achieving distributive justice between
states and within nations for all peoples.

The chapter consists of three main sections. The first section examines the evolving
concept of ‘development’. The second section explores the implications of the two
competing paradigms: neoliberalism and the Right to Development. The third section
looks at the prevailing paradigm of development in the Pacific through the lens of
MDG8.

3.2 Defining ‘Development’

The extensive literature on the theories of development\(^{162}\) shows the concept is both
narrative (descriptive) and normative (prescriptive). When development is seen as a
narrative concept, it is perceived from a historical perspective. In this regard, the
changing conception of development is closely associated with the evolution of
capitalism. According to Ernest Mandel in *Late Capitalism*, development in a
narrative perspective can be traced to three distinct stages in the history of capitalism:
(1) age of competitive capitalism (1700-1860); (2) age of imperialism (1860 -1945);

\(^{162}\) See for example, Leys, C., *The Rise & Fall of Development Theory*, (London: James Currey Ltd, 1996);
Larrain, J., *Theories of Development: Capitalism, Colonialism and Dependency*. (UK: Polity Press, 1989);
Rienner Publishers, 2007); Peet, R. & Hartwick, E., *Theories of Development: Contentions, Arguments,
and (3) late capitalism (post-1945).  

When development is regarded as a normative concept it relates to a typical ideal or model of development that establishes norms and practices that form the ethical and political basis of the prevailing discourse of development. Competing norms of development operating at the same time can be conflicting insofar as different values can be inconsistent with one another. For example, from one normative value position, the purpose and priority of the development process may be the generation of economic growth. From another value position, the purpose of the development process could be the protection of human rights and freedom that do not privilege economic prosperity over other rights.

According to Bairoch, the dominant notion of development changed from a descriptive narrative to a normative one in the 1950s. Poverty and economic difficulties of the less developed countries came to the fore as the legacy of colonisation became more obvious. This rethinking about development by development practitioners, international institutions and academics was not simply about greater economic efficiency. It also incorporated value judgments about what particular policy actions should be recommended to achieve development goals. As Feyter noted, ‘development is not about what people want, but it is a model’. The question is, which model, who decides, and what legal and institutional vehicles do they use to pursue it?

### 3.2.1 Growth Promoting Development

There is no universally accepted definition of ‘development’. Advocates of free trade agreements in the Pacific tend to equate ‘development’ with ‘economic growth’. For example, in 2007, the authors of *Pacific 2020: Challenges and Opportunities for Growth* asserted that ‘economic growth will make all these challenges (facing the

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163 The three-stage terminology proposed by Mandel, E., *Late Capitalism*, (London: New Left Books, 1975) is now commonly used by many scholars.

164 Some studies have found that the wealth disparity between nations during the decolonisation period was so wide that the average incomes in parts of the developing world were lower than they had been in the 1800s while some parts of the developed world were 1000 per cent higher. See for instance, Bairoch, P. *Economics and World History*, (London: Harvester Wheatshead, 1993).

PICs) disappear’ but ‘without a sustained acceleration in growth, the Pacific will be unable to meet its pressing challenges’.166 These advocates stressed the potential for free trade agreements to grow the economy by producing more goods and services on the one side of the national account (gross domestic product or GDP)167 and a larger total income on the other (gross national income or GNI).168

Even assuming these agreements do so, the economy can grow without addressing social problems like inequality and poverty when all the increase in wealth goes to a few people. Indeed, according to a 2013 UN Research Institute for Social Development (UNRISD) report, the richest 1% of the world’s population now control up to 40% of global assets, while the poorest half owns just one per cent.169 The Fiji example shows how economic growth can occur within a country while income inequality among its citizens deteriorates. According to a 2014 UN Economic and Social Commission for Asia and the Pacific (UNESCAP) report, Fiji achieved 5.8% of economic growth in 2014 but 35% of its population lived below the poverty line with a further 30% just above the poverty line.170 Thus, achieving ‘economic growth’ is fundamentally different from achieving ‘development’ if such a progress only functions to channel money and power to the already wealthy and influential elites in society.

Further, although GDP is an important measure of the market value of goods and services, it is not necessarily an indicator of welfare or even a significant measure of standards of living. For example, GDP does not include aid relief efforts that do not go through the official channels, such as someone helping neighbours to rebuild their house in the aftermath of a natural disaster, like for example, during the devastating flooding of Nadi in 2012; taking time off work to take care of ailing relatives; or planting cassava to feed a family. Likewise, tourists buying handicrafts or fruit from

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167 The GDP account measures final purchases by households, business, and government by consumer consumption, investment, government spending, and net exports.
168 The GNI measures total incomes earned by households by summing wages and salaries, rents, profits, interest, and other income. The accounts also provide information on the prices at which the output is sold and measures of real, inflation-adjusted, measures of output and income.
roadside stores (which are not officially registered business entities) are excluded from national accounts, while their shopping from supermarkets or duty free shops are reflected in the GDP. In other words, the GDP only measures activities of the formal sector; but it ignores the contributions of the informal sector. It accounts for the quantitative official data on economic growth, but has nothing to do with the variations in the quality of life.\(^\text{171}\)

As GDP increases, for example by expanding tourism services, resource use and environmental damage tend to increase even faster, with such consequences as global warming and climate change. But governments can be deterred from addressing such factors, which are fundamental to achieving other developmental goals.\(^\text{172}\) The primacy accorded to economic objectives and the subordination of development goals is discussed further in chapter 5 in relation to Fiji and tourism.

### 3.2.2 Good Governance

In the 1990s, the World Bank revised the concept of development embodied in the original ‘Washington Consensus’, advocating deeper institutional reforms and ‘good governance’.\(^\text{173}\) The World Bank does not have a standard definition of ‘good governance’. However, its researchers have distinguished six main dimensions: voice and accountability; government effectiveness; the absence of regulatory burden; the rule of law; independence of the judiciary; and control of corruption.\(^\text{174}\) The IMF defined ‘good governance’ more narrowly, focusing on management of public resources and ensuring a regulatory environment conducive to efficient private sector

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\(^{171}\) An alternative dataset – the Human Development Index (HDI) takes into not only growth, but the levels and changes in life expectancy at birth, literacy, income sufficiency and so on. This measure derives from a different conception of development.

\(^{172}\) For example, in 2004 China attempted to introduce a ‘green GDP’, adjusted to reflect the cost of pollution. By the time officials computed the costs of polluted rivers, smoke-filled skies and shattered ecosystems, growth figures in some provinces fell close to zero. That proposal was quickly scrapped. The efforts collapsed completely in 2007 as the Chinese leadership needed high economic growth to legitimise its authoritarian rule. Faris, S., “A Better Measure: Our Obsession with Gross Domestic Product is Unhealthy-and Misleading”, *Time*, 2 November 2009, p.48.

\(^{173}\) By expanding its agenda to ‘good governance’ the Bank in effect can justify formulating an entire new set of initiatives that seeks to reform the political institutions of a recipient state that Article 10 of the Bank’s Articles of Agreement has explicitly prohibited. See, Anglie, A., *Imperialism, Soverignty and the Making of International Law*, (New York: Cambridge University Press, 2005), p. 261.

activities. Critics like Wood have argued that the Bank’s new governance agenda is a ‘fig leaf’ hiding renewed aid conditionalities. She questioned the Bank’s neutrality and its neoliberal agenda with regard to the political nature of its reforms.

Both international development institutions saw a new role for law in development. The World Bank’s more expansive vision saw ‘the rule of law’ as ‘essential to equitable economic development and sustainable poverty reduction…Vulnerable individuals, including women and children, are unprotected from violence and other forms of abuse that exacerbate inequalities’. However, both institutions conveyed the view that law reforms were primarily aimed at making institutions function better to supplement the markets.

### 3.2.3 Development Discourse

Critics of the economic growth model such as Peet and Hartwick argue that development is interested not so much in the growth of an economy, but rather the conditions under which production occurs and the results that flow from it. They advocate an alternative development discourse in which

...development attends to the social consequences of production.

If growth merely concentrates wealth in the hands of a few, it is not development. Most contentiously, development analyses who controls production and consumption. If the growth process is controlled by a few powerful people rather than the many people who make it possible, it is not development. If growth means subjecting the world’s people to an incessant barrage of consumption inducements that invade every corner of life, it is not development. If growth is the outcome of market processes that

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177 Ibid. p.27.

no one controls – although a few people benefit – it is not
development. Development is optimistic and utopian.
Development means changing the world for the better.
Development means starting change at the bottom rather than the

Influential voices from within the original mainstream also began to argue that
progress in a range of areas is required for development to take place including -
economic growth, social and political progress and the fulfillment of basic human
needs (material, emotional and cerebral). Reflective of this shift in development
thinking, Nobel laureates and influential economists like Joseph Stiglitz and
Amartya Sen have also advocated a broader definition of ‘development’.

For Stiglitz, ‘development’ is an ideal that entails a movement over time as a
‘transformation of society’ that provides individuals and societies more control
over their destiny in achieving social, economic, political and cultural progress.
According to Stiglitz, the changes associated with development should enrich lives,
whiten people’s horizons, reduce the sufferings brought by diseases and poverty, and
improve the vitality of a more fulfilling and meaningful life.

Amartya Sen, on the other hand, advocates another concept of ‘development as
freedom’ which departs from the earlier approaches identified with economic
growth. Sen expands the definition of ‘freedom’ to include five instrumental
freedoms: political freedom, economic facilities, social opportunities, transparency
guarantees, and protective security. His broad view of ‘freedom’ draws attention to
the ends that make development important, rather than merely to some of the means

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181 Columbia University Professor Joseph Stiglitz was awarded the Nobel Prize in Economics in 2001 by the Royal Swedish Academy of Sciences. He won the prize with George Akerlof of the University of California, Berkeley and A. Michael Spence of Stanford University.
182 Professor Amartya Sen, an Indian economist, won his Nobel Prize in Economics in 1998.
184 Ibid
that, *inter alia*, play a prominent part in the process’.\textsuperscript{186}

Indian legal scholar Chimni has identified at least seven overlapping features of Sen’s broad conception of development, including ways of realising the aspiration of development as freedom that has informed contemporary international law discourse.\textsuperscript{187} These features include the view of freedom being: a constituent component of development; as capabilities of persons; as building blocks of the development process; no privilege of certain rights over others; reliance on markets for wealth creation; the importance of open arguments (consultations and deliberation) in the decision-making process; and importance of democracy to the realisation of the goal of development as freedom.\textsuperscript{188} In summary, Sen’s concept of ‘development as freedom’ focuses on the ends of development (through the functions of the market) and explains ‘both the intrinsic and instrumental significance of human rights and democracy in realizing developmental goals’.\textsuperscript{189}

In simultaneously supporting liberalisation of markets and the goals of investing in other social areas such as public health and education, Sen’s view fails to provide any serious attempts to address the possible conflicts and incompatibility between the two sets of goals. Chimni described Sen’s concept of development as freedom as a ‘liberal humanism’ approach which could not deliver development goals such as the MDGs.\textsuperscript{190} He has argued that Sen’s failure to adequately address the deficiencies of the market and the social constraints that inhibited the realisation of the goal of development as freedom was parallel to the mainstream contemporary international law’s incorporation of the idea of the new concept, which failed to seriously engage in a holistic approach to solve the injustice and global problems facing the developing world.

### 3.3 Competing Paradigms of Law and Development

\textsuperscript{186} Ibid. p. 3.
\textsuperscript{188} Ibid.
\textsuperscript{190} Ibid. pp. 9-11.
The following discussion examines the two above-mentioned competing paradigms of development. The aim is to determine whether the human rights approach to development, particularly the concept of the right to development and its attendant principles, can be used to reframe international economic law so as to harness the positive impact of globalisation while minimising its negative consequences at the national level.

3.3.1 The Neoliberal Paradigm

As neoliberalism became the dominant model of economic development in the 1980s, interest in the role of law grew. But law was treated more as a framework for market activity than as an instrument of state power. The focus of law shifted from empowering the state to a framework of rules for the market. Law became the foundation for market relations and as a limit on the state. However, the very notion of using law to strengthen markets implies a paradox: efforts to facilitate private actor activities require some form of state intervention through law.

The international economic regime developed rules that benefit corporations, including investment rules and transparency provisions in FTAs and investment treaties which give greater rights to corporations than to societies and their individuals. By extension, the complex trade regime under the auspices of the WTO reflected the determination of developed countries to protect their own interests while making little attempt to address global inequity and injustice. For instance, Oxfam noted that Tonga during its WTO accession process had to agree to bind tariffs at levels ‘lower than any other country in the history of the WTO, with the sole exception of Armenia’, as well as agreeing to liberalise eleven of the twelve categories of services.

By using the WTO agreements as the medium for international trade law to limit the regulatory autonomy of the state, while retaining its responsibility for supporting

market institutions, neoliberalism reveals the ‘open secret’ of its version of development - that its character and results are determined by relations of power, not by the rhetorical appeals to ‘participation’, ‘civil society’ or ‘poverty reduction’.  

In his book, *Kicking Away the Ladder*, Ha-Joon Chang points out the hypocrisy that almost every developed country today, including those strongly advocating liberal market economies and free trade, had employed state-led industrial promotion and protectionist policies during their own development process. Yet after achieving economic development, these developed countries decided to ‘kick away the ladder’ and used neoliberal regulatory framework and rules for international trade, represented by the WTO, to prevent developing countries from adopting effective development policies.

The rules-based trade regime operates to bind the state into the future so that pro-market reforms agreed at one point in time with one administration cannot be reversed without considerable efforts and expenses, by any new administration at a later date. Fiji’s experiment with its neoliberal reforms since the 1980s, discussed in chapter five, highlights the risk for countries like the PICs to embark on that model of development.

### 3.3.2 The RTD Paradigm

The emergence of the notion of the right to development (RTD) was linked with the demand articulated by developing countries, in the 1970s, for a New International Economic Order (NIEO) in which their development needs would also be incorporated in the global order. The RTD was regarded by developing states as a quest for participation in decision-making in global affairs, fair trade practices and demands for development assistance from the developed states through the establishment of the NIEO. This international order was to be:

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Based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices.\textsuperscript{196}

This demand faced strong opposition from some developed countries and the debate on the NIEO subsequently slipped off the international agenda until the 1980s.\textsuperscript{197} The United Nations General Assembly proclaimed development as a human right in its 1986 Declaration on the Right to Development (DRTD).\textsuperscript{198} The right to development has consequentially become a fundamental human right, rooted in the foundational provisions of the \textit{Charter of the United Nations and the Universal Declaration of Human Rights}.\textsuperscript{199} It was explicitly articulated through the \textit{Declaration on the Right to Development},\textsuperscript{200} which established the right to development as ‘an inalienable human right’.\textsuperscript{201}

The DRTD contains an important clause obliging all States to take steps ‘to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights’.\textsuperscript{202} The text also calls for the State to ensure inter alia equality of opportunity for all to access basic social services, an active role for women, appropriate economic and social reforms aiming at eradicating social injustice, and popular participation.\textsuperscript{203}

Unlike the one-dimensional growth-centric version of development, the RTD paradigm approaches development as a multi-dimensional concept. Both the \textit{process} and \textit{outcome} of the development endeavour are human rights. Economic growth is a


\textsuperscript{197} For a discussion on the failure of the NIEO, see for example, Salomon, M., ‘From NIEO to Now and the Unfinishable Story of Economic Justice’, \textit{International and Comparative Law Quarterly}, (Cambridge: Cambridge University Press, 2013), 62, pp. 31-54


\textsuperscript{199} UN, ‘Universal Declaration of Human Rights’, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

\textsuperscript{200} UN, ‘Declaration on the Right to Development’, adopted by General Assembly Resolution 41/128, 4 December 1986.

\textsuperscript{201} Declaration on the Right to Development, Article 1 (1).

\textsuperscript{202} DRTD, Article 6, para. 3.

\textsuperscript{203} DRTD, Article 8.
part of this vector, being both an end and a means of the development process. However, growth itself must be realised in accordance with human rights standards, ensuring equity or the reduction of disparities.

As such, the RTD places the human person as the central subject of development with an ultimate goal to empower all citizens in achieving the right to a process of development in which all human rights and fundamental freedoms can be fully realised. It calls for a development framework that obliges states to take steps ‘to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights’. 204

During the 1990s, the RTD was reaffirmed as a fundamental human right in many international meetings, including the 1992 Earth Summit in Rio de Janeiro,205 the 1993 World Conference on Human Rights in Vienna,206 and the 2000 UN Millennium Declaration.207

3.3.2.1 Power, Process and the Right to Development

Defining the concept of RTD is a precondition to devising an effective mechanism to achieving its goals. However, a rights-based approach to development is controversial in that there are many possible interpretations, each with a different emphasis. Marks identifies seven ways development writers and practitioners interpret the human-rights framework: the holistic approach, the capabilities approach, the right to development approach, the responsibilities approach, the human rights education approach, the human rights-based approach and the social justice approach.208 These various approaches indicate the complexity of the RTD paradigm and result in protracted discussions and highly politicised debates at international fora.

The often-cited authoritative definition of the RTD was provided by the UN Independent Expert, Professor Arjun Sengupta as ‘the right to a process of

204 Article 6, para.3 of the UN Declaration on the Right to Development.
205 Rio Declaration on Environment and Development, Principle 3
206 Vienna Declaration and Programme of Action, para. 10
207 UN Millennium Declaration, UN Doc. A/Res/55/2, paras 11 and 24
development in which all human rights and fundamental freedoms can be fully realised’ (emphasis added).\textsuperscript{209} This definition strictly follows the content of the first Article of the 1986 Declaration, which states:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.\textsuperscript{210} (emphasis added)

Subsequent articles in the Declaration clarify the nature of this process. The ‘human person’ is the central subject of development, in the sense of being an ‘active participant and beneficiary of the right to development’.\textsuperscript{211} The measures designed for the realisation of the RTD must ensure ‘equality of opportunity for all’ in their access to basic resources, education, health, services, food, housing, employment and in the fair distribution of income.\textsuperscript{212} The realisation of this right also requires that women have an active role in the development process, and that ‘appropriate economic and social reforms should be carried out with a view to eradicating all social injustices’.\textsuperscript{213}

The above definition not only prescribes certain rules according to which development should be realised, but also defines development itself as a human right. The affirmation of the RTD as a human right, taken seriously, forces a rethinking of the different policies implemented by the states, both domestically and internationally.

### 3.3.2.2 The Role and Duty of the State

As the Declaration points out, the primary responsibility for implementing the right to development belongs to states.\textsuperscript{214} The beneficiaries are individuals. The international community has the duty under the RTD to co-operate to enable states to implement

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{210} The RTD, Article 1 (1).
  \item \textsuperscript{211} Article 2 (1) of the DRTD.
  \item \textsuperscript{212} Article 8 of the DRTD.
  \item \textsuperscript{213} Ibid.
  \item \textsuperscript{214} DRTD, Article 3 (1).
\end{itemize}
\end{footnotesize}
development policies at the national level with equitable economic relations and a favourable environment at the international level. Article 2 (3) of the Declaration provides that:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom (emphasis added).  \(^{215}\)

The Declaration implies that all states, persons and peoples\(^{216}\) have a corresponding right to development and the enjoyment of equal opportunity and a fair distribution of benefits. Achieving that would require the state to take meaningful measures, backed up with sufficient resources to introduce reforms aimed at eradicating social injustices and inequalities. By extension, women, children, the disabled and other minority or disadvantaged groups must also be given special consideration in the application of this right.

In regard to the obligation of the states operating at the international level, the Declaration emphasises the critical importance of international cooperation. The duties of states as international players vary from the full respect of international law to the duty to cooperate in pursuance of the RTD. Article 3(3) says:

States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realise their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights.  \(^{217}\)

\(^{215}\) Article 2 (3) of the DRTD.

\(^{216}\) Person refers to an individual while peoples refers to a group of persons sharing a culture or social environment.

\(^{217}\) Article 3(3) of the DRTD.
Article 3(3) implies an obligation on the part of the rich countries to cooperate with developing states to take all necessary actions to remove the structural obstacles to achieving that, including any rules or activities of the IFIs and the WTO that contribute to underdevelopment. This also acknowledges that, in a globalised world, developing countries, while having their own duty to formulate and implement development policies in line with human rights principles, face constraints that can only be removed with the cooperation of the international community. These include the supply of technology, providing market access and modifying the asymmetries in the global governance and the exercise of foreign power, as well as adjusting the rules of operation of the existing trading and financial institutions to create ‘a new international order’ to meet the specific needs of developing countries.218

While developed countries indeed have great leverage over the decision-making on all these issues, a RTD framework stipulates a collaborative process requiring inputs and participation from the developing countries. This requires developed countries to mobilise resources and political commitment consistent with international responsibilities outlined in the Declaration. In other words, developed countries should not impose conditions on implementation to further their free trade or other aspirations without paying due regard to developing countries’ development priorities.

### 3.3.2.3 The Optimal Decision-making Process

The RTD is not just an umbrella right or the sum of a set of rights. It is the right to “a process that expands the capabilities or freedom of individuals to improve their well-being and to realise what they value”.219 This process implies that decision-making at both the national and international levels must be ‘participatory’, ‘democratic’, ‘inclusive’ and ‘transparent’.

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219 Ibid. p. 84.
At the national level, the formulation of the language in Article 2 (3) of the Declaration implies that the state must empower the beneficiaries of development, making them active participants in the development process. This requirement has two characteristics: (a) the process must be ‘participatory’ on the basis that all persons are active, free and meaningful participants; and (b) the benefits must be equitable resulting from fair distribution.\footnote{220}

This requirement demands accountability from all actors in the development process through legal, administrative, or political mechanisms to enable the ‘right-holders’ (individuals) to make claims against the ‘duty-holder’ (the state), for not meeting their obligations. It also requires all actors in a position to influence domestic policy to consult widely with all stakeholders to ensure these minimum standards are reached. Notably, this demands a high level of transparency, accountability and effective participation in the decision-making process.

\subsection*{3.3.2.4 International Obstacles to the RTD Paradigm}

At the international level, the duty of the international community to cooperate in order to implement the RTD is also absolute. According to the \textit{Report of the Global Consultation on the Right to Development as a Human Right},\footnote{221} the concept of participation is of central importance in the realisation of the RTD. This implies an international cooperation framework that should be transparent, non-discriminatory, participatory and equitable, both in the decision-making and in the benefit sharing.

Although the international human rights obligations of international organisations is a contested concept, Gianviti sees three possible avenues to argue for such obligations: (1) as organisations with international legal personality, they are bound by general norms of international law; (2) as specialised UN agencies, they are bound by the UN Charter; (3) they are bound through the international human rights obligations of Member States.

Even if these obligations were to apply the RTD has met the procedural requirements

\footnote{220} Article 2 of the DRTD.

\footnote{221} This report was prepared in accordance with Commission on Human Rights resolution 1989/45 and was submitted to the Commission at its forty-sixth session in 1990 (E/CN.4/1990/9/Rev.1). Paragraphs 77-207 of the report have been reproduced as chapter 3 in UN, \textit{Realising the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development} (New York and Geneva: UN, 2013), pp. 49-66.
to become a new internationally recognised human right, but the Declaration is not a legally binding treaty, hence states cannot be held legally accountable for its implementation. The lack of international legal principles that govern this right against non-compliant states is perhaps a major reason why developed countries are not politically committed to reform the IFI and the WTO or honour their pledges to give effect to its elements.

Marks identifies three possible reasons for the absence of the RTD from international policy setting. The first obstacle is a political one. As Marks observes, the interventions by delegations at various international meetings on the RTD are often characterised by political posturing of predictable positions rather than practical dialogue. The challenge is to shift the focus from political posturing to creating the international environment which all countries declare to be so important in the UN resolutions.

The second obstacle is ignorance. Since the late 1970s, many scholars have contributed to a veritable library of literature on the RTD. The challenge is to bring the abstract concepts of the Declaration down to the level of development practice. This requires an in-depth understanding of how developing countries function in setting their development priorities.

The third obstacle is lack of practice of RTD, resulting from the absence of policies at the national and international levels that go beyond political rhetoric. For instance, while most developing countries instructed their delegates to the Commission on Human Rights and the General Assembly to vote for the RTD and support the concept in speeches or related resolutions, the reality remains that few of these countries consider such foreign policy positions truly reflect their national development strategies.

This thesis identifies a fourth obstacle – conflicting interests of major capitalist powers aligned to the neoliberal model vis-à-vis the development objectives of developing countries. In his insightful book *Imperialism, Sovereignty and the Making*

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222 It was endorsed by the UN General Assembly by consensus and reaffirmed in later world conferences, including more recently at the UN Millennium Summit.


224 Ibid.
of International Law, Anghie cautioned about the difficulties in attempting to change the status quo given the colonial legacy of international law that was designed by, and had served the interests of, the powerful Western states.\textsuperscript{225} He argued that when the existing order is advantageous to the West, attempts to make changes to the status quo were usually met with resistance by the beneficiaries thus making the realisation of the RTD difficult.\textsuperscript{226}

3.3.2.5 Problems of Implementing the RTD at National Level

While effective international cooperation would reduce the perceived unfairness of the prevailing neoliberal economic order, it is also important to acknowledge the overall responsibility of developing countries themselves in implementing the RTD, following the human rights approach. That obligation should not be diminished, even if international cooperation is not forthcoming to the extent desired.

The RTD gives citizens a rights-based mechanism to hold the state accountable to ensure the government and its agents undertake ‘all necessary measures for the realization of the right to development’.\textsuperscript{227} This means that political leaders, empowered by a democratic process of governance, must take charge of the development agenda to ensure that policies, laws and administrative actions will contribute to the realization of the fundamental human rights for all its citizens. That includes states’ responsibility to adopt appropriate development policies, engage in public consultations, and formulate strategies that empower the beneficiaries at the grass-roots level to promote a process of sustainable development with whatever resources they have, including when negotiating, adopting and implementing trade agreements.\textsuperscript{228}

One of the most decried weaknesses in the Pacific is the ‘implementation gap’ between political rhetoric and practice. For instance, only Solomon Islands is a

\textsuperscript{225} For an overview of the literature on how colonial confrontation was central to the formation of international law, and how such a process had served the interests of the Western states, see Anghie, A., Imperialism, Sovereignty and the Making of International Law, (New York: Cambridge University Press, 2005).

\textsuperscript{226} For example, the draft resolution on the right to development (document A/62/439/Add.2) was adopted by the UN General Assembly on 18 December 2007 by a recorded vote of 136 in favour. But 53 (including all the OECD and EC members with whom cooperation is essential) voted against the resolution. Retrieved from http://www.un.org/News/Press/docs/2007/ga10678.doc.htm

\textsuperscript{227} Article 8 of the DRTD.

signatory of the International Covenant on Economic, Social and Cultural Rights. Nauru is the lone PIC that has signed the Covenant on Civil and Political Rights. This reality does not portray a political commitment on the part of the PICs to fulfill their specific duties to formulate adequate development policies conducive to the realization the RTD. It also gives ammunition to critics who assert that some developing countries are only concerned with using the right when making claims at the international level.229

The resource constraints on PIC economies give rise to the notion of progressive realisation of economic, social and cultural rights, giving some justifications for policy-makers to set priorities and make trade-offs among rights on the basis that it may not be possible for all rights to be fulfilled simultaneously. Notwithstanding this practical reality, the international human rights system, as noted by Salomon, specifies core obligations on states with international treaty obligations to ensure, with immediate effect, certain minimum levels of enjoyment of each economic, social and cultural rights.230

The extent of application of these ‘soft’ laws depends on their incorporation into domestic law, or on the judiciary drawing on them when interpreting a constitution or statute. By contrast international trade agreements are largely enforceable by international extraterritorial judicial bodies who can authorise significant economic penalties.

3.4 The Prevailing Paradigm in the Pacific: Through the Lens of MDG8

At the time of writing, ‘the post-2015 development agenda’ is a catchcry of the moment – to a point that it risks diverting attention from the unfulfilled promises of the MDGs. That tendency is particularly evident at the UN, where Member States

concluded negotiations in early August on a Post-2015 Development Agenda. The outcome document *Transforming Our World: The 2030 Agenda for Sustainable Development* includes a new set of seventeen ‘Sustainable Development Goals’ (SDGs) when the MDGs deadline expired by end of 2015.

On its face, this latest effort aims to make a paradigm shift in the UN’s development thinking that might constitute the Pacific equivalent of what Trubek and Santos termed ‘the inauguration of the Third Moment in law and development since the 1990s’. However, observers have pointed out a behind-closed-doors process carried out in bad faith and dirty politics during the last hours of negotiations had resulted in an outcomes document that set negative precedent for future international conferences and undermined legal agreements such as climate change COP in Paris in December 2015 and the Convention on Biodiversity. In contemplating the post-2015 development agenda in the Pacific at the expiry of the MDGs, it is not only appropriate but also timely to reflect on the lessons learned from the implementation of the MDGs, especially MDG8.

Exploring MDG 8 from a Pacific perspective underlines the differences between the two different paradigms and illustrates the tensions that are intrinsic in the Third Moment, as they relate to international law and institutions. The discussion centres on two arguments. The first articulates the parallels between Sen’s concept of ‘development as freedom’ and the MDGs. Second, the current efforts towards achieving the MDGs are being hampered by the conflicting interests of external powers. This reinforces the argument that the neoliberal era has not ended in the Pacific even though, as discussed in the subsequent chapters, there are signs of a Third Moment in the region.

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231 The United Nations summit for the adoption of the post-2015 development agenda will be held from 25 to 27 September 2015, in New York and convened as a high-level plenary meeting of the General Assembly.


235 Author has an e-copy summary of an insider account of the negotiations during the last few days before the adoption of the post-2015 development agenda.
3.4.1 The Millennium Development Goals (MDGs)

In 2000, the Members of the United Nations unanimously adopted the Millennium Declaration that contained a number of specific objectives to be met by 2015. Those objectives were elaborated in an Annex to a ‘Road Map’ produced by the UN Secretary-General in September 2001 and distilled into eight main Goals, split up into 18 Targets and 48 Indicators. The list was updated following the UN Summit Session of 2005 to incorporate 21 Targets and 60 Indicators.

Of the eight Goals, the first six aim to deliver the most basic human rights to some of the world’s poorest people, geared around reducing the different components and consequences of poverty. The seventh pertains to the environment and human interaction with the environment. The primary responsibility for achieving these seven Goals rests with the developing countries.

While most of the MDGs and Targets relate to specific issues, Goal 8 is much broader. Its overarching goal to ‘develop a global partnership for development’ is meant to reflect the efforts of the international community in supporting developing countries to achieve their economic and social development goals. Goal 8 can also be understood as a fundamental precondition, a roadmap that sets out the mechanism for achieving the first seven Goals. Since their adoption, the MDGs became highly influential at the level of international discourse about development.

In the Pacific, the MDGs were captured in the Pacific Plan through national

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238 For a detailed listing of the goals, targets, and indicators, see: [www.un.org/millenniumgoals](http://www.un.org/millenniumgoals)
239 The UN has been convening regular Summit Sessions and produced annual reports on the MDGs; the World Bank and IMF put together an annual ‘Global Monitoring Report’ about them; and no G8 summit was complete without some reference to them. For a discussion of the MDG list, see, Manning, R, ‘The Impact and Design of the MDGs: Some Reflections’, IDS Bulletin (2010), 41:1, pp 7-14.
240 Ibid. p.7.
sustainable development strategies. In 2008, Australia redefined its commitment to helping the PICs achieve the MDGs through a major programme called the Pacific Partnership for Development. In 2009, the Pacific Islands Forum leaders called for a new development compact for the Pacific - the Cairns Compact on Strengthening Development Coordination in the Pacific. The key objective of the Cairns Compact was ‘to drive more effective coordination of available development resources from both Forum Island countries and all development partners, centred on the aim of achieving real progress against the MDGs’.244

The world leaders’ collective commitment to the MDGs, purported to reflect a change in development thinking, representing the emergence of a new paradigm in law and development, as the MDGs along with the international law that informed it, indicated a broader approach to development. The normative basis of the Millennium Declaration was derived from the RTD.

It was hoped that the MDGs, through Goal 8, would provide a great opportunity for developing countries ‘to push for a global trade system that is more in their favour as well as for the realisation of the financial commitments made by developed countries’.245 The MDGs stressed the importance of international trade as ‘an important engine for growth and development.246 This focus was based on the assumption that liberalisation of trade could, and should, benefit, developing countries by promoting growth, generating employment and increasing foreign exchange

244 The Cairns Compact, attachment 1.
245 Kirchmeier, F, ‘The Right to Development-Where Do We Stand?’ Dialogue on Globalisation, Occasional Papers, No. 23/July 2006, (Geneva: Friedrich Ebert Stiftung, 2006), p.17. In terms of international cooperation developed countries have repeatedly pledged to spend 0.7% of their Gross National Product (GNP) as official development assistance (ODA) but this pledge has only been fulfilled by a few countries. The first pledge was made in a 1970 UNGA Resolution. The 0.7% target has been reaffirmed in many international agreements over the years, including, the 2002 International Conference on Financing for Development in Monterrey, Mexico and the World Summit on Sustainable Development held in Johannesburg later that year. See, International Development Strategy for the Second United Nations Development Decade, UN General Assembly Resolution 2626 (XXV), October 24, 1970, para. 43
The eight goals converged in terms of both policy and delivery on the ground through the much-touted ‘coherence’. Critics have aptly pointed out the worrying trend of seeing the human rights and development discourse being progressively co-opted within this ‘trade-related’ paradigm, reinvented through the medium of the MDGs.\(^{248}\) Because the MDGs did not challenge or modify commitments in the areas of trade and investment that benefit powerful states, the MDGs were, in the words of Salomon, ‘at best as a feeble complement to the international economic regime, at worst as a vehicle for advancing the will and preferences of influential states and their industries’.\(^{249}\)

### 3.4.2 MDG 8 and Sen’s Concept of ‘Development as Freedom’

The positions of developed countries and international institutions like the World Bank, IMF and the WTO were framed by newfound metaphors like ‘good governance’, ‘rule of law’ and ‘sustainable development’ rhetoric. From the World Bank’s promotion of a ‘Comprehensive Development Framework’ to the WTO’s Doha ‘development’ round of negotiations, major powers have set out to capture every opportunity to re-orientate the international legal vocabulary.

While Sen’s broad definition of development was powerful, his approach nevertheless remained faithfully situated in the neoliberal ideology. He believed in the institutions of the market to deliver economic growth that leads to better living standards while the state plays a supplementary role to the market.\(^{250}\)

The MDG framework of utilising MDG 8 as the vehicle under which all other goals were to be achieved was consistent with Sen’s broader concept of development. Reliance on MDG 8 to achieve the ends could be attributed to a misappropriation of

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\(^{247}\) Ibid. p.137.


the MDGs by the dominant orthodoxy, which represents the ideological perspective on development that relies on economic growth. In the process, as noted by Saith, the essential values underlying the MDGs have been lost in translation because of the conventional economic thinking and the dominant development ideology of our times.251

The idea of ‘global partnership’, enshrined in Goal 8 prescribed the pursuit of international coherence in economic policy-making across aid, finance and international trade. While this ‘global partnership’ included a benevolent commitment to ‘good governance, development, and poverty reduction – both national and internationally’, MDG 8 in practice effectively sanctioned free markets and free trade, advocated by the WTO, as legitimate mechanisms in fulfilling human rights and development.

In theory, the WTO has a commitment to create a ‘level playing field’ for all Members. In practice, the WTO agreements ignored the vast differences in development status between developing and developed countries by subjecting both groups of countries to the same set of liberal rules, which were predominately negotiated by the industrialised countries. For instance, the ‘Special and Differentiated (S&D) Treatment’252 provisions were purported to be development-friendly to address the gap between developed and developing countries, yet the key characteristic of these S&D treatment provisions was mostly ‘best-endeavour’ commitments which have no legal force through dispute settlements. In practice, the objective of the S&D Treatment provisions for developing countries focused on providing longer periods for transition to and compliance with a uniform set of rules. Their aim was therefore to facilitate developing countries’ continued liberalisation, deregulation and privatisation for eventual integration in the world trading system.

Moreover, despite the WTO’s claim of ushering in a new era of global economic

252 The WTO Secretariat has made several compilations of the special and differential provisions and their use. The latest WTO document setting out the implementation of these S&D provisions is in WTO Document: WT/COMTD/W/196. According to the WTO, S&D Treatment provisions can be divided into six categories: (1) provisions aimed at increasing the trade opportunities of developing countries; (2) provisions under which WTO members should safeguard the interests of developing countries; (3) flexibilities of commitments, of action, and use of policy instruments; (4) transitional time periods; (5) technical assistance; and (6) provisions relating to least-developed countries.
cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of all peoples,\textsuperscript{253} some of the world’s poorest countries were required to accept obligations more onerous than developed countries in the process of accession. For example, despite Vanuatu’s LDC status under the UN definition, WTO Members demanded excessive concessions from this tiny Pacific economy during its accession negotiations. According to its accession package, on goods, Vanuatu agreed to bind 100 percent of tariffs, with a tariff peak of 75 percent and an average tariff rate of 40 percent.\textsuperscript{254} On services, Vanuatu agreed to ten out of eleven general areas, which included fifty specific commitments.\textsuperscript{255} By comparison, Fiji has commitments in only one sub-sector.\textsuperscript{256}

As far as the PICs are concerned, while MDG 8 Target 14 purported to address the special needs of the Small Island Developing States (SIDS), its incorporation of the whole of the 1994 Barbados Programme of Action\textsuperscript{257} presented a major challenge. The Programme called for actions at the national, regional and international levels to address fourteen priorities areas,\textsuperscript{258} which were mostly associated with environmental sustainability and livelihood issues. The approach of treating trade as a vehicle for achieving all the development objectives that were stipulated in the Programme risked setting in motion a neoliberal agenda that created conditions and outcomes hostile to the development of the PICs.

There is also naïve optimism in Sen’s assertion that in a political economy, good arguments play a key role in international law making.\textsuperscript{259} The majority of WTO

\textsuperscript{253} Marrakesh Declaration of 15 April 1994, para 2.


\textsuperscript{255} Ibid.

\textsuperscript{256} WTO, Fiji: General Agreement on Trade in Services - Schedule of Specific Commitments, GATS/SC/32 (Apr. 15, 1994).

\textsuperscript{257} This document was the outcome of an international conference held in 1994 which provided the main focus for efforts to address SIDS development concerns. It is annexed to Report of the Global Conference on the Sustainable Development of Small Island Developing States, held in Barbados from 25 April-6 May 1994. The document is available online at http://www.un.org/documents/ga/conf167/aconf167-9.htm.

\textsuperscript{258} The fourteen priority areas are: climate change and sea level rise; natural and environmental disasters; waste management; coastal and marine resources; freshwater resources; land resources; energy resources; tourism; biodiversity; national institutions and administrative capacity; regional institutions and technical cooperation; transport and communication; science and technology; and human resource development. These were contained in Report of the Global Conference on the Sustainable Development of Small Island Developing States, pt 1, res 1, annex II, UN Doc A/CONF.167/9 (October 1994) (‘Barbados Programme of Action’).

Members are developing countries. However, the decision-making system in the WTO does not provide the developing countries adequate means and appropriate procedures to enable them to voice their interests and exercise their rights.\(^{260}\) Despite the ‘one Member one vote’ rule, in practice a few major countries have been able to dominate decision-making, using informal meetings such as the ‘green room’ process to make critical decisions, and drafting negotiating texts among a small group of Members which are then passed to the rest of the membership for adoption.\(^{261}\)

At the regional level, as revealed in chapter 6, the EU, Australia and New Zealand have been using a range of different instruments and approaches to claim political legitimacy and give themselves ample space to secure advantages over the small Pacific countries. The stress on a dialogic resolution of development problems within the market model overlooks the critical role of economic and social power in shaping public discourse and the framing of solutions to social problems. In this regard, Sen fails to appreciate the political economy of international relations at the global or regional level, whereby different forms of coercion still exist to force reluctant developing countries into adopting a particular path of development.

From a Pacific perspective, recent regional initiatives like the ACP-EU EPA under the auspices of the Cotonou Agreement, PACER-Plus under the Pacific Plan, the Pacific Partnership for Development and the Cairns Compact are all supposed to reflect the region’s major donors’ new commitment to lift the economic and development performance of the PICs. However, the discussion below suggests the MDG project in the Pacific, assisted by the efforts of the EU, Australia and New Zealand has become, in the words of Salomon, ‘an important humanitarian venture only as long as the various structures of the neo-liberal mission are not seriously challenged, nor its beneficiaries displayed’.\(^{262}\)

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3.4.3 Operationalising MDG 8 in the Pacific in the Guise of ‘A Global Partnership’ for Development

If the MDGs are to be met, key public services such as health and education need to be accessible to all and must be adequately funded. Similarly, action needs to be taken to arrest the spread of HIV and other non-communicable diseases (NCDs). Progress on the MDGs requires resources. The budgets of most PICs are not up to funding these urgent tasks unless the overseas development assistance (ODA) increases. So while rhetorically MDG 8 in the Pacific context concerns developing a ‘partnership’ between the PICs and their more advanced development partners, the weight of the responsibility for giving effect to this partnership largely rests with the region’s three major donors: the EU, Australia and New Zealand.

As discussed below, the Pacific Partnership for Development and the Cairns Compact were two recent initiatives promoted by the Australian government. The Pacific Partnership for Development was promoted as a ‘new era of engagement’ by the Australian Government towards the South Pacific while the Cairns Compact identified a range of actions that would help achieve the Pacific Plan.

According to the EC, the Cotonou Agreement was an innovative framework for a deeper partnership between the EU and the ACP states with a view to ‘facilitating economic development and addressing – together – the major challenges of poverty, conflict and war, environmental degradation and risks of economic and technological marginalisation’.

In 2003, speaking on behalf of the EU, the Greek Ambassador informed the Commission on Human Rights that the Agreement ‘constitutes a concrete contribution to the fight against poverty and a further step towards the realization of the Right to

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263 According to an ADB report, the incidence of NCDs such as diabetes, ischemic heart diseases, and other cardiovascular diseases among the PICs is the highest in the world and accounts for 75% of all deaths in the Pacific. See, Asian Development Bank, Workshop Report: The Millennium Development Goals in Pacific Island Countries: Taking Stock, Emerging Issues, and the Way Forward, (Manila, the Philippines, 2011).


In reality, the Cotonou Agreement was a transitional agreement aiming to minimise the adverse impacts of the loss of preferences to the ACP countries. It extended trade preferences for a further eight years. Significantly, the Cotonou Agreement also envisioned a radically new trade regime for the ACP countries. It called for the ACP and the EU to conclude WTO-compatible trade agreements that would progressively remove barriers to trade between them and enhance cooperation in all areas relevant to trade. This commitment has taken the form of negotiations for Economic Partnership Agreements (EPAs), with the EU dividing the ACP countries into six regions, each of which would negotiate a reciprocal trade agreement with it.

3.4.3.1 Negotiating EPAs under the Cotonou Agreement

Negotiations between the EU and the Pacific ACP (PACP) states over an EPA began in 2002 with an initial deadline of 31 December 2007. The period between 2002-2004 was the preparation phrase. When the EU and the PICs officially launched the EPA negotiations on 10 September 2004, they agreed to defer substantive negotiations to the end of 2006. This was intended to defer triggering an obligation under PACER to begin negotiating a FTA with Australia and New Zealand.

However, as elaborated in chapter 6, the PICs saw few benefits in concluding a comprehensive EPA with the EU. Thus, since the launch of EPA negotiations in 2002, progress has been much slower than expected. Only two ‘interim EPAs’ were ‘initialled’ and then signed, by Fiji and PNG, under threats of EU withdrawal of preferential access of key agricultural products to the EU market. Fiji dragged its

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267 A waiver was secured at the Doha Ministerial Conference in 2001 that permits the extension of preferences. See, European Communities- ACP-EC Partnership Agreement, Decision of 14 November 2001, WT/MIN (01)/15, Fourth Session of the WTO Ministerial Conference. Available from http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e/mindecl_acp_ec_agre_e.htm

268 The six sub-regions negotiating separate EPAs with the EU are: West Africa, Central Africa, Eastern and Southern Africa, East African Community, Southern African Development Community, Caribbean, and the Pacific.

269 In 2008, Fiji and Papua New Guinea were ‘bullied’ into initialing a new interim trade deal with the EU in the face of a threat to increase tariffs on their key exports such as sugar and tuna to the European markets. See, PANG, Fiji and PNG pushed into interim trade deal with EU, Press Release (Suva: PANG, 2008).
ratification process in an attempt to delay the interim agreement coming into force.

In September 2011, the EU unilaterally announced that those countries that have concluded an EPA with the EU without having taken steps to ratify and implement it would be withdrawn from the Market Access Regulation (put into place after the Cotonou Agreement expired at the end of 2007, to provide duty free and quota free market access to 36 ACP countries) as of 1 January 2014.\textsuperscript{270} This meant the deadline to ratify the ‘interim agreement’ was the end of 2013. The coerciveness of this threat by the EU to remove trade preferences resulted in the reluctant compliance by Fiji, which notified the EU of its provisional application of the agreement in July 2014.\textsuperscript{271}

Although PNG ratified the interim EPA on 25 May 2011, it informed the EU on 14 October 2013 of its decision to withdraw from the comprehensive EPA negotiations due to the potential watering down of the global fish sourcing provision that will be transposed from the interim to the comprehensive EPA.\textsuperscript{272} In response, the EU suspended the negotiations for a comprehensive EPA.\textsuperscript{273}

### 3.4.3.2 Negotiating PACER Plus under the Pacific Plan

In 2005, an ADB - Commonwealth Secretariat joint report, titled *Toward a New Pacific Regionalism* was tasked with providing a cost-benefit analysis of the Pacific Plan.\textsuperscript{274} The report identified three different concepts of regionalism.\textsuperscript{275} It suggested that ‘in the Pacific, regional approaches to overcome capacity limitations in service delivery at a national level, and increasing economic opportunities through market


\textsuperscript{275} The three different concepts of regionalism identified by the report are: (1) regional cooperation – through setting up dialogues or processes between governments; (2) regional provision of public goods/services – by pooling national services (eg. Customs, health, education, sports) at the regional level; and (3) regional integration – embarking on freer trade through the lowering of market barriers between countries.
integration are expected to provide the highest gains’. Although regional integration under the Pacific Plan could be conceived broadly to include social, political and cultural dimensions, they were not given the same priority as economic integration. According to the joint report, an appropriate approach to addressing the four pillars for the Pacific Plan was to consider ‘good governance’ and the creation of ‘economic growth’ the highest priorities and necessary prerequisites for achieving the Forum’s sustainable and security objectives.

The Pacific Plan’s strong emphasis on economic growth was operationalised through strategic negotiations by the PICs with their larger trading partners on regional trade agreements such as PICTA, EPA and PACER Plus. In particular, these agreements were envisaged to cover not only the reduction or elimination of tariffs and other non-tariff barriers on trade in goods and services, but also covered broader elements outside the scope of WTO agreements, such as investment rules. The key interest of the Pacific Plan in reality was to promote economic integration through an expanded PACER, known as PACER-Plus.

3.4.3.3 The Pacific Partnership for Development

Since coming into office in late 2007, the Rudd Labor government was determined to change the diplomatic style of Australia’s engagement with the Pacific following the serious deterioration of relations with key Pacific governments in the closing years of the Howard government.

It also planned to change the substance of the policy framework. As spelt out in Rudd’s address to the Australian Strategic Policy Institute in August 2007 the new policy of a future Labor government approach towards the Pacific was ‘a large, long-term commitment, but one designed to rebuild the economic and social infrastructure of (the Pacific, and) Melanesia in particular’.

Such an approach would emphasise the ‘economic’ rather than the ‘military’, with ‘economic development challenges as a priority’, not as an ‘afterthought’. The approach would be ‘proactive’ rather than

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276 ADB, Towards a New Pacific Regionalism, p. 5.
‘reactive’, and ‘long term’ rather than ‘last minute’.

This claim of a new approach to the Pacific was confirmed in the *Port Moresby Declaration* of 6 March 2008, which stated in paragraph 20, that Australia believed the MDGs:

…provide an appropriate framework for developing nations world-wide, including in our region. At the mid-point, progress towards the Millennium Development Goals has been mixed. Australia wants to reach a common resolve with the island nations of the Pacific to strive towards greater success against the Millennium Development Goals by 2015.

The Australian government was thus ‘committed to beginning a new era of cooperation with the island nations of the Pacific’, one that was based on ‘partnership, mutual respect and mutual responsibility’. The centre piece of the new policy approach was the *Pacific Partnerships for Development.*

Under *Pacific Partnerships for Development*, Australia would provide increased development assistance over time and in response to commitments by Pacific nations in areas such as improved economic and financial management, better management of essential infrastructure and the achievement of better outcomes in basic health and education. It was intended that partnership arrangements would progressively replace existing country strategies as the principal statement of agreed priority areas of cooperation. By 2011, Australia had signed eleven *Pacific Partnership for Development* agreements with the PICs.

Implicit in all the declarations was a commitment to strengthen country ownership and better align development assistance with national development strategies and

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280 *Port Moresby Declaration*, paras 1 and 17.
281 *Port Moresby Declaration*, para. 8.
priorities. In other words, there was a commitment from the Australian government to ensure that Pacific island peoples and governments take charge of their own development path and have greater control over those processes.

However, the development and ownership rhetoric around PACER-Plus has not been matched by meaningful action. In addition, critics have pointed out that the promises of increased aid for trade through PACER-Plus has merely served to divert attention away from the fact that the reciprocal agreement required the PICs to liberalise trade with Australia and New Zealand in accordance with WTO rules.283

This would have major consequences for Pacific Island economies and communities, including significant losses in government revenue. For instance, the Pacific Regional Trade and Economic Cooperation: Joint Baseline and Gap Analysis,284 has estimated that many of the PICs would lose more than 10 per cent of their total overall revenue as a result of free trade with Australia and New Zealand. This would seriously undermine the PICs’ ability to provide public services and meet the targets of the MDGs.

Moreover, according to Waden Narsey, a prominent former professor with the University of the South Pacific, local manufacturers in the PICs could not compete with their larger and more competitive counterparts for Australia and New Zealand. He predicted that under PACER Plus, up to 80 per cent of Pacific manufacturing would be forced to close down, which would lead to the loss of thousands of jobs.285

3.4.3.4 The Cairns Compact

The Forum Leaders at their 40th meeting in Cairns, Australia on 6th August 2009 adopted the Cairns Compact to ‘foster new and invigorated commitment to lift the

283 Ibid.
economic and development performance of the region’. The key objective of the Compact was to drive more effective coordination of available development resources from both Forum donors (Australia and New Zealand) and other Development Partners (such as the EU, Japan, China, other donors and aid agencies).

The Cairns Compact calls for PICs and Development Partners to deliver on a series of Actions that reflected the ‘good governance’ agenda and linked them to the MDGs. It also established a new review and reporting process involving the PICs, development partners and the Forum Secretariat. This ‘peer review’ legitimised donors’ right to have consultations and direct dialogues with the governments of the PICs on their national development plans, budgeting, financial and aid management systems and processes.

The governments of Australia and New Zealand undertook immediate steps to implement the Cairns Compact. Just two weeks after its adoption, the New Zealand Prime Minister John Key and the then Prime Minister Kevin Rudd held their fourth bilateral meeting in August 2009. Their joint press statement confirmed their endorsement of a new Partnership for Development Cooperation in the Pacific, claiming it was an important first step towards implementing the Cairns Compact.

The new ‘policy coherence’ under the Partnership for Development Cooperation in the Pacific marked a radical shift in the approach to ODA by NZAID, which was being folded back into the Ministry of Foreign Affairs and Trade. In a speech to the New Zealand Institute of International Affairs in May 2009, New Zealand’s Foreign Minister, Muray McCully justified the shift to replace NZAID’s central focus on

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287 For example, Australia, the Asian Development Bank, EU, New Zealand and the World Bank worked closely and correctly with Tuvalu for over six months in 2011 to develop a Tuvalu Policy Reform Matrix under the ‘peer review’ consultation framework of the Cairns Compact (now interestingly renamed as the ‘Forum Compact’). The policy matrix was primarily to support the release of budget allocations to address Tuvalu’s fiscal issues. Contrary to Australia’s pledge under the Port Moresby Declaration to increase development assistance over time to the PICs, one of the key recommendations of this ‘peer review’ was to encourage Tuvalu to undertake 13% reduction in its 2012 national budget. It was evident that as the logic of neoliberalism permeated the aid bureaucracy, donors began to tighten the screws on the governments of the PICs despite the fact that Tuvalu continued to face serious environmental challenges due to climate change.


290 NZAID became semi-detached from the Ministry in 2002.
poverty elimination with economic development as necessary to achieve ‘a greater sense of alignment with our overall foreign policy goals. Most important in this respect will be our ability to align aid policy with trade policy within our region’.291

Critics like Oxfam New Zealand objected that ‘funds spent on promoting economic growth are all too easily captured by powerfully elites in developing countries’ rather than assisting the poor and needy.292 Others alleged this shift would ‘debase the quality’ of New Zealand overseas aid, thus undermining its standing in the Pacific, and compromising the effectiveness of efforts to lift millions of people out of poverty.293

While the Cotonou Agreement and the Pacific Plan were agreed with great fanfare, their implementation has provided the governments of the EU, Australia and NZ with yet another opportunity to compel the PICs to adopt neoliberal policy changes. For example, while these developed partners require the PICs to make sweeping changes to their tariff structure and domestic regulation to provide a ‘level playing field’ for European, Australian and New Zealand products and services, the developed partners are not prepared to commit themselves to binding labour mobility schemes or even a minimum level of foreign aid. Instead, development aid from both Australia and New Zealand is now tied to the adoption and implementation of neoliberal reforms. The EU, as mentioned earlier, threatened to withdraw trade preferences from PNG and Fiji in order to force these two PICs into signing interim EPA agreements.

Despite Australia’s declared ‘new approach’ to engage the Pacific island states, the recent regional initiatives, the Pacific Partnership for Development and the Cairns Compact, spearheaded by the Australian government, were just new instruments aiming to improve Australia’s image in the region and tie development aid to its trade and diplomatic policies in the region, rather than fundamentally alter the existing regional order that tacitly or explicitly favours the two powerful Forum members.

An inclusive new regional order, which truly benefits the PICs, would only come about once developed partners like the EU, and Australia and New Zealand in particular, reconfigure the system and its associated institutions that provide them with benefits. Failing this, the claim of fostering a ‘global partnership for development’ in the Pacific remains hollow rhetoric under various guises of mutual benefits and common goals.

3.5 Conclusion

The chapter’s analysis of the two competing paradigms of development leads to the conclusion that the alternative vision for development policy and global partnership that was enshrined in the DRTD carries the potential to bring about a paradigm shift in the region.

Unfortunately, the chapter also demonstrates that, despite the passage of almost three decades since the adoption of the DRTD, the predominant growth model of economic development continues to prevail in the Pacific. The continuation of a model of development that ignores environmental and social concerns, including human rights, will not solve challenging global problems facing the world today or the Pacific. The actions of the PICs’ developed partners in using their power to advance trade agreements and trade-related aid that bind PICs to that model also aggravate the development challenges facing the PICs.

As discussed in the chapter, the general development discourse since the late 1990s has seen the revision of neoliberal ideas, for example by adding new elements to the definition of development; paying more attention to the failures of markets; stressing participatory decision-making; and more focus on poverty reduction. Sen’s reconceptualisation of ‘development as freedom’ was a good example of such an attempt. However, in simultaneously supporting liberalising of markets and the goals of investing in other social areas such as education and public health, Sen’s theory failed to provide any serious attempts to address the possible conflicts and incompatibility between the two sets of goals.

While the neoliberal approach remains the dominant model of development, the RTD paradigm is making slow inroads in the field of IEL but mostly in the form of soft
laws like the United Nations declarations, and conventions. However, as chapter four reveals, international hard laws such as the current WTO rules like the General Agreement on Trade in Services (GATS) constrain policy options and development strategies of the PICs. A Third Moment is possible only if all concerned parties, including national governments and international financial institutions (IFIs) have the political will to change the status quo and reshape the international order, including changes to the unfair rules of the WTO and WTO-compatible agreements.
CHAPTER 4: A PACIFIC PERSPECTIVE ON SERVICES LIBERALISATION UNDER THE GATS

4.1 Introduction

The services economy, as succinctly described by Kelsey, is ‘a proxy term for the transformation of capitalism in the later twentieth century’ where services transactions take place across national borders.\(^{294}\) She attributes the exponential growth of the international services economy to a combination of new technologies, neoliberal policies of privatisation and deregulation, and expansion of transnational corporations’ activities across the world.\(^ {295}\)

According to the WTO, world trade in services\(^ {296}\) accounts for two thirds of global output, one third of global employment and nearly 20% of global trade.\(^ {297}\) Based on past growth, it was forecast that world services trade could reach the level of world merchandise trade by 2020.\(^ {298}\) The growing importance of the services sector has led some to argue that there are substantial gains from freeing up trade in services either autonomously or through bilateral, regional and multilateral treaties. For example, Robinson et al. suggested that ‘the welfare gain for the world as a whole from a 50% cut of protection in the service sector is 5 times larger than from non-service sector trade liberalisation’.\(^ {299}\)

The international trading regime uses a market-based framework to realise this potential through the legal instrument of the WTO’s GATS, which aims to improve commercial opportunities for foreign services and service suppliers with little


\(^{295}\) Ibid.

\(^{296}\) The lack of reliable statistics makes it very difficult to track the international services economy. The WTO, for instance draws on the balance of payments figures to produce rough estimates of the value of international trade in ‘commercial services’. See, Kelsey, J, Serving Whose Interests? The Political Economy of Trade in Services Agreements (Oxon: Routledge-Cavendish, 2008), pp. 9-12.


reflection on non-economic interests including human rights.

The GATS sets legally binding rules which can be enforced through the WTO dispute settlement body. Yet its appropriate objective is contested. According to Krajewski, there are two basic approaches in interpreting the object and purpose of the GATS: a neoliberal market integration approach favouring trade liberalisation over national regulatory autonomy; and a human rights approach (such as the Right to Development (RTD)) that sets the promotion and protection of human rights as objectives of trade liberalisation.

Since services are socially embedded in many human activities, the neoliberal approach of treating services as commodities means replacing a social paradigm of services with one based on market relations. This market-oriented approach to regulate services through the mechanisms of GATS is viewed by critics like Kelsey as an integral element of a new hegemonic ideology of neoliberalism, which ‘pitted the economic imperative of trade against the social essence of human wellbeing, just distribution of wealth and complex democracy’.

The RTD approach to the GATS, according to the UN Human Rights Commission, has a different focus. The Commission considers the function of WTO law should be restricted to the prevention of protectionism and calls for deference to national autonomy to take into account the development needs of developing countries and the rights of all individuals, in particular vulnerable individuals and groups. As noted by the High Commissioner for Human Rights, it is important for a human rights approach to insist on an ongoing examination of trade law and policy because the

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303 Ibid.

market imperatives of free trade are often incompatible with the social imperatives of human wellbeing.  

While the GATS in principle provides the flexibility to limit the scope of liberalisation by positive lists of commitments, subject to limitations, as elaborated later, a critical area of concern has been whether in practice developing countries, particularly small states like the Pacific island states, have been able to exercise and utilise the flexibilities embedded in the agreement and retain sufficient policy space to regulate effectively.

This chapter concentrates on the legal text of the GATS, using the examples of Fiji and the more recently acceded countries of Samoa, Tonga and Vanuatu. It aims to untangle the issue of regulatory limitations in services trade under the GATS by examining the interplay between Article II on Most-Favoured-Nation (MFN), Article XVI on Market Access, Article XVII on National Treatment, and Article VI on domestic regulation. These Pacific examples reveal the risks and pitfalls of using the GATS legal framework as a platform for services liberalisation, in terms of the loss of policy space and flexibility.

The chapter consists of three main sections. After briefly discussing the rise of the services economy, it examines the concept of ‘services’ and the definition of ‘trade in services’ used by the WTO. This highlights the conceptual differences between trade in goods and services.

The second section provides a critical textual analysis of some key provisions and disciplines of the GATS agreement. The objective of this exercise is to explore the legal implications of the GATS rules and it stresses the profound reach of its scope and coverage. In doing so, it examines the GATS commitments of Fiji, Tonga, Vanuatu and Samoa and highlights the potential risks of liberalising in areas where a particular service sector is yet to mature. Liberalising services in the absence of an effective regulatory framework is, in the words of a UN Development Programme (UNDP) report, ‘akin to putting the cart before the horse’.  

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305 Ibid.
The third section examines the GATS from a RTD perspective, focusing on two areas: the right to regulate and the flexibility to withdraw or modify commitments in light of unforeseen development circumstances. It explains the importance for the PICs of having the ability to adjust trade obligations in situations where liberalisation adversely and disproportionally affects the poor, vulnerable and disadvantaged. This is because the regulation of service supply for economic, social, cultural or environment reasons is a legitimate function of government and an important means of promoting and protecting the right to development.

4.2 The Concept of ‘Trade in Services’

4.2.1 The Rise of the Service Economy

Services can be offered in relation to a diverse range of economic and social activities such as education, health care, water supply, tourism, telecommunications, construction, banking, finance and many more. According to a UN human rights report, the globalisation and liberalisation of trade in services has been driven by many factors. These include advances in technology and communication which allowed the provision of better services at lower prices. Improved and cheaper travel enabled greater mobility for service suppliers across national borders. Policy reforms – liberalisation, deregulation and privatisation - which favour market-oriented approaches to the regulation and delivery of services have also complemented new technologies in supporting the expansion of trade in services as part of domestic and international commerce.

Whereas international trade in goods has been regulated by the GATT since 1947, trade in services only came under the disciplines of the multilateral trading system in 1995 when the WTO was established. This is because trade in services has long been

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308 Some commentators argue that services liberalisation was possible in part because, since the conclusion of the Uruguay Round, the political context was favourable toward the neoliberal Reagan-Thatcher vision of radical economic management. See, Rafael Leal-Arcas, “The GATS in the Doha Round: A European Perspective” in K Alexander and M. Andenas (eds.), The World Trade Organisation and Trade in Services, Koninldijke Brill NV, Leiden, p. 52 (2008).
ignored by classical economists like Adam Smith as ‘unproductive’. In his famous book *An Enquiry into the Nature and the Causes of the Wealth of Nations*, Smith concluded that services were largely unproductive because the work of people employed in services could not be accumulated to form a part of the capital stock. Classical economists rejected the possibility of trade in services because, in contrast to goods, services are of the intangible, non-storable and transitory nature of services. At that time, services were considered to be products of labour embodied in the production of goods and would perish the moment the labour is performed.

Perceptions of the contribution of services to economic development changed significantly in the last three decades in the wake of the unravelling of the golden age of industrial capitalism. The expansion of the ‘service economy’ is due in large part to the rapid technological advancement occurring in information and communication networks. Physical proximity between service suppliers and consumers is no longer essential.

The potential for business entrepreneurs in developed countries to secure their competitive positions on the world market has induced many corporate lobby groups, particularly those in the US and Europe, to advance services as a separate subject of multilateral negotiations. They wanted an international trading regime that could reflect the dynamism of FDI in services and protect their absolute and comparative advantages. As noted by Feketekuty, it was the US in 1982 that first proposed including trade in services on the agenda of the Uruguay Round trade negotiations.

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310 The list of non-productive services activities compiled by Smith consists of: the servants of the State, clergy, lawyers, medical personnel, writers, artists, comedians, musicians, singers, opera dancers, other personal services, and domestic servants.
312 The story of how a cadre of key players (the so called second-tier ‘epistemic community’ that include academics, researchers, journalists, lawyers and other services experts) were able to capture national governments, corporations and international institutions (the first-tier of the ‘epistemic community’) to secure a legal instrument in the GATS that conformed to their neoliberal world view, which effectively globalised trade interest of the North (notably the US and the EC) is documented in “Case Study 3: The ‘Services Mafia’” and “Case Study 4: Understanding the “GATS Attack” in Kelsey, J, *Serving Whose Interest? The Political Economy of Trade in Services Agreements*, (Oxon: Routledge-Cavendish, 2008), pp. 76-88.
In the words of Stephenson, an influential advocate of services liberalisation in Asia Pacific, the objective of ‘engaging in market-opening and rule-setting negotiations’ was to expand the growth of the services exports from countries in the Western Hemisphere, which enjoy strong competitive advantage over developing countries.\textsuperscript{314} Stephenson stated the aim was threefold: to remove discrimination against foreign service providers; to deal with non-discriminatory regulations that have the effect of restricting trade; and to design rules that enhance transparency, ensure stability and help to optimize the liberalising character of any given services agreement.\textsuperscript{315}

\textbf{4.2.2 Defining ‘Services’ and ‘Trade in Services’}

There are many definitions of services in the literature.\textsuperscript{316} A pragmatic characterization of services that was suggested by \textit{The Economist} is ‘anything sold in trade that could not be dropped on your foot’.\textsuperscript{317} In other words, as noted by Kelsey, services are portrayed as intangible, invisible and perishable, requiring simultaneous production and consumption.\textsuperscript{318} However, some services have elements of tangibility, such as music embodied in a CD. A service such as legal advice that is provided via the Internet does not require face-to-face contact between the service provider and the consumer, and postal delivery is neither instantaneous nor unstored.

Aside from the differences in definition between goods and services, there are several ways in which the concept of ‘trade in services’ is fundamentally different from trade in goods. The GATT does not define ‘trade in goods’ because it is obvious that international trade takes place when merchandise crosses the border. However, it is more complex in the case of services because international trade in many services requires a permanent or temporary presence of the foreign service suppliers. Thus, the definition of services in the GATS is based on the means by which services are

\textsuperscript{315} Ibid.
\textsuperscript{317} Ibid.
supplied internationally.319

According to Leal-Arcas, the differences between trade in goods and services exist at four levels. 320 First, services are intangible and non-storable; second, there are different modes for trade in services; third, international trade in services usually requires movement of one or more factors of production; and lastly, the level of national regulation of services trade is more extensive than that of trade in goods.

The GATS does not expressly define services since the contracting parties could not agree on a definition, nor has the Appellate Body found it necessary to define ‘services’ in abstract terms. 321 The WTO Secretariat recognised twelve service sectors: business services (including professional and computer services); telecommunication; construction and engineering; distribution; education; environmental services; financial services (including banking and finance); health; tourism and travel; culture and sport; transportation; other services. These service sectors were divided by the Secretariat into 155 sub-sectors,322 known as the Services Sectoral Classification List (W/120).323 It was compiled on the basis of the provisional UN Central Product Classification (CPC) system from 1991.

The use of the W/120 list is not mandatory. Yet most WTO Members use it as a basis for scheduling their specific commitments. If a Member undertakes commitments based on this List, the CPC then becomes the reference that the WTO judiciary will rely on in order to identify the scope of commitments.324 In US-Gambling the US had not used a CPC reference for its commitment on ‘Other Recreational Services (except Sporting)’. The Appellate Body endorsed the relationship between the United States’ schedule of commitments and the W/120 list, stating that in the absence of any

indication to the contrary, ‘Members were assumed to have relied on W/120 and the corresponding CPC references’. 325

In order to ensure that GATS will potentially apply to all services, including services that could be developed in the future, as well as to every measure that might affect trade in services, the term ‘service’ is defined in Article I in a very broad manner to encompass ‘any service in any sector except services supplied in the exercise of governmental authority’. 326 The broad scope of GATS will be discussed later in the chapter.

Under the GATS, services are internationally traded in four modes of supply, as defined in Article I: 2 (a)-(d) of GATS:

- Cross-border (Mode 1): ‘from the territory of one Member into the territory of any other Member’. According to this mode, the service ‘crosses’ the border, even though the supplier does not. For example, booking an air ticket via the Internet;

- Consumption abroad (Mode 2): ‘in the territory of one Member to the service consumer of any other Member’. According to this mode, the consumer crosses a border to receive the service in the supplier’s country. For example, a visiting tourist;

- Commercial presence (Mode 3): ‘by a service supplier of one Member, through commercial presence in the territory of any other Member’. According to this mode, the service supplier establishes a commercial presence, such as a subsidiary, branch, agent or service centre in the country of destination in order to supply the service from it. For example, a hotel from a global chain; and

- Movement of natural persons (Mode 4): ‘by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member’. According to this mode, the service supplier, who is a natural

325 Appellate Body Report, *US-Gambling*, para. 204
326 GATS Article I: 3(b). Government procurements are excluded from the scope of GATS in Article XIII.
person that works temporarily as an independent supplier or as an employee of a service supplier, crosses a border in order to supply a service. For example, a foreign hotel manager working in a Fijian resort.

As a result of these different modes of supply, barriers to trade in services are more elaborate than barriers to trade in goods. Barriers to trade in goods typically comprise border measures such as tariffs and quantitative restrictions. Barriers to trade in services are usually embodied in domestic regulations, which may not only be sector specific, but also country-specific because of differences in preferences, legal culture, development priorities and so on. In other words, each country has its own perception regarding the way the supply of a specific service should be regulated. Given the development asymmetries existing with respect to the degree of services regulation in different countries, it is imperative for small developing countries such as the PICs to exercise the right to regulate according to their national circumstances.

4.3 The Legal Framework of the GATS

4.3.1 Article I: Scope and Definition

As a legal instrument, the GATS is a complex framework agreement consisting of 29 articles in six parts, eight Annexes, several ministerial decisions and individual country schedules of specific commitments. The desire to potentially subject every possible barrier to international trade in services, be it direct or indirect, current or future, to GATS disciplines resulted in a very broad scope agreement. The scope of the GATS is set out in Article I:1, which states that the Agreement shall apply to ‘measures by Members affecting trade in services’. The coverage is extensive and open-ended; it includes all measures, whether in the form of a law, regulation, procedure, decision, administrative action or any other form. It applies to both services and service suppliers, and to all levels of government.

Unlike GATT that applies only to goods and not to their suppliers, the GATS

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328 GATS Article XXVIII (a)
disciplines apply to measures affecting both services and service suppliers, thus recognising that many of perceived barriers to trade in services are directed at their suppliers. As a result, some modes of supply address services and some service suppliers.

Under the GATS, the supply of services includes the production, distribution, marketing, sale and delivery of a service.\(^{329}\) The sector of a service means one or more, or all, subsectors of that service, as specified in a Member’s Schedule. Otherwise, the whole of that service sector, including all of its subsectors are included.\(^{330}\) This supply chain is particularly important for the tourism sector. There is real difficulty in distinguishing between what is covered in relation to a single service or subsector, when there are other subsectors that the supply chain activities also relate to. According to the World Tourism Organisation, tourism is a social, cultural and economic phenomenon which entails the movement of people to countries or places outside their usual environment for personal or business/professional purposes.\(^{331}\) As such, tourism activities are inextricably linked to many other services sectors, including distribution, business, construction, transport or environmental services.

Measures affecting trade in services include those measures in respect of: the purchase, payment or use of a service;\(^{332}\) in connection with the supply of a service, the access to and use of services which are required by those Members to be offered to the public generally,\(^{333}\) and the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.\(^{334}\)

The EC-Bananas III case confirmed the very broad scope of this definition. In defining the term ‘affecting’ in Article I: 1 of the GATS, the Appellate Body agreed with the Panel that no measure is a priori excluded from the scope of GATS. Its Report states that:

\(^{329}\) GATS Article XXVIII (b)  
\(^{330}\) GATS Article XXVIII (e)  
\(^{331}\) UNWTO (2014), Understanding Tourism: Basic Glossary,  
www.media.unwto.org/en/content/understanding-tourism-basic-glossary (accessed 25 November 2014)  
\(^{332}\) GATS Article XXVIII (c) (i)  
\(^{333}\) GATS Article XXVIII (c) (ii)  
\(^{334}\) GATS Article XXVIII (c) (iii)
[In our view, the use of the term ‘affecting’ reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application. ... We also note that Article I:3(b) of the GATS provides that ‘services includes any service in any sector except services supplied in the exercise of governmental authority’, and that Article XXVIII (b) of the GATS provides that the ‘supply of services includes the production, distribution, marketing, sale and delivery of a service’. There is nothing at all in these provisions to suggest a limited scope of application of the GATS.335

In Canada-Autos, the Appellate Body applied the understanding of ‘affecting’ found in the EC-Banana III. However, the Appellate Body further pronounced that for a measure to be regarded as one ‘affecting trade in services’, there must be a two-step legal test. The threshold issue for the applicability of the GATS is whether: (a) there is ‘trade in services’ as defined by GATS Article I:2; and (b) the measure at issue ‘affects’ such trade in services within the meaning of GATS Article I:1.336 The first step of this legal test is satisfied if it is established that there is ‘trade in services’ in one of the four modes of supply.337 The second step of the test requires a market analysis to determine whether the measure could be found to fall within the scope of the GATS.

Article I: 3 ensures that the disciplines of GATS will apply to all government levels: central, regional or local governments and authorities, subject to exceptions relating to ‘services supplied in the exercise of governmental authority’.338 Furthermore, it provides for their application even to non-governmental bodies which exercise powers delegated by central, regional or local government governments or authorities. In order to prevent possible claims of irresponsibility by lower levels of government

338 GATS Article I:3 (c) stipulates that ‘a service supplied in the exercise of governmental authority’ means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.
or non-government bodies with delegated powers, the Article also states that ‘in fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory’.\textsuperscript{339}

Even though the GATS excludes ‘services supplied in the exercise of governmental authority’,\textsuperscript{340} such services must be ‘supplied neither on a commercial basis nor in competition with one or more service suppliers’.\textsuperscript{341} In other words, services supplied by central governmental authority delivered on a commercial basis are subject to the GATS, as are those delivered by lower levels of government and bodies exercising delegated authority, such as local councils providing facilities for visitors to enjoy.

The restriction of ‘services supplied in the exercise of governmental authority’ to non-commercial services is especially problematic when governments commercialise their free public monopoly services. Adversaries of the GATS assert that the ultimate objective of the agreement is to open up essential public services in the developing world, such as education, health, water, transport and energy to competition from western corporations.\textsuperscript{342}

The lack of definition of ‘commercial’ in the text raises the question whether all services for which a price is charged (either for profit-making or as a symbolic due to discourage excessive usage) should be considered ‘commercial’. Because governments commercialise public services gradually, for example providing some services through ‘public-private partnerships’ that were traditionally supplied on a non-profit making basis, the same institution or government department could be providing services on both a commercial and non-commercial basis. Infrastructure such as airports, parks and gardens, as well as roading, and the removal of sewerage and waste from resorts are some of the important services to the tourism industry that can be supplied both on a commercial and/or non-commercial basis.

\textsuperscript{339} Ibid.
\textsuperscript{340} GATS Article I:3 (b)
\textsuperscript{341} GATS Article I:3 (c)
Another example could be the provision of health services relating to the treatment of visitors. For instance, public hospitals often charge foreign tourists higher medical fees than local residents in an attempt to make a profit and ‘cross-subsidise’ the treatment of domestic patients. It could be argued that the medical treatment provided to foreigners is supplied ‘on a commercial basis’, while the treatment of local nationals is not. Hence, it could be argued that the profit-seeking intentions of these public institutions could affect the applicability of the exclusion to other services provided by the same supplier. In practice, the entity delivering these services cannot separate out the covered and excluded services.

The second element of the sectoral exception of Article I: 3 (c) is the requirement that the service is not supplied in ‘competition with one or more service suppliers’. The term ‘competition’ raises the question of the relevant market and its associated concept of ‘likeness’ in services and service suppliers, terms which are also mentioned in Article II: 1 (MFN) and Article XVII (National Treatment).343

In a GATT case ruling on Japan-Alcoholic Beverages II, the Panel (confirmed by the Appellate Body) held the view that ‘the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-users, inter alia, as shown by elasticity of substitution (and) whether such elasticity exists and how large it has to be must be determined on a case-by-case and varies from country to country’.344

However, this interpretation of ‘likeness’ in the GATT opens a series of questions with regard to trade in services, which might be supplied by four different modes. In Canada-Autos, the Panel accepted the possibility that ‘like services’ may be supplied through various modes.345 In Mexico-Telecoms, the Panel found that the existence of ‘competition’ involving like services depends on whether the behaviour of the service supplier in question involves competing with other service suppliers, regardless of

whether the actions of others are within or beyond a country’s jurisdiction.\textsuperscript{346} According to this interpretation, public entities such as hospitals that seek to attract foreign tourists from private domestic or foreign clinics as patients for profit could be deemed to fall within the coverage of the GATS.

Given the definition of trade in services in the GATS and the established case law relating to the understanding of key terms such as ‘affecting’, ‘commercial’ and ‘competition’, it is obvious that the scope of the GATS is potentially very broad. Hardly any measures could generally be excluded from the coverage of the GATS as being ‘supplied in the exercise of government authority’.

\subsection*{4.3.2 The GATS and Its Mechanics of Services Liberalisation}

The aim of the GATS is to establish a legally binding set of commitments to liberalise services through mechanisms that enhance predictability and transparency under the promise of progressive liberalisation through successive rounds of negotiations. According to Article XIX of the GATS, entitled ‘Negotiation of Specific Commitments’,\textsuperscript{347} the Uruguay Round negotiations on the liberalisation of trade in services were only a first step in what will be a long process of progressive liberalisation.\textsuperscript{348}

The approach to GATS, and the subsequent round of the GATS negotiations launched in 2000 (GATS 2000), is a request-and-offer approach.\textsuperscript{349} The WTO Secretariat explains this negotiating method as follows:\textsuperscript{350}

\begin{flushright}
\footnotesize
\textsuperscript{347} Article XIX of the GATS states that ‘in pursuance of the objective of this Agreement, Members shall enter into successive rounds of negotiations…with a view to achieving a progressively higher level of liberalisation’.
\textsuperscript{348} In an attempt to overcome the stalemate of the Doha Round of negotiations on trade in services, in 2013 under the leadership of the EU, Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong China, Iceland, Israel, Japan, the Republic of Korea, Mexico, New Zealand, Norway, Panama, Pakistan, Peru, Switzerland, Turkey and the USA began negotiations on a plurilateral trade in services agreement. In its first phase, this plurilateral agreement will only be binding upon the participants – and therefore will not be part of the Doha Development Agenda as such. But the EU has ensured that the structure of the agreement provides for a credible pathway to future multilateralisation. See, European Commission, Press Release, \textit{Negotiations for a Plurilateral Agreement on Trade in services}, 15 February 2013, Brussels. \url{http://europa.eu/rapid/press-release_MEMO-13-107_en.htm} (accessed 18 April 2015).
\textsuperscript{349} Under the GATS negotiations, as discussed later, it uses a ‘positive list’ approach – liberalise service sectors that Members identified in their schedules. However, trade in services also include other liberalisation initiatives such as through FTAs, which often use the ‘negative list’ approach – liberalise all service sectors except those that parties have identified for exemption. The latter approach is a more aggressive form of service liberalisation.
\end{flushright}
Governments send requests to each other indicating what market access opportunities they are seeking; the governments in receipt of such requests reply by submitting their initial offers specifying how and to what extent they are willing to consider opening their domestic market in response to these requests ... regardless of which country submits a request, the offer from the responding country applies to all countries. At the end of negotiations, the final offers then become legally-binding commitments specifying the conditions under which market access is granted.

Under the GATS, the terms, limitations and conditions on market access agreed to in the negotiations on the liberalisation of services are set out in Schedules of Specific Commitments, commonly referred to as Services Schedules, for each WTO Member. The conditions and qualifications on national treatment and undertakings relating to additional commitments are also set out in the Schedules, as discussed below.

To achieve progressive liberalisation in trade in services, the main liberalising tools of the GATS are the provisions relating to non-discrimination through the Most-Favoured-Nation (MFN) (Article II), National Treatment (Article XVII) and rules on Market Access (Article XVI). The latter two provisions are to be found in Part III of the Agreement, entitled ‘Specific Commitments’.

Other general rules in Part II of the GATS, which are of particular importance for this thesis include domestic regulation, and the application of general exceptions. The rules on increasing participation of developing countries; and regional economic and labour market integration are discussed in chapter 6, which covers regional integration initiatives in the Pacific.

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351 Other rules not mentioned in this paper include international recognition of service suppliers’ credentials (GATS Article VII); regulation of monopolies and exclusive service suppliers (GATS Article VIII); regulation of restrictive business practices (GATS Article IX); restrictions on international payments and transfers (GATS Article XI).
352 GATS Article VI.
353 GATS Article XIV and GATS XIV bis.
354 GATS Article IV.
355 GATS Article V and V bis
In addition, Part II contains provisions that, due to lack of consensus during the Uruguay Round, generally call for future negotiations. These include emergency safeguard measures;\textsuperscript{356} government procurement;\textsuperscript{357} and subsidies.\textsuperscript{358} None has been concluded in the WTO, although they are often added in regional trade agreements.

### 4.3.2.1 Most-Favoured-Nation Treatment (MFN): GATS Article II

The MFN principle is contained in Article II:1, which stipulates that ‘with respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.’\textsuperscript{359}

The MFN clause prohibits discrimination between ‘like services’ and ‘like service suppliers’ from different countries, effectively ensuring equality of opportunity for all service suppliers from all WTO Members and guaranteeing that any liberalisation granted by a WTO Member to any other country, whether or not it is a member of the WTO, must be extended to all other WTO Members.

The economic rationale for the MFN commitment is to prevent trade diversion, premised on the assumption that without the benefit of the MFN principle the most efficient service provider or the best available service may not have access to a foreign market because of discriminatory practices in favour of other less efficient service suppliers.\textsuperscript{360} To contextualise this argument in view of the imbalance between the global North and South in international trade in services, the MFN treatment benefits the powerful transnational corporations of the North, given their economies of scale and competitive advantages.

\textsuperscript{356} GATS Article X.
\textsuperscript{357} GATS Article XIII.
\textsuperscript{358} GATS Article XV.
\textsuperscript{359} GATS Article II:1.
The Appellate Body in *Canada-Autos* confirmed the implicit objective of the unconditional MFN treatment as one that ‘serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis’.\(^{361}\) As a means to avoid extending the MFN rule to certain sectoral sensitivities and free riding by those making few commitments, the GATS provides for certain exemptions from MFN in accordance with the terms of Article II:2.\(^{362}\) Such exemptions had to be taken either at the time of entry into force of the agreement or at the time of a Member’s accession to the WTO. Around two-thirds of WTO Members have listed MFN exemptions.\(^{363}\) Most of these exemptions are in sectors concerning transport (maritime), communication (mostly audiovisual), financial and business services.\(^{364}\) In principle, these exemptions should not exceed ten years.\(^{365}\) However, many WTO Members have stated in their exemption list that particular exemptions would last for more than ten years.

There is no provision for more exceptions to be added later. For example, had the European Communities (EC) entered an MFN exemption for the African, Caribbean and Pacific (ACP) distribution services in its schedule, the EC’s banana import licensing regime would not have fallen foul of the GATS rules under *EC-Banana III* case.\(^{366}\) Instead, the EC had to secure a temporary waiver from the WTO.\(^{367}\)

The other permitted departure from the MFN treatment under the GATS rules is among countries that are members of regional trading arrangements (RTAs) in accordance with the terms set out in Article V on ‘Economic Integration’. That is discussed in chapter 6 on regional FTAs. The requirements for WTO-compatibility also have significant implications for non-WTO members when involved in

\(^{361}\) Appellate Body Report, *Canada-Autos*, WT/DS139/AB/R, para. 84

\(^{362}\) GATS Article II: 2 states that “A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions”.

\(^{363}\) For example, Solomon Islands had included a MFN exemption for an indefinite duration in its schedule to enable MSG members to have recourse to waivers with respect to normal government approval and registration for foreign investors and measures affecting the entry and temporary stay of natural persons. See, WTO Doc. Solomon Islands: GATS/EL/117, *General Agreement on Trade in Services: Final List of Article II (MFN) Exemptions*, 1 April 1996.


\(^{365}\) Para 6 of the Annex on Article II Exemptions states that the exemptions should not exceed a period of ten years. It does not state that they shall not exceed ten years.

\(^{366}\) Appellate Body Report, *EC-Banana III*, WT/DS27/AB/R.

negotiations with a WTO Member, as with the PICs in the EPA and PACER Plus negotiations.

4.3.2.2 Market Access

The GATS provides for specific rules on barriers to ‘market access’ and their progressive elimination. Article XVI: 2 of the GATS sets out an exhaustive list of the six prohibited measures with regard to trade in services in all or part of a Member’s territory:

a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
f) limitation on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

In short, the market access barriers listed in Article XVI: 2 of the GATS include: four

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368 Article XVI: 2 (a) to (f) of the GATS.
types of quantitative restrictions; limitations on forms of legal entity; and limitations on foreign equity participation. It is important to note that almost all apply to the services market generally, although they can also have a discriminatory element; only paragraph (f) is directed specifically at foreign investors. These ‘market access’ obligations apply only to services sectors that are inscribed in the Members’ Schedules in relation to each of the four modes of supply and subject to conditions and limitations set out therein.

4.3.2.3 Selected PICs’ GATS Commitments on Market Access

A Member’s schedule has two parts: a part containing the horizontal commitments; and a part containing sectoral commitments. Horizontal commitments apply to all sectors included in the Schedule. Its purpose is to avoid repeating the same information regarding a limitation, condition and/or qualification of commitments for each sector in the Schedule. Sectoral commitments are commitments made regarding specific services sectors or sub-sectors. According to WTO scheduling requirements, there are three levels of commitments: none; with limitations; or unbound. The first level means that the PICs have placed no limits on their commitments to other WTO Member States. The second sets out any limitations on their commitments. Unbound means no commitments are made or the mode of supply is not technically feasible for that sector or subsector.

The Schedules have separate columns for market access and national treatment. The table below shows the different levels of market access committed under the GATS by Fiji, Tonga, Vanuatu and Samoa respectively.

Table 1: Commitments on Market Access

<table>
<thead>
<tr>
<th>Country</th>
<th>Market Access (Sectors)</th>
<th>Market Access Limitations</th>
</tr>
</thead>
</table>

369 Article XVI:2 (a) to (d) of the GATS
370 Article XVI:2 (e) of the GATS
371 Article XVI:2 (f) of the GATS
### Samoa

1. Business services
2. Communication services
3. Construction and related engineering services
4. Distribution services
5. Education services
6. Environmental services
7. Financial services
8. Tourism and travel-related services
9. Recreational, cultural and sporting services
10. Transport services

- Modes 1, 2 & 3: none (full commitment) for all sub-sectors; except the following:
  - Mode 1: unbound in selected sub-sectors including banking; tour operators; cinema theatre operation
  - Both Modes 1 & 2: unbound in commission agents’ services; insurance
  - Mode 3: limitations in accounting and bookkeeping; architectural; engineering; general construction; refuse disposal; hotels and restaurants

Note: Mode 4 in all sub-sectors are unbound except as provided in the horizontal commitments. Fiji’s schedule has no horizontal commitments. Table is a summary compiled from the Schedules of Specific Commitments of Fiji, Tonga, Vanuatu and Samoa.
As illustrated in Table 1, apart from Fiji, the remaining three PICs have all made extensive market access commitments in services subsectors. For example, Tonga has undertaken commitments in ten services categories.\footnote{372} By contrast, Solomon Islands (a founding WTO Member) has commitments in four sectors and Fiji has commitments in only one sector.\footnote{373} The comparison between Tonga and the other two is even more dramatic at the level of the individual sectors. Tonga has commitments in 26 sub-sectors (eg. air transport, hospitals and restaurants, and hospitals) out of 53, while Solomon Islands has committed 6 subsectors, and Fiji only 2 sub-sectors in hotels and restaurants.

A full commitment on market access would prevent any of these PICs from limiting access to its services market in any of the specified ways. For example, Tonga has made full commitments on market access (both horizontal and sectoral commitments) in Modes 1, 2 and 3 in nine of the eleven possible sectors and, with the exception of distribution services and recreational, cultural and sporting services, the government cannot introduce or adopt any of the six listed market access barriers for any of those liberalised subsectors.

In the tourism sector, Tonga has made a specific market access commitment to open up hotels and restaurants, and travel agencies and tour operators services. Tonga cannot limit the number of hotels, restaurants, travel agencies or tour operators, whether foreign owned or not; require the foreign investors to use a joint venture; or limit the level of foreign shareholdings. This is despite the importance of tourism for governments to control the number of hotels overall and in specific locations in order to protect the environment or in areas of particular historical, cultural or artistic interest. The policy space is further limited by the fact that the GATS market access restrictions apply to measures that are for all or any part of the Tongan territory. The chapeau of Article XVI:2 of the GATS states that ‘in sectors where market access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule’ (emphasis added).

Preventing a government from using quotas, bans, or other numerical limits is one of the most problematic aspects of the market access rules. There are instances where the government has legitimate reasons to restrict new development in a sector if, for example, the supply of services is sufficient and any further expansion would threaten the viability of existing local businesses. It may also wish to reduce or prohibit certain activities that have become problematic.

For example, the government of Vanuatu made full market access commitments for travel agencies in mode 1 and 3 (excluding tour operating services). Therefore, with the exception of tour operating services, it cannot restrict the number or value of bookings made through offshore Internet sites or foreign-based travel agencies (mode 1), or restrict the number of such operators, even if that allows those operators to control most of the ground inbound services such as hotel reservations, arrival and departure transfers, car hires and so on. The consequence may be that local operators are denied the opportunity to benefit from tourism, and that Vanuatu becomes hostage to a small number of dominant foreign tourism firms.

Under certain circumstances, requiring foreign firms to work jointly with a domestic company (not permitted under Article XVI.2(e)) can maximise the benefits of inward investment, such as ensuring the transfer of technology, improvement in management skills and training of local staff. Insisting on a particular legal form or joint venture arrangement that requires a foreign company to hold some domestic assets also facilitates the enforcement by regulatory bodies of any judgment made against the foreign company for breach of a local law. Full market access commitments, such as those made by Tonga, deprive Pacific governments of that policy space.

4.3.2.4 National Treatment: GATS Article XVII

The national treatment obligation of Article XVII focuses on discrimination.

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374 In US-Gambling, the Appellate Body held that an origin-neutral ban on remote gambling was ‘in effect’ a ‘zero-quota’, and that such a ‘zero-quota’ violated GATS Article XVI.2. See, United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005. Paras. 6.264-6.265.

Commitments to ‘national treatment’ set out the sectors in which services and service suppliers of other WTO Members are promised non-discriminatory treatment with their domestic counterparts, for example with rights to permits or subsidies, or rights to own land. As with market access these commitments can be subject to specified conditions and qualifications.

A three-step test of consistency is required to determine whether a measure violates a Member’s specific commitments under Article XVII. This consistency test requires an examination of (i) whether the measure at issue affects trade in services; (ii) the foreign and domestic services or service suppliers are ‘like’ services or service suppliers; (iii) and the foreign services or service suppliers are granted less favourable treatment.\(^{376}\) Given the Appellate Body’s broad interpretation on measures ‘affecting’ trade in services, the concept of ‘like’ services or service suppliers needs to be understood within the context of the scope of the GATS.

The interpretative footnote 10 to Article XVII clarifies that national treatment does not require compensation for ‘any inherent competitive disadvantages which result from the foreign character of the relevant services or service providers’. For example, the difficulty of a foreign supplier in understanding local networking practices or regulations in the language of the host country are inherent competitive disadvantages but do not constitute de facto discrimination. However, in Canada-Autos the Panel stressed the limited scope of this footnote and held that ‘it does not provide cover for actions which might modify conditions of competition against services or service suppliers which are already disadvantaged due to their foreign character’.\(^{377}\)

While GATS proponents claim the purpose of Article XVII is simply to apply non-discrimination between domestic and foreign services or service suppliers, a regulatory regime that is non-discriminatory on its face could still be challenged for violation of the national treatment rule. Where a schedule makes a commitment to national treatment in a sector or subsector the relevant domestic measures must be brought into conformity unless limitations are explicitly listed. Hence, the manner in

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\(^{377}\) Panel Report, *Canada-Autos*, para. 10.300.
which national treatment is handled in the GATS becomes a critical area of concern for both developed and developing countries. However, where a limitation on a market access commitment applies to a measure that is discriminatory, Article XX.2 says it automatically applies to the national treatment column in the schedule as well.

4.3.2.5 Selected PICs’ GATS Commitments on National Treatment

A commitment on national treatment in a sector or subsector, and any limitations on that commitment, can be different for each of the four modes. Table 2 summarises the national treatment commitments and limitations, conditions and qualifications contained in the services schedules of Fiji, Tonga, Vanuatu and Samoa.\(^\text{378}\)

Table 2: Commitments on National Treatment

<table>
<thead>
<tr>
<th>Country</th>
<th>Sector or sub-sectors Scheduled to Liberalise</th>
<th>National Treatment Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fiji</td>
<td>1) Tourism and travel-related services</td>
<td>1) no horizontal commitments</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2) sectoral commitments</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- ‘none’ for Modes 1, 2 &amp; 3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Mode 4: foreign managers/skilled employees required to provide locals with on-the-job training</td>
</tr>
</tbody>
</table>

\[^{378}\] The three newly acceded PICs (Samoa, Tonga and Vanuatu) may have further relevant commitments beyond this schedule in their respective protocols of accession.
<table>
<thead>
<tr>
<th>Tonga</th>
<th></th>
<th>Vanuatu</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Business services</td>
<td>1) horizontal commitments</td>
<td>- ‘none’ for Modes 1, 2 &amp; 3 for all sectors included in its schedule; unbound with regard to subsidies</td>
</tr>
<tr>
<td>2) Communication services</td>
<td>- Mode 3: government approval is required for foreign investors to invest in Tonga; the Tongan Constitution prohibits the sales of land to all foreigners. Foreigners can only attain land through leasing, with the right to lease land for up to 99 years as well as sub-lease property</td>
<td></td>
</tr>
<tr>
<td>4) Distribution services</td>
<td>2) sectoral commitments</td>
<td>- none for Modes 1, 2 &amp; 3 (except on mode 3 in commission agents services; wholesale trade, retailing; cinema theatre operation; and maritime transport services)</td>
</tr>
<tr>
<td>5) Education services</td>
<td>- Mode 4: unbound except as indicated under horizontal commitments</td>
<td></td>
</tr>
<tr>
<td>6) Environmental services</td>
<td>2) sectoral commitments</td>
<td>- Mode 4: unbound except as indicated under horizontal commitments</td>
</tr>
<tr>
<td>7) Financial services</td>
<td>- Mode 4: unbound except for measures listed under Market Access; subsidies available to natural persons may be limited to Tongan citizens</td>
<td></td>
</tr>
<tr>
<td>8) Health related and social services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9) Tourism and travel-related services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10) Recreational, cultural and sporting services</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Samoa</th>
<th>1) Business services</th>
<th>1) <strong>horizontal commitments</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2) Communication services</td>
<td>- Modes 1,2 &amp;3: unbound for subsidies</td>
</tr>
<tr>
<td></td>
<td>3) Construction and related engineering</td>
<td>- Mode 3: non-Samoan natural and juridical persons may lease but not own land. Land may be leased for up to 30 years renewable once in the case of land leased or licensed for industrial purposes or a hotel and 20 years renewable once in the other cases. Foreign service suppliers may be required to provide training to local employees.</td>
</tr>
<tr>
<td></td>
<td>services</td>
<td>- Mode 4: unbound except for the measures affecting the entry and temporary stay of natural persons referred to in the market access column.</td>
</tr>
<tr>
<td></td>
<td>4) Distribution services</td>
<td>2) <strong>sectoral commitments</strong></td>
</tr>
<tr>
<td></td>
<td>5) Education services</td>
<td>- none for Modes 1, 2 &amp; 3 for all sub-sectors, except (modes 1&amp;2 in commission agents’ services; life and non-life insurance; Mode 1 for tour operators; and cinema theatre operation services). Unbound for maritime transport services in all four Modes.</td>
</tr>
<tr>
<td></td>
<td>6) Environmental services</td>
<td>- Mode 4: unbound, except as provided in the horizontal section</td>
</tr>
<tr>
<td></td>
<td>7) Financial services</td>
<td></td>
</tr>
<tr>
<td></td>
<td>8) Tourism and travel-related services</td>
<td></td>
</tr>
<tr>
<td></td>
<td>9) Recreational, cultural and sporting services</td>
<td></td>
</tr>
<tr>
<td></td>
<td>10) Transport services</td>
<td></td>
</tr>
</tbody>
</table>

Source: summary compiled from the Schedules of Specific Commitments of Fiji, Tonga, Vanuatu and Samoa

The respective GATS Schedules of Specific Commitments of Tonga, Samoa and Vanuatu have all included a horizontal reservation relating to limitations of foreign ownership of land that applies across all services. Both Tonga and Vanuatu have horizontal reservations for their foreign investment laws and vetting regimes. However, none of the three PICs have horizontal reservations on the right to apply restrictions to future privatisation of state assets. This omission makes it difficult for future Pacific governments to restrict the privatisation of state assets or state-owned enterprises inconsistent with national treatment requirement, even though it might be in the public interest to keep some state assets such as wharfs and airports to ensure national security, unless they can find a way to protect them through their foreign investment law or approval regime.

From the above table, it is clear that the four PICs (with a few specific limitations) have all made national treatment commitments on modes 1, 2 and 3 but opted to keep mode 4 on the movement of natural persons largely unbound. Fiji entered a broad limitation in market access for its only sector, tourism, which says ‘normal
government approval and registration required for foreign investors’. Under Article XX.2 that entry would also apply to the national treatment column because the limitations are discriminatory. The problem with interpreting this provision is discussed further in chapter 5.

4.3.2.6 Domestic Regulation: GATS Article VI

As acknowledged by Kaufmann et al., proper regulations and regulatory institutions are necessary for successful economic development. Regulations are usually designed by governments to fix market failures, such as those typically associated with externalities, information inadequacies, or imperfect competition and misuse of market power, in order to ensure beneficial outcomes for society at large. Governments are driven by public interest considerations, among other objectives. There are many good reasons why services markets need regulation, including the need for protecting consumers to tackle fraud and tax evasion, or to make services available and affordable to all citizens on equitable conditions. The motivation behind domestic regulation is normally the desire to accomplish non-economic, social, environmental or other developmental goals.

Article VI of the GATS contains obligations concerning domestic regulation and plays a central role in the liberalisation of trade in services. As noted by Mattoo and Sauvé, Article VI can be seen as the third complementary dimension of a three-pronged approach to effective access to service markets (coupled with Article XVI on market access and Article XVII on national treatment). Article VI acknowledges that regulations may be unnecessarily burdensome and by implication may have chilling effects on foreign service suppliers. The Article assumes that cumbersome licensing and qualification procedures, non-transparent criteria, burdensome and redundant technical requirements, and administrative ‘red-tape’ can impede trade, even if this was not their intention.

Article VI introduces a distinction between two types of domestic regulatory measures. ‘Measures of general application’ affecting trade in services are subjected to provisions of Article VI:1 to 3. A particular set of measures relating to qualification requirements and procedures, technical standards and licensing requirements are restricted by Article VI:5, pending agreement on further disciplines on these measures through negotiations mandated in Article VI:4.

On measures of general application affecting trade in services, Article VI:1 states that ‘in sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner’ (emphasis added). This obligation is the counterpart of Article X:3 of the GATT 1994. In Argentina-Hides and Leather, the Panel considered a broadly equivalent provision in GATT Article X:3 (a) and found that ‘reasonable’, ‘objective’ and ‘impartial’ are legally distinct standards. In order to comply with obligations under Article VI:1, a Member must satisfy each of these standards cumulatively in sectors where it has made specific commitments. For example, a foreign hotelier could establish a violation of Article VI:1 if the investor could demonstrate that Fiji adopts a measure of general application affecting the tourism sector, such as the requirement for a sustainability impact assessment, that is administered in an ‘unreasonable’ way, even if the administration of the same measure is considered ‘objective’ and ‘impartial’.

It should be noted that Article VI:1 disciplines the administration of regulation rather than regulation itself. Measures of general application are also subjected to the provisions of Article VI:2 and 3, providing for the availability of procedures and ‘prompt review of, and where justified, appropriate remedies for, administrative

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382 The concept of ‘measures of general application’ is not defined in the GATS. However, the WTO adjudicating bodies have interpreted the meaning of ‘measures of general application’ in a number of cases pertaining to Article X of the GATT. See for example, United States-Restrictions on Imports of Cotton and Man-made Fibre Underwear (US-Underwear), WT/DS24/R, para 7.65; and Report of the Appellate Body, US-Underwear, WT/DS24/AB/R, adopted 25 February 1997, at 21.


decisions affecting trade in services.\footnote{385} Also, when authorisation is required to supply a service, Article VI:3 requires that the status of the application to be informed to the services supplier on a reasonable timeframe, and adequately respond, without undue delay, to inquiries by the applicant.\footnote{386}

Article VI does not give any guidance on how to determine which domestic regulation measures should be considered as measures of general application subjected to these provisions. Subjecting all measures covered by the GATS to the requirements of Article VI.1 in sectors where specific commitments are undertaken will impose an extremely high administrative and procedural burden on the PICs which have limited human and capital resources.

In addition to the procedural obligations in Article VI:1 to VI:3, there is a substantive obligation on WTO Members in Article VI:4 to develop disciplines to ensure that qualification and licensing requirements and procedures and the application of technical standards to services and service suppliers does not result in restrictions on trade in services. The paragraph reads:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies, it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. (emphasis added)

\footnote{385} Article VI:2 (a) of the GATS.
\footnote{386} Article VI:3 of the GATS.
These criteria amount to an indicative list of characteristics that the new rules should satisfy as a minimum.

This work has been undertaken by the Working Party on Domestic Regulation (WPDR) – a subsidiary body created in 1999 by the Council for Trade in Services to conduct these negotiations.\textsuperscript{387} The Work Programme on WPDR negotiations remains a major challenge for developing countries, many of whom have both offensive and defensive interests. The proposed disciplines on licensing requirements, licensing procedures, qualification requirements, qualification procedures, and technical standards could help countries, including developing countries, in advancing their offensive interests to some degree.

As noted by the South Centre,\textsuperscript{388} market access in Mode 4 is limited by non-transparent qualification requirements. Mode 4 is potentially relevant for the PICs in remittance areas like teaching and healthcare. But the proposed disciplines would only apply to sectors in which commitments have been made and no developed countries have made commitments in Mode 4 that are of any interest to PICs. By contrast, in the tourism sector, the big chains will bring their own people to work in the host country under Mode 4. On Mode 3, arbitrary or burdensome licensing requirements for companies could also make it difficult for suppliers from developing countries to actually operate in overseas markets, despite scheduled market openings in those markets, especially when commitments are not in areas of positive interest for them.

At the same time, most developing countries particularly the PICs are defensive when it comes to services trade. Apart from tourism and mode 4, most PICs import more services than they export. For the Pacific WTO Members which have bound at the WTO certain services sectors and modes of supply, the disciplines being negotiated under Article VI:4 will apply to all those sectors and modes. These disciplines stipulate that the PICs’ measures relating to qualification, licensing and technical standards should be ‘pre-established’, based on ‘objective and transparent criteria’

\textsuperscript{387} Progress in the WPDR on the negotiations of disciplines relating to qualifications, licensing and technical standards has been very slow. See, \textit{Disciplines on Domestic Regulation Pursuant to GATS Article VI-4, Chairman’s Progress Report}, WTO Doc. S/WPDR/W/45 (14 April 2011).

that relate to matters such as competence and ability to supply the service, and ‘relevant’ to the supply of the services.\textsuperscript{389} Importantly, the measures must not be any more burdensome than necessary to ensure the quality of the service, which seems to exclude other social and cultural considerations unless quality is given a subjective interpretation and read very broadly. In addition, the measures must not constitute ‘unnecessary’ barriers to trade in services. Cumulatively, these disciplines severely restrict the regulatory choices governments can make, and screen out many considerations that are essential to a RTD approach.

The proposed disciplines under Article VI:4 would be especially important for the PICs given the significance of tourism to their economies. Technical standards in the tourism context apply to measures such as eco-tourism standards, pollution and waste production levels from hotels and remediation obligations (for example, polluter pays rules), opening hours for shops and markets and so on. Licensing on the other hand might include fees (often an important revenue earner for many PICs), requirements to provide services to local users in remote areas, and standards that must be met before the licence is granted.

Pending conclusion of the Article VI:4 negotiations, similar disciplines operate in a limited form under Article VI:5, which states that ‘in sectors in which a Member has undertaken specific commitments … the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made’.

As Krajewski pointed out, by choosing the term ‘discipline’ the GATS drafters intended such rules to restrict domestic regulatory autonomy.\textsuperscript{390} The removal of regulatory barriers to foreign services and service suppliers may be quite harmful and onerous for the PICs given their resource constraints (both in human and finance terms), and the low level of technological development and sophistication of

\textsuperscript{389} Ibid.
regulatory bodies. The push for strict disciplines on licensing procedures in particular ignores the challenges faced by regulators of small developing countries and LDCs. Many Pacific governments often lack the capacity to ensure streamlined procedures and quick responses to applications. Under such resource and technological constraints, even when a streamlined procedure on licensing in a Pacific country is possible, it may imply a less stringent examination process of the applications. That may subsequently lead to undesirable outcomes, such as licences granted without the credentials being properly established.

In sum, for those sectors where Fiji (tourism only), Tonga, Vanuatu and Samoa have taken commitments, these disciplines will bind their regulatory freedom and are likely to make it more difficult to introduce or formulate their regulations according to their national circumstances, resource constraints, and the need to increase the local supply of services. Foreign companies seeking greater market access could, through their governments, challenge the measures and regulations of the WTO’s Pacific Members which are deemed to be inconsistent with Article VI. Since services regulation affects not only the economy, but also people’s well-being, access to essential services, societal preferences and cultural sensitivities, the potential effect of these disciplines is far-reaching for those PICs which liberalise their services sectors under the GATS.

4.6 A RTD Perspective on Issues Arising from the GATS

A RTD approach to services liberalisation, necessarily reflects a human rights perspective. According to the UN Economic and Social Council (ECOSOC), the evolving nature of the services sectors and the unforeseen consequences of liberalisation generally have a disproportionate effect on the poor, disadvantaged and

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391 Australia and New Zealand have been strong advocates for a stricter version of the domestic regulation disciplines and are likely to pursue that approach under PACER Plus, with a resultant effect of further constraining the policy space of the PICs. Their position was obvious in the leaked Trade in Services Agreement Annex on Domestic Regulation of the Trans-Pacific Partnership Agreement. Author has a copy of the preliminary analysis of this leaked document.
the vulnerable members of society. Since the RTD approach places the human being as centre of development, it is important to understand the effects of trade liberalization on human rights.

In her report on the liberalisation of trade in services and human rights in 2002, the High Commissioner for Human Rights pointed out that the legal basis for adopting rights-based approaches to trade liberalisation was clear. All WTO Members have ratified at least one human rights instrument and thus undertaken obligations under human rights law. In other words, WTO Members have concurrent human rights obligations under international law and should therefore take into account the promotion and protection of human rights during trade negotiations and the implementation of international rules pertaining to trade liberalisation.

A human rights perspective on trade in services requires a careful balancing of the states’ rights to regulate for the public interest against the commercial interests of the business sector and benefits to the economy. According to Harrison, responsible states should undertake a human rights impact assessment prior to undertaking commitments in a trade agreement to liberalise any service sector. Such human rights impact assessment seeks to assess how the legal obligations of that agreement will affect the human rights of people in the countries concerned, negatively or positively. This assessment should be based on an explicit evaluation of the impact

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394 Ibid.

395 As a treaty, the GATS has to be interpreted in accordance with the Vienna Convention on the Law of Treaties (1155 U.N.T.S. 331). The Convention refers, inter alia, to the principle of good faith and to other rules of international law applicable between the parties, as being relevant to treaty interpretation (art 31(1) and (3)(c)). The relationship between WTO law and human rights law and other areas of international law is contested. Mareau has argued that WTO law must be interpreted in a manner which is consistent with human rights law. See, Mareau, G., The WTO Dispute Settlement and Human Rights, 13 European Journal of International Law 753 (2002). On the relationship between WTO law and general international law, see further Pauwelyn, J., Conflict of Norms in Public International Law - How WTO Law Relates to Other Rules of International Law (Cambridge: The Press Syndicate of the University of Cambridge, 2003), also Pauwelyn, J., Cottier, T. and Burgi, E., (eds.), Human Rights and International Trade (Oxford: Oxford University Press, 2005); and between WTO law and environmental law, see, Young, M., 56 International and Comparative Law Quarterly, (2007), pp 209-211.


397 Ibid.
of trade law obligations on relevant, codified human rights obligations that apply to the actors (states and inter-governmental organisations) in question.  

For any such assessment, it is important to understand whether the GATS architecture affords sufficient flexibility to states to deviate from their commitments under the general exceptions provisions, and seek to modify or withdraw commitments to service liberalisation where a human rights impact assessment indicates that it would be necessary in order to promote and protect human rights.

### 4.6.1 The Right to Regulate

The complex regime put in place by the GATS has tended to put an overriding emphasis on increasing market access and trade flows without providing adequate safeguards and legal protection to balance the development costs and benefits. Nonetheless, the importance of regulatory flexibility to achieving development goals has been recognised in other settings and should also be reflected whenever new disciplines are integrated into GATS. The Sao-Paulo Consensus during the 11th Session of the UNCTAD in 2004 highlighted that countries should be mindful of their development goals and objectives. Countries were urged to take into account the appropriate balance between national policy space and international disciplines and commitments in trade, investment and industrial development. The Sao-Paulo Consensus defines *policy space* as ‘the scope for domestic policies, especially in the areas of trade, investment, and industrial development … often framed by international disciplines, commitments, and global market considerations’.

A RTD approach to services liberalisation stresses the role of state in the process of economic liberalisation. It holds the state party to a trade treaty responsible not only as a negotiator of trade rules and setter of trade policy, but also as the duty bearer for

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398 Ibid
399 The effectiveness of the safeguards and exceptions provisions of the GATS vis-à-vis the provision of legal protection to balance the development costs and benefits will be briefly discussed later in this Chapter.
401 Ibid. pp.2-3.
human rights. In order for the state party to honour its obligations to respect, protect and fulfill human rights, it must have the right to regulate to ensure that private business entities or individuals, including transnational corporations over which the party state exercises jurisdiction, behave in a responsible manner.

In human rights terms, as discussed in chapter 3, the Declaration on the Right to Development makes it clear that the state has not only the right but also the duty to regulate any services sector with an objective to benefit the entire population and all individuals. In this context, the Pacific governments are obliged to adequately regulate a services sector, which is often left unregulated when privatised and the government monopoly removed, to avoid the possible risk of having human rights and broad development objectives subordinated to commercial interests. As a 2005 review of the electricity and telecommunication sectors in Vanuatu revealed, service provision by a dominant supplier in a small market is likely to result in poor-quality, high-cost services in the absence of an effective regulatory regime.

The concern that trade disciplines on domestic regulation might result in a loss of regulatory freedom for Members to pursue non-trade objectives seems to be a principal reason for the failure of negotiations mandated under Article VI.4. Such disciplines are often perceived to extend far beyond the traditional trade concern of non-discrimination to the fundamental societal question of the balance between regulation and market freedom.

According to Gamberale and Mattoo, the ‘economic case’ for regulation in services arises essentially from market failure attributable to three kinds of problems: natural monopoly or oligopoly-like network services (eg. infrastructure or distribution network); asymmetric information (eg. knowledge-based services); and externalities

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404 Article 2 (3) of the Declaration on the Right to Development
(last accessed 5 August 2015).
(eg. transport or tourism). For example, in the Pacific, most PICs rely on one monopolistic supplier in water or electricity. In the absence of proper regulation, these monopolies may concentrate the provision of services in urban centres where residents are relatively more affluent than their rural citizens. State interventions, either through law or the provision of subsidies, are required to ensure that the rural communities and those living in remote islands are not excluded from the enjoyment of such basic utilities.

On the other hand, the ‘social case’ for regulation is based on the aspiration of achieving equity, such as redistribution of income, consumer protection or access to universal services. Indeed, governments might regulate the usage of fresh water by hotels if their excessive consumption of the natural resource would lead to shortages of water supply to surrounding rural communities or irresponsible discharge of waste causes environmental degradation.

Given these considerations, regulation can be considered a justified instrument of public policy and a necessary tool for achieving desirable social, cultural and environmental objectives and meeting the state’s legal obligations. For example, the 2014 Constitution of the Republic of Fiji guarantees its citizens the right to adequate food and water, as well as environmental rights.

As far as GATS is concerned, the right of Members to regulate, and to introduce new regulations on the supply of services is explicitly recognised by the fourth recital of the Preamble. This right, however, is narrowly interpreted. In *US-Gambling*, the Panel held the view that while ‘Members maintain the sovereign right to regulate within the parameters of Article VI of the GATS … but this sovereignty ends whenever rights of other Members under the GATS are impaired’. From a development perspective, any eventual disciplines to be integrated into GATS should fully incorporate the concerns of developing countries and provide considerable

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407 Ibid.


flexibility both in terms of application across the membership, as well as the obligations undertaken by Members.

4.4.2 GATS Exceptions and the Flexibility to Modify or Withdraw Existing Commitments

Services liberalisation from a human rights perspective requires the government to enjoy a reasonable degree of flexibility with respect to modifying or withdrawing GATS commitments where such commitments threaten the enjoyment of human rights. Article XXI of the GATS allows a country to modify or withdraw a commitment after three years have elapsed from the date the commitment came into force, but it must enter into consultations for compensatory liberalisation with any country affected by the modification or withdrawal if requested to do so. However, the requirement to provide compensatory liberalisation, even when genuine technical mistakes are made in the schedules, could reinforce the status quo or exacerbate human rights problems. The problem is particularly serious for the accession PICs because they have already committed to liberalise the majority of services sectors.

According to the GATS, if a full commitment is made in any particular service sector there are only three ways in which a country can modify, withdraw or deviate from a commitment if it finds that to be necessary.410

First, a Member can modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of Article XXI of the GATS.411 A Member wishing to do so must first notify its intention to the Council of Trade in Services. If no Member requests consultations within three months, the modifying Member can implement the intended change. However, if so requested by another Member it must enter into negotiations with that Member with a view to reaching agreement on any necessary compensatory adjustment. This usually means replacing the commitment withdrawn with another market opening that is agreed to be of equivalent value.

411 Article XXI:1 (a) of the GATS.
If no agreement on compensatory adjustment can be reached between the modifying Member and any affected Members, Article XXI:3 (a) provides that the latter may refer the matter to arbitration. If arbitration is requested, the modifying Member may not make those changes until it has made compensatory adjustments in conformity with the findings of the arbitration. In the event that the modifying Member does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may be authorised to modify or withdraw substantially equivalent benefits in conformity with those findings. In other words, trade sanctions can apply.

The limited scope for withdrawal of commitments and the expected high compensatory adjustments or compensatory new commitments such actions entail demonstrates the need for initial caution in opening up any sector under the GATS, especially when the implications are not carefully analysed. This caution is particularly crucial for the Pacific island economies because making commitments to liberalise services under the GATS will ultimately constrain the state’s flexibility and policy space to advance social, environmental and developmental goals in accordance with its national circumstances.

Second, the General Exceptions in Article XIV of the GATS provides for exceptions from the obligations and commitments under the GATS for any measures of a Member that are ‘necessary’ to protect or maintain certain specified public policy goals. The provisions of Article XIV of the GATS that are particularly relevant to this thesis provide that:

Subject to the requirement that such measures are not applied in a

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412 Article XXI:4 (a) of the GATS.
413 Article XXI:4 (b) of the GATS.
414 The US-Gambling dispute is a classic case where it negotiated an outcome with the EU but not with Antigua and Barbuda. As a result, Antigua has submitted a request to level concessions against the US - to offset the economic effect of the continuing failure of the US to comply with the rulings and allow Antiguan operators’ access to American consumers. Antigua has requested approval to achieve its concessions by suspending up to $3.4 billion annually in intellectual property rights with respect to American copyrighted and trademarked products under the WTO's intellectual property rights agreement, or “TRIPS”. The case remains unsolved at the time of writing. For a brief analysis of Antigua’s action, see, for example, Drake, E., Antigua and US Dispute Proposed Withdrawal of Intellectual Property Rights Protections as Authorised WTO Retaliation: Implications for the WTO Dispute Settlement System, Stewart and Stewart, 7 March 2013. Available [http://www.stewartlaw.com/article/ViewArticle/8446](http://www.stewartlaw.com/article/ViewArticle/8446) (accessed 15 August 2015).
manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

a) necessary to protect public morals or to maintain public order;

b) necessary to protect human, animal or plant life or health;

c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(1) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; …

In any dispute brought against a Member relating to obligations or specific commitments under the GATS, once the measure has been found to be prima facie inconsistent with those obligations, the Member may plead one of the exceptions contained in Article XIV in its defence. In order to claim the benefit of this defence, the defending party must meet the requirements of a three step test. It must first demonstrate the measure can provisionally be justified under one of the specific exceptions under paragraphs (a) to (e). That requires it to fall within the policy objective. Second, the measure must shown to be ‘necessary’ to achieve that objective. It is not enough to establish a connection between the measure and the objective. The importance of the objective is weighed against the contribution the measure makes to achieving it and the extent to which it restricts international trade. The complaining party can still claim an alternative measure that would have been less trade restrictive, which would be reasonably available to the Member, and would


have provided the level of protection it wanted to achieve. The defending Member then needs to show there were no such reasonably available alternatives.\textsuperscript{417}

If a measure meets those requirements and is provisionally justified, the defending WTO Member must still satisfy the requirements of the chapeau of article XIV, that is, the final stage of the three-step test. According to the chapeau, the measure in question must not ‘constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services’.\textsuperscript{418} Satisfying all elements of the general exception in Article XIV of the GATS, or its equivalent Article XX of the GATT, is extremely difficult. One study of its use showed the exception has succeeded only once in the forty four times it has been argued under the old GATT or in a WTO dispute.\textsuperscript{419}

The practical difficulty of satisfying this test is shown by a hypothetical example. Fiji might seek to rely on the public order exception should it face major riots or a threatened coup as a backlash against foreign investments. The government might consider it needs to adopt a measure in relation to hotels that breaches its market access obligations (for example closing hotels in certain areas or restricting the number of tourists they could accommodate, which would adversely affect another WTO Member’s interests) or its national treatment obligations (for example, imposing restrictions only on foreign owned hotels, or hotels owned by specific countries), or subjecting hotel operators to new technical requirements that were considered unduly burdensome, such as security arrangements or insurance, or administered in a biased manner.

The criteria for justifying the ‘protection of public order’, set out in footnote 5 to Article XIV (a), states that ‘the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society’. What constitutes a ‘genuine and sufficiently serious threat’ is unclear, and is

\textsuperscript{417}Ayres, G. and Mitchell, A. ‘General and Security Exceptions under the GATT and the GATS’, 2011, pp,16-17, reflecting on the Appellate Body reasoning in Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS32/AB/R.

\textsuperscript{418}See, for example, WTO, Appellate Body Report, United States – Gasoline, WT/DS2/AB/R, adopted 20 May 1996.

\textsuperscript{419}‘Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception’, Public Citizen, Washington DC, April 2015.
not self-defining. The Fiji government might argue that it had to take such action because of the nature of the threat. If that were accepted, Fiji would then have to show the measure was necessary to achieve the policy objective, by establishing a clear nexus between the objective and the measure adopted, and counter any challenge from the complaining country that there were other reasonably available and effective alternatives.

If Fiji satisfied the first two limbs of the exception, its public order measure would then be tested against the requirements of the chapeau. In other words, Fiji would have to show that the measure is ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services’.

*Third*, under the WTO Agreement, governments could seek a temporary waiver from any obligation, subject to unanimous approval by all Members. The process of getting a WTO waiver is very difficult and the result is time bound. For example, on 29 February 2000, the day on which the Lomé waiver expired, the EC requested a waiver for preferences under the Cotonou Agreement.\(^{420}\) The waiver was granted by the 2001 Doha Minister Conference, which permitted the EC to continue providing preferential tariff treatment for products originating in ACP states till 31 December 2007.\(^{421}\)

**4.4.3 The Ability to Control Cross Border Movement of Capital**

The PICs are generally characterised by low levels of diversification in production and exports, and are highly vulnerable to adverse external price shocks.\(^ {422}\) Consequently, for the PICs, adverse terms-of-trade shocks can lead to a substantial deterioration in their current account balances, which in turn increases national indebtedness. However, footnote 8 of Article XVI requires any Member that makes a

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\(^{420}\) WTO, *Request for a WTO Waiver from the EC and from Tanzania and Jamaica on behalf of the ACP Countries, New ACP-EC Partnership Agreement*, 29 February 2000, G/C/W/187 (2 March 2000).


market access commitment for mode 1 to allow all unrestricted cross-border movements of capital where that is an essential part of the service, and inflows of capital relates to a service committed in mode 3. Under Article XI the Member cannot restrict inflows and outflows of payments for current transactions related to its services commitments.

The Article XII on ‘restrictions to safeguard the balance of payments’ is therefore an important provision which the Pacific WTO Members may wish to invoke as a defence to safeguard their foreign reserves. This states that ‘in the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services for transactions related to such commitment’. 423 However, this provision comes with stringent conditions, which include the need to be non-discriminatory; be consistent with obligations under the Articles of Agreement of the IMF on balance-of-payments; avoid unnecessary damage to the commercial, financial and economic interests of other Parties; be temporary and not be adopted to protect any particular service sector. 424

Another possible way to control cross-border movement of capital is to invoke Article XIV(c)(i) under the ‘general exceptions’ provision for the purpose of preventing deceptive and fraudulent practices. In order to use this as a legitimate defence, WTO Members like Fiji would have to satisfy the difficult three-step test, described above.

4.7 Conclusion

The liberalisation of trade in services presents opportunities as well as challenges to the Pacific island countries. While liberalisation offers opportunities for economic growth and development, it also poses challenges to the Pacific governments to ensure the expansion of trade in services does not come at the expense of the progressive realisation of other development objectives.

The textual analysis of some key provisions of the GATS and WTO case law in this chapter illustrates the neoliberal origin of the GATS architecture, based on market
integration and trade expansion assumptions, which neglects the important role of government in the context of development. As demonstrated by the accession schedules of Tonga, Samoa and Vanuatu and Fiji, it is important to be aware of the impacts of using the GATS as a platform for services liberalisation, particularly the loss of policy space and flexibility.

In the context of the GATS, national regulatory autonomy and the need for states to respect, protect and fulfil their human rights are subsumed to the imperative of commercial interests. Adopting a RTD approach to the GATS, with due deference to national regulatory autonomy as advocated by the UN Human Rights Commission, would better enable states to reconcile their obligations under human rights and international trade law.

The limitations of the GATS and WTO-compatible regional FTAs to assist the PICs achieve sustainable tourism development is discussed in the next chapter. The chapter argues why it is impossible to use the present GATS and WTO-compatible FTAs, as legal frameworks, to achieve sustainable tourism given the cross-sectional nature of tourism activities which connect virtually the entire services sector.
CHAPTER 5: SUSTAINABLE TOURISM, GATS AND THE PACIFIC

5.1 Introduction

This chapter focuses on the problematic relationship between sustainable tourism, the GATS and foreign direct investment (FDI) in the Pacific to illustrate of the tensions of the Second Moment and the potential for transition to the Third.

Among internationally traded services, tourism is an area of special interest to the Pacific island countries. This is because tourism is increasingly viewed in the Pacific as an engine of growth and an important source of foreign exchange earnings that contributes substantially to poverty alleviation, employment and capital investment in the economy.425 A Right to Development approach to trade in tourism services would require Pacific states, and their business corporations as they seek to maximise the commercial opportunities of trade in tourism services, to recognise that most tourism-related services also perform social functions. Any services policy or efforts to commit to services liberalisation through the multilateral trading system, which gives priority to commercial considerations over social and development objectives, may effectively constrain the ability of states to pursue sustainable tourism and adopt internationally accepted guiding principles for tourism, such as those advanced by the United Nations World Tourism Organisation (UNWTO).426

The chapter consists of five sections. The first discusses the concept of sustainable tourism and the UNWTO guidelines and principles on sustainable tourism. Second, the chapter highlights the importance of tourism to the PICs. Third, it identifies the development deficit from tourism and illustrates this by analysing the Fiji Tourism Development Plan 2007-12. The chapter then explains the relationship between GATS and sustainable tourism with particular focus on Mode3. With referene to the GATS tourism commitments of the three newly acceded PICs (Samoa, Tonga and Vanuatu),

426 The United Nations World Tourism Organisation (UNWTO) is the UN’s agency responsible for the promotion of responsible, sustainable and universally accessible tourism. Its membership includes 156 countries, 6 territories and over 400 affiliate members representing the private sector, educational institutions, tourism associations and local tourism authorities. See, www2.unwto.org for more information.
as well as Fiji. After assessing the possible implications of these PICs’ GATS commitments, the chapter considers whether FDI liberalisation under Mode 3 can contribute to achieving development goals in the PICs.

5.2 The Concept of ‘Sustainable Tourism’

As a subfield of sustainable development, ‘sustainable tourism’ has an impressive literature.⁴²⁷ The UN’s specialist agency for tourism, the UNWTO, has made many Statements and Declarations relating to ‘sustainable tourism’. These include the *Manila Declaration on World Tourism 1980*,⁴²⁸ the *Lanzarote Charter for Sustainable Tourism 1995*⁴²⁹ (jointly with the UN Environmental Programme, UN Educational, Scientific and Cultural Organisation (UNESCO) and the EU), and the *Djerba Declaration on Tourism and Climate Change 2003*.⁴³⁰ According to the UNWTO: ⁴³¹

> Sustainability principles refer to the environmental, economic and socio-cultural aspects of tourism development, and a suitable balance must be established between these three dimensions to guarantee its long-term sustainability.

It argues that:

> Sustainable tourism development guidelines and management practices are applicable to all forms of tourism in all types of destinations, including mass tourism and the various niche tourism segments.

Thus, it says sustainable tourism should:

i) Make optimal use of environmental resources that constitute a key element in tourism development, maintaining essential ecological processes and helping to conserve natural heritage and biodiversity;

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⁴²⁷ In its 1999 annotated bibliography, the UNWTO reviewed about 100 books and more than 250 articles on sustainable tourism.
⁴³¹ Cited from the UNWTO’s official website, [www2.unwto.org](http://www2.unwto.org) (last accessed 8 May 2015).
ii) Respect the socio-cultural authenticity of host communities, conserve their built and living cultural heritage and traditional values, and contribute to inter-cultural understanding and tolerance;

iii) Ensure viable, long-term economic operations, providing socio-economic benefits to all stakeholders that are fairly distributed, including stable employment and income-earning opportunities and social services to host communities, and contributing to poverty alleviation;

iv) Sustainable tourism development requires the informed participation of all relevant stakeholders, as well as strong political leadership to ensure wide participation and consensus building. Achieving sustainable tourism is a continuous process and it requires constant monitoring of impacts, introducing the necessary preventive and/or corrective measures whenever necessary; and

v) Sustainable tourism should also maintain a high level of tourist satisfaction and ensure a meaningful experience to the tourists, raising their awareness about sustainability issues and promoting sustainable tourism practices amongst them.

Cernat and Gourdon consider this definition is sufficiently flexible to allow many approaches and interpretations of the concept. They note the UNWTO’s annotated bibliography includes under the catchphrase of ‘sustainable development’ issues relating to rural development, alternative tourism, wildlife, indigenous people, and natural parks. Such issues are complex, so it is important to emphasise that the essence of sustainable tourism is about the environment, socio-cultural issues and the economy.

The UNWTO has over the years also launched many pro-poor tourism initiatives and

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433 Ibid.
developed some important guidelines for sustainable tourism.\textsuperscript{434} For instance, the *Global Code of Ethics for Tourism*, adopted by the UNWTO in 1999 and endorsed by the UN General Assembly in 2001, provides a number of principles and rules for achieving sustainable tourism.\textsuperscript{435} Moreover, the UNWTO has published many reports on using tourism as an instrument for poverty alleviation. One of its earliest reports *Tourism and Poverty Alleviation: Recommendations and Actions (2004)* recommends that in order for tourism to help the poor, the following guidelines and principles must be taken into consideration:\textsuperscript{436}

- jobs should be created particularly for the local and poor population;
- goods and services should to a large extent be purchased locally in order to increase the value added in tourism;
- special consideration must be given to establishing small and medium sized enterprises as well as community-run enterprises;
- tax systems should be designed in such a way as to benefit the poor;
- tax incentives meant to lure foreign investors must be handled with care;
- investment in infrastructure must benefit the poor;
- the local population must have a right to information and participation in decision-making on tourism projects;
- legislation, such as property rights for women or those relating to the protection of the environment, must be strengthened.

That report highlights the importance of legislation (including employment legislation and environmental regulation) and the treatment of taxes and investment conditions to the benefit of the local communities, as preconditions for the equitable distribution of the benefits derived from tourism. It also places the human person, particularly the poor, as the central subject of tourism development. Most of these guidelines and

\textsuperscript{434} For example, the Tourism World Organisation’s Sustainable Tourism - Eliminating Poverty Initiative (ST-EP), which was launched in 2002, promotes poverty alleviation through the provision of assistance to sustainable development projects.


\textsuperscript{436} The publication, which was based on a detailed analysis of tourism policies and frameworks, outlined a series of practical approaches and guidelines to be applied by tourism practitioners to ensure that the benefits of tourism are delivered directly and indirectly to the poor. See, World Tourism Organisation (2004), *Tourism and Poverty Alleviation, Recommendations for Action*. Available [http://www.e-unwto.org/action/showPublications?category=40000028](http://www.e-unwto.org/action/showPublications?category=40000028) (accessed 3 August 2015)
principles require the state to play an active role, which coincides with the role of government under Article 2 of the Declaration on the RTD that ‘the state has the right and duty to formulate development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom’. 437

Consistent with the UNWTO’s definition, niche tourism segments such as ecotourism are increasingly viewed as optimal ways of combining economic development with environmental sustainability. A World Ecotourism Summit was held in Quebec City, Canada in May 2002, the principal event to mark 2002 as the International Year of Ecotourism. 438 The main output from the Summit was the Quebec Declaration on Ecotourism. 439 This was taken forward to the World Summit on Sustainable Development (WSSD) at Johannesburg in 2002. The WSSD resulted in two outcome documents: a Political Declaration that expressed commitments and direction for implementing sustainable development; 440 and a negotiated programme of action (the Plan of Implementation) that would guide government activities in pursuit of sustainable development, 441 including the development of community-based initiatives on sustainable tourism for the Small Island Developing Countries.

5.3 The Importance of Tourism for the Pacific Island Countries

The debate as to whether or not tourism is a tool for development in the Pacific has been articulated at length by Harrison. 442 He argued that, despite the gloss from politicians about the positive benefits of tourism to the economies of the PICs, in reality, transnational companies became main benefactors of tourism activities and left local companies, employees and populations with relatively little. He further asserted that the industry produces negative impacts on the family, religion and local

437 Article 2 (3) of the DRTD
tradition, as well as polluting the physical environment. The negative impacts of tourism are even acknowledged by the South Pacific Tourism Organisation (SPTO), a regional institution set up to promote Pacific tourism. The organisation recognises that if tourism is not managed properly, it can contribute to excessive demand for resources and unbalanced economic development, increase the incidence of crime, create social problems and cause the degradation of the natural and cultural environment of the Pacific islands.

The perceived economic benefits of tourism to the Pacific islands were typically summed up by Berger:

i) International tourism has been a principal source of foreign exchange earnings for many Pacific island countries. It also is one of few options for diversifying the economy and raising income levels in these countries:

ii) Tourism can contribute towards development, especially in remote areas that previously did not benefit from other types of economic development. This is particularly important since the majority of people facing extreme hardship and poverty live in rural areas.

iii) Tourism is generally labour intensive and lends itself to small-scale businesses. Since unemployment is often the principal social and economic challenge facing many developing countries, the development of this sector can greatly reduce the magnitude of this challenge.

iv) Finally, tourism often employs a high proportion of women and youth. Their employment, as well as those of other vulnerable members of society, could contribute toward achieving greater equality in these countries.

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To harness these anticipated benefits, Pacific governments are being urged by their major donor countries, business lobbyists, the Asian Development Bank, and other institutions to liberalise the tourism sector further. Liberalisation is expected to attract more tourists as well as investment that will provide the facilities to expand the sector’s capacity. As a result of the perceived benefits of tourism, some decision makers in the Pacific believe that making binding commitments under the GATS may represent a new pathway for tourism development and a means of attracting FDI in the tourism sector.

5.4 The Development Deficit from Tourism

Arguably, tourism could therefore be the most promising sector for the Pacific region. It could be the engine of economic growth and offer opportunities for local communities through pro-poor tourism initiatives. It could provide the vital linkages with other traditional sectors such as agriculture, manufacturing and fisheries. More tourist arrivals will inevitably increase the potential for additional demands for related goods and services throughout the economy, including transport, hotels and restaurants, financial services and telecommunication.

Yet, despite the Pacific’s commitments to tourism development, the benefits of tourism in many PICs have not been fairly distributed to all members of the society, often with the poorest excluded. Behind those smiling faces and beautiful

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446 In 2005, AusAid commissioned a series of nine background papers written for the Pacific 2020 project. One of these papers focused on tourism. It concluded that for many Pacific island countries, tourism can offer a sustainable alternative to logging, mining and other extractive industries. Also in 2005, the first EU/Pro-Invest ‘PROFIT in the Pacific’ forum was held in Fiji assist individuals and businesses seeking tourism investment opportunities in the PICs. See, Allcock, A, Pacific 2020 Background Paper: Tourism, (Canberra: AusAID, 2006), Australia.


450 For example, the first written report of a 2009 NZAID funded research project on tourism in the Pacific has found that the benefits of tourism in the Pacific islands did not reach the poorest group in society. See, Scheyven, R. & Russell, M, Tourism and Poverty Reduction in the South Pacific, (Wellington: Massey University, 2009).
landscapes that feature prominently on most promotional brochures are problems pertaining to environmental degradation, increased pressure on natural resources, land conflicts and threats to local cultures and traditions. It is a reminder that, in spite of the enormous potential of tourism, the sector up to now has not been managed in most of the PICs in a sustainable way.

More than a decade ago, critics like Williams observed the conventional wisdom that tourism is unambiguously good for development suffers from at least three blind spots.\textsuperscript{451} First, it does not recognise the ‘leakage’ problem through high imports of food and beverages causing loss of revenues abroad. Second, it does not adequately distinguish between the micro welfare effects of poverty alleviation and the macro effects of economic growth. Third, it ignores the social, gender equity and environmental impacts of tourism.

Williams further noted that the trend towards more privatisation and liberalisation of tourism services could dissipate the benefits of tourism for development, in spite of the widely acknowledged increase in demand for certain types of tourism activities in developing countries. She claimed that tourism development might not be in line with a social vision of sustainable tourism for at least eight important reasons.\textsuperscript{452}

Among these eight reasons are the problem of high leakage of tourist receipts offshore to pay for imported food and beverages, as well as the imports of machines and equipment; the asymmetry in the ownership of resources, which was skewed to the North and Northern based FDI that resulted in loss of foreign exchange, outflow of profits without local reinvestment, loss of enterprise control even where there might be local ownership involved; and insufficient attention to local human resource development and technology. Local small and medium enterprises (SMEs) faced difficulty when competing with the large well-financed and highly capital endowed foreign investors.

\textsuperscript{451} Williams, M, ‘The Political Economy of Tourism Liberalisation, Gender and the GATS’, Occasional Paper Series on Gender, Trade and Development (Center of Concern-Global Women’s Project and International Gender and Trade Network-Secretariat, April 2002).

\textsuperscript{452} Ibid.

There were also frequent problems around land, including land grabbing and land speculation. Another identified reason was tourism’s ecological/environmental effects. In addition, gender bias and inequities, such as trafficking and sex tourism, negatively affected women’s health and morbidity. Poverty and inequality in the distribution of benefits, and displacement of other sectors, such as a decline in domestic agriculture, were Williams’ final two reasons.

To use tourism as an effective tool for helping to address poverty, the 2005 Economic and Social Commission for Asia and the Pacific (ESCAP) report *Major Issues in Tourism Development in the Asia and Pacific Region* recommended a paradigm shift in tourism development. The report said national and local governments should work together with international organisations and academic institutions to support pro-poor initiatives, and encourage public-private partnership cooperation in tourism-related investments with a focus on poverty reduction. Public participation in the tourism planning and management process for pro-poor tourism initiatives needs to be encouraged, and access to tourism training opportunities improved for the poor. While partnership and networking with other supporting institutions, organisation and programmes are important to achieve pro-poor tourism objectives, other agencies and ministries outside the tourism sector should be encouraged to cooperate to reduce the risk of undue dependency on tourism.

### 5.4.1 Analysing the Fiji Tourism Development Plan 2007-16

The following discussion examines Fiji’s Tourism Development Plan 2007-16 (hereafter *The Tourism Plan*). It illustrates the development deficit from tourism liberalisation as a result of an approach to tourism development that puts commercial interests ahead of other societal considerations.

The Fiji government’s report to the WTO Trade Policy Review Body in 2009, while committing to liberalisation and whole-heartedly supporting private enterprise, expressed its apprehension about hasty liberalisation and asserted that ‘trade liberalisation should not be an end in itself, but a means to promote economic growth

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and poverty alleviation’.\(^{454}\) Despite the hesitation, however, the government maintained a market-based approach to trade in services, particularly in tourism. The Policy Review statement confirmed that Fiji’s Cabinet had endorsed the Tourism Development Plan (2007-16), a comprehensive guide to expanding the tourism industry.\(^{455}\) This development plan was to be supported by generous investment incentives and tax holidays.\(^{456}\) The following examination reveals its neoliberal approach towards developing the Fiji tourism industry.

The desire to prioritise economics over other societal concerns was clearly reflected in The Tourism Plan’s vision: to achieve a growth scenario of 1.1 million visitor arrivals and tourism infrastructure including 16,000 rooms, or earnings of F$1.2 billion, by 2016.\(^{457}\) Tellingly, the Supplement to the 2009 Budget Address referred to The Tourism Plan as ‘a framework for the sustainable growth of tourism in Fiji’.\(^{458}\) In other words, the involvement of government principally focused on two things: increase tourist arrivals and increase foreign investment in hotels.

According to The Tourism Plan, the role of government in tourism was to facilitate the expansion of the industry through coordination; planning; legislation and regulation; tourism marketing and promotion; stimulation of tourism investment; capacity builder; support research, disseminating knowledge; as a protector to provide security of investment, a fair trading regime, a secured land title regime and a surety of access to resources of the ‘commons’; as a public interest protector; and as an advocate in providing policing, security and health services to tourists and those working in the tourism industry.

While The Tourism Plan advocated government as a ‘public interest protector’, the proposed policies, legislation and budget allocations were all directed towards promoting and protecting the tourism industry with little attention and inadequate budgetary support for addressing the social, cultural and environmental needs.

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\(^{455}\) Ibid. p. 13

\(^{456}\) Ibid.

\(^{457}\) In 2006, there were 347 properties with 9,070 rooms (including 233 cabins on local ships). See, *Fiji Tourism Development Plan 2007 – 2016*, Department of Tourism, Ministry of Tourism and Environment, Suva, 2007, p. 4

For instance, to attract investment in the tourism sector, the government offered generous tax concessions to foreign investment in hotels. The Hotel Aid Act has been revised a number of times to give generous incentives and concessions to hotel developers. In 2015, the hotel industry incentives included investment allowances (in addition to ordinary depreciation) of 55% of total capital expenditure; carrying forward of losses was extended to 8 years; a 10 year tax holiday for capital investment of not less than F$7 million; and import duty exemption on all capital goods not available in Fiji.459

To achieve ‘sustainable growth’ in tourism, the government devoted a large portion of its annual budget to Tourism Fiji (previously known as the Fiji Visitors Bureau), which used the funds for marketing and promotional activities. For example, in Fiji’s 2015 National Budget, in addition to the F$3 million grant to Tourism Fiji, a further F$23.5 million was allocated as grants for marketing.460 This generous support was given despite the government having to raise the regressive Valued Added Tax (VAT) from 12.5% to 15% in 2011 to generate additional revenue to repay its mounting debts and to provide for public services.461

In comparison, the 2015 National Budget allocated a mere F$300,000 for the Integrated National Poverty Eradication Program, which aimed to improve and empower the disadvantaged through targeted services, such as augmentation of basic social services including fair wages, reforms and poverty mapping.462 In addition, F$1 million was allocated to the Women’s Plan of Action to facilitate the implementation of all women’s projects.463 This Women’s Plan of Action was to address five priority areas in which Fiji has commitments aligned to key international

463 Ibid.
conventions and agreements,\textsuperscript{464} including: the Convention on Elimination on All Forms of Discrimination Against Women (CEDAW),\textsuperscript{465} Beijing Platform of Action,\textsuperscript{466} Millennium Development Goals,\textsuperscript{467} and regional agreements such as the Pacific Platform for Action.\textsuperscript{468}

Resource constraints may be used to justify the ‘implementation gap’ between political rhetoric and practice in the fullfilment of treaty obligations, such as those under CEDAW,\textsuperscript{469} in order to improve the unequal status of women in Fiji. For a small country like Fiji, the realisation of economic, social and cultural rights has to be approached progressively and it may not be possible for all rights to be fulfilled simultaneously. Notwithstanding this practical reality the fact that the combined 2015 budget allocations for the \textit{Integrated National Poverty Eradication Program} and the \textit{Women’s Plan of Action} only amounted to F$1.3 million, while the tourism sector received a massive grant of F$26.5 million, reflects a serious imbalance between economic and social objectives.

\textbf{5.5 GATS and Sustainable Tourism}

Tourism is situated in the GATS legal framework under the heading of ‘Tourism and Travel-Related Services’. While tourism is a sector that connects to virtually the entire services sector in the W/120 list,\textsuperscript{470} the ‘tourism and travel related services’ category of the List is distinctly limited in scope. The category is divided into four sub-sectors:\textsuperscript{471}

\begin{enumerate}
\item A. Hotels and restaurants (including catering)
\end{enumerate}

\textsuperscript{464}The five priority areas are: 1) formal sector employment and livelihoods; 2) equal participation in decision-making; 3) elimination of violence against women and children; 4) access to services (HIV/AIDS, education, transport); and 5) women and law.
\textsuperscript{467}MDG 3 focuses on the promotion of general equality and the empowerment of women. For MDG 3 targets and indicators, see, http://www.unmillenniumproject.org/goals/gti.htm (accessed 20 June 2015).
\textsuperscript{468}A revised version is available from http://www.pacificwomen.org/resources/reports/revised-pacific-platform/ (accessed 20 June 2015).
\textsuperscript{469}Fiji ratified the Convention on 28 August 1995.
\textsuperscript{470}WTO document MTN.GNS/W/120. It is commonly known simply as W/120.
\textsuperscript{471}For a more technical discussion including the CPC numbers of these sub-sectors, see the \textit{Guide to the GATS: An Overview of Issues for Further Liberalisation of Trade in Services}, edited by the WTO Secretariat, Kluwer Law International, 2001. pp. 563-575.
B. Travel agencies and tour operators services
C. Tourist guides services; and
D. Other

That definition leaves out many services activities that are regarded by the UNWTO as key tourism-related industries.\textsuperscript{472} Activities which are absent from the tourism category include transport, hotel construction, computer reservation systems, car rentals, travel insurance and cruise ships, among others.\textsuperscript{473}

Even though the Preamble to the Agreement Establishing the WTO refers to sustainable development in the opening paragraph, the GATS does not integrate the concept into its legal framework in ways that recognise the need for governments to address the specific environmental, social, economic and cultural impacts of tourism in a destination. According to Articles VI:4 and VI:5 of the GATS, which oblige states to ensure domestic regulations do not ‘constitute unnecessary barriers to trade in services’, the application of internationally agreed environmental standards by a government could be construed by the WTO dispute settlement body as a technical standard that is more burdensome than necessary to ensure the quality of the service.

Since all fourteen PICs are parties to the CBD,\textsuperscript{474} those who are WTO Members could find their governments’ actions in fulfilling the CBD commitments and obligations challenged through the WTO dispute settlement system if those actions are considered by another WTO Member to be ‘unnecessary barriers to trade in services’. This risk is particularly relevant for the PICs in the tourism industry as its activities are closely linked with the environment and the protection of biological diversity. If an environmental measure is found to conflict with Article VI or nullifies or impairs another Member’s expected benefits under Article VI,\textsuperscript{475} the burden would then shift to the PICs to prove an exception applies.

\textsuperscript{472} Based on the UNWTO’s ‘Standard International Classification of Tourism Activities’ (SICTA), it identified approximately 70 specific activities related to supplying tourism services. In addition, another 70 activities are regarded at least partially related to the supply of tourism services.
\textsuperscript{473} Ibid.
\textsuperscript{475} Article XXIII GATS.
The relevant GATS exception is more limited because it does not have a provision like Article XX (g) of the GATT for the conservation of natural resources, hence the PICs would need to rely on the exception for measures ‘necessary to protect human, animal or plant life or health’\(^\text{476}\) to defend their action. The difficulty in invoking the GATS general exceptions in Article XIV is discussed in chapter 4. Legal uncertainty combined with cost could deter a government, particularly a relatively resource-poor PIC, from adopting a measure even if it was confident of its legal grounds.

Moreover, whilst the Pacific region has a relatively high proportion of indigenous peoples within national populations compared to any other regions of the world,\(^\text{477}\) a 2008 report on sustainable development in the Pacific region by Koshy and others revealed that ‘the articulation of sustainable development in the PICs is usually being made without any significant regard for traditional and indigenous systems of knowledge and practices that are already in existence in the Pacific communities’\(^\text{478}\).

The Koshy report concluded that sustainable tourism development strategies in the Pacific lacked substance for the indigenous communities at large.\(^\text{479}\) Instead of reaping the socio-economic benefits of tourism, the expanding global tourism industry may cause problems for indigenous communities such as bio-piracy.\(^\text{480}\) The report argued that a participatory approach to decision-making would be required if sustainable development in tourism was to be an internal development pathway in the PICs.\(^\text{481}\) The GATS, like all WTO agreements, is silent on the rights of indigenous peoples, even in the general exception.

\(^{476}\) Article XIV (b) of the GATS.


\(^{479}\) Ibid.

\(^{480}\) Bio-piracy is the appropriation of another’s knowledge of use of biological resources. The major issue involving bio-piracy is the exploitation of patent biological resources or knowledge of farmers and traditional communities and indigenous tribes by multinational companies.

\(^{481}\) Ibid. p.34
5.5.1 GATS Mode 3: FDI and Tourism

Inflows of FDI have been regarded in the Pacific as a means of supplementing domestic savings as well as fostering domestic managerial skills and transfers of technology. According to Jayaraman, aside from bringing a package of highly productive resources into the host economy, FDI also creates job opportunities not only in those sectors attracting the investment inflows but in the supportive domestic industries as well.\textsuperscript{482}

To achieve these expected benefits, the PICs have been encouraged by development agencies in the region over the last three decades to liberalise foreign investment with the aim of attracting more FDI to their shores. For example, the 1998 ADB report \textit{Improving Growth Prospects in the Pacific} urged the PICs to remove obstacles to foreign investment, arguing that such a move would lead to enhanced human capital and the introduction of productivity and growth-improving technology.\textsuperscript{483} On FDI in services, another report commissioned by the Pacific Islands Forum Secretariat in 2001 concluded that many governments in the Pacific ‘have come to view a services agreement as the best promotor of foreign direct investment in that it can bring with it capital, human resources, and technology’.\textsuperscript{484}

At the national level, since the 1980s many PICs have created investment promotion agencies especially to provide information and services to foreign investors with the aim of attracting FDI. For instance, Fiji set up its Fiji Trade and Investment Bureau (FTIB) under the Economic Development Board Act 1980. This agency was renamed in 2011 as Investment Fiji to ‘actively promote investments and export of goods and services’ with an aim to ‘stimulate the development of new and existing industries by facilitating their establishment, expansion and diversification’.\textsuperscript{485} Likewise, Vanuatu established its Investment Promotion Authority in 1998 with a mission ‘to

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expeditiously facilitate, promote and foster foreign investment in Vanuatu\textsuperscript{486}. It is a common practice for the PICs to offer substantial concessions to foreign investors to attract foreign investment in tourism. The Fijian government, for instance, offers generous investment incentives to encourage this trend. Its Income Tax Act (Hotel Incentives Amendment) Promulgation, which came into force on 1 July 2007, offers five-star hotel developers incentives that include corporate profit tax exemptions for 10 to 20 years depending on the amount of capital investment, the ability to carry forward losses for up to 8 years in succession, and permits for hotel owning companies to import capital goods free of duty.\textsuperscript{487} The focus on five-star hotel development is a strategic move by the Fijian government to attract FDI from international hotel chains. However, such a policy also undermines efforts to strengthen small-scale providers and community-based tourism initiatives. This biased tax policy also ensures that benefits from tourism flow primarily to the foreign investor or to local elites with foreign links.

5.5.2 GATS Mode 3 Tourism Commitments of the Newly Acceded PICs

Just like Fiji, tourism is a major source of export and foreign exchange earner for many PICs. These PICs, particularly the newly acceded Pacific WTO Members, have been led to believe that commitments under the GATS Mode 3, for instance, could result in an expansion of their tourism industry such as increased tourist arrivals and FDIs in the tourism sector. Table 3 summarises Mode 3 (horizontal, market access, national treatment) commitments in tourism services made by Tonga, Samoa and Vanuatu in the tourism sector under their WTO accessions.

\textsuperscript{486} See, Vanuatu’s Investment Promotion Authority, \url{http://www.investvanuatu.org/} (accessed 6 July 2014).
<table>
<thead>
<tr>
<th>Type of Mode 3 Commitments</th>
<th>Tonga</th>
<th>Vanuatu</th>
<th>Samoa</th>
</tr>
</thead>
<tbody>
<tr>
<td>Horizontal</td>
<td>Limits on land ownership; subsidies; and specific services sectors reserved for locals only. Government approval is required for foreign investors to invest in Tonga; the Tongan Constitution prohibits the sales of land to all foreigners. Foreigners can only attain land through leasing, with the right to lease land for up to 99 years as well as sub-lease property.</td>
<td>Limits on land ownership; government approval is required for all investment. Subject to limitations on purchase of real estate. The Vanuatu Constitution prohibits freehold ownership of land. Indigenous Ni-Vanuatu alone can own land under customary law provisions. Indigenous citizens and expatriates can hold land in leasehold.</td>
<td>Limits on land ownership; subsidies; and requirement to provide training to local employees. Non-Samoan natural and juridical persons may lease but not own land. Land may be leased for up to 30 years renewable once in the case of land leased or licensed for industrial purposes or a hotel and 20 years renewable once in the other cases. Foreign service suppliers may be required to provide training to local employees.</td>
</tr>
<tr>
<td>Market Access</td>
<td>Full market access to specific sectors in hotels and restaurants (including catering) for investment of TOP 200,000 or more; and travel agencies and tour operators services.</td>
<td>Full market access to specific sectors in hotels and restaurants (including catering), except guest houses if the number of beds is less than 50 or less than 10 rooms or annual turnover is less than VT 20 million; bungalows if the annual turnover is less than VT 30 million; hotels and motels if the total value of the investment is less than VT10 million or the annual turnover is less than VT 20 million; and kava bars. Full market access in travel agencies, excluding tour operator services.</td>
<td>Full market access for investments incorporated in Samoa for hotels 3 and above stars; food serving services; beverage services without entertainment. Full market access to tour operator services, including passage and baggage transportation, accommodation, sightseeing arrangements and similar services provided during a package tour.</td>
</tr>
<tr>
<td>National Treatment*</td>
<td>No limitations apartment from the horizontal restrictions</td>
<td>No limitations apartment from the horizontal restrictions</td>
<td>No limitations apartment from the horizontal restrictions</td>
</tr>
</tbody>
</table>

*Note that market access limitations that are also discriminatory apply automatically to the national treatment rule under GATS Article XX.2. Source: compiled from the Schedules of Specific Commitments of Tonga, Vanuatu and Samoa.

In Samoa’s Schedule, there is a horizontal reservation that maintains the prohibition on foreign ownership of land with the right for hotels to 30 year leases renewable once and for 20 years renewable once for other uses. Foreign investors in all services sectors, including tourism, may also be required to train local employees. This requirement for foreign investors in hotel and restaurants could contribute to knowledge transfer and efforts to up-skill local workers.

Samoa did not include in its horizontal reservation any list of reserved activities for its small local businesses in the committed sectors in its initial Schedule. Given that omission, Samoa will not have the flexibility of introducing one later because that would mean changing the nature of the existing commitments. Any attempt to modify the Schedule must comply with the provisions of Article XXI of the GATS, which may mean further liberalisation of other services sectors.
In Tonga’s Schedule, there is a specific reference to its Constitution which prohibits the sale of land to foreigners. Foreigners can only obtain land through leasing and sub-leasing up to a maximum period of 99 years. Tonga’s horizontal reservation also ensures that Government approval is required under Tonga’s Foreign Investment Act for all foreign investors.

Except for those limitations stipulated under its horizontal reservations, Tonga offers full market access and national treatment in hotels and restaurants for any investment higher than TOP 200,000 (approximately US$100,000). This means local investors can only enjoy potential preferences in investment ventures with capital below that threshold. The government of Tonga will find it difficult to raise the ceiling in future, for example should its currency depreciate, because any modification of the Schedule could trigger compensation to affected WTO Members. In addition, Tonga maintains no restrictions on travel agencies and tour operators.

Vanuatu’s Schedule has an explicit reference to its Constitution which prohibits freehold ownership of land. It specifies that only indigenous Ni-Vanuatu can own land under customary laws and that other indigenous citizens and expatriates can hold land in leasehold. Moreover, government approval is required for all foreign investors under the Foreign Investment Act No. 5 of 1998 and its Amendments. Under current laws, foreigners must invest a minimum of VT 5 million (approximately US$50,000) in order to establish a business in Vanuatu. Significantly, the schedule reserves the right for the government to raise this minimum in line with general cost increases.

Vanuatu offers full market access and national treatment in hotels and restaurants except guest houses if the number of beds is fewer than 50 or it has fewer than 10 rooms or annual turnover is less than VT 20 million (approx. US$200,000); in bungalows if the annual turnover is less than VT 30 million (approx. US$300,000); in hotels and motels if the total value of the investment is less than VT10 million (approx. US$100,000) or the annual turnover is less than VT 20 million (approx. US$200,000); and in kava bars. It also grants full market access and national treatment to travel agencies, excluding tour-operating services.
When compared with the scheduled commitments of Fiji, as discussed below, it is clear that Tonga, Vanuatu and Samoa have made many more concessions in the tourism sector, although the three newly acceded PICs have been more prudent on the issue of land, as noted earlier.

As discussed earlier, tourism activities are often embedded with social functions whose scope and coverage are broader than those defined by the GATS. The extensive commitments across all other services sectors that Tonga, Vanuatu and Samoa have committed as a result of their accession will impact on a much bigger cluster of tourism-related services, such as those relating to foreign exchange, travel insurance, environmental, construction and communication services. Compounded by the limitations of Article VI on domestic regulations, the governments of these newly acceded PICs will find it difficult to regulate the provision of services for non-economic considerations or use legislation to correct market or regulatory failures across all those sub-sectors that they have committed under the GATS.

5.5.3 Fiji’s GATS Commitments in the Tourism Sector

Of all the subsectors under the heading ‘Tourism’ in the W/120 list, Fiji has only made binding commitments on hotels and restaurants. This specific commitment is outlined in Table 4.

<table>
<thead>
<tr>
<th>Sub-sector</th>
<th>CPC Code</th>
<th>Modes of Supply</th>
<th>Limitations on Market Access</th>
<th>Limitations on National Treatment</th>
</tr>
</thead>
</table>

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<table>
<thead>
<tr>
<th>Hotels, Motels and Other Tourist Accommodation</th>
<th>641</th>
<th>1</th>
<th>None</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2</td>
<td></td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td></td>
<td>Normal government approval and registration required for all foreign investors</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td></td>
<td>Entry limited to:</td>
<td>Skilled foreign employees to provide training to locals</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(a) management based; and</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(b) skilled employees for 3 years where positions cannot be filled locally</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Restaurants</th>
<th>642</th>
<th>1</th>
<th>None</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2</td>
<td></td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td></td>
<td>Government approval and registration (specialty restaurants only)</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td></td>
<td>Entry limited to:</td>
<td>Skilled foreign employees to provide training to locals</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(a) management based; and</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(b) skilled employees for 3 years where positions cannot be filled locally</td>
<td></td>
</tr>
</tbody>
</table>


### 5.5.3.1 Market Access

On market access, Fiji did not schedule any limitations on Mode 1 (cross border supply) and Mode 2 (consumption abroad). Recalling that the definition of ‘supply of a services’ includes the production, distribution, marketing, sale and delivery of a service, Fiji’s full commitment on market access for Mode 1 means any policies that limit cross border supply in hotel accommodation, such as online reservations, could potentially be challenged as violating Fiji’s GATS obligations.

On Mode 3 (commercial presence) Fiji has made a vague market access limitation

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489 Article XXVIII (b) of the GATS
that ‘normal government approval and registration’ is required for all foreign investment. How this is interpreted is crucial to Fiji’s regulatory autonomy. The market access entry could be interpreted to mean that any regime Fiji introduces that sets conditions for approval of foreign investment and/or registration of hotel and restaurants is protected for the future. Alternatively, it could be read narrowly to permit only the approval and registration regime that existed in 1996 when Fiji joined the WTO.

Even if future changes were considered compliant with Fiji’s market access schedule, another WTO Member could argue that the Fiji government’s measures had nullified or impaired its expected benefits. Under Article XXIII:3 (on dispute settlement and enforcement) of the GATS:

If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have the recourse to the DSU [Dispute Settlement Understanding]. If the measure is determined by the DSB [Dispute Settlement Body] to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

According to the report submitted by the Fijian government to the WTO during its Trade Policy Review in 1997, Fiji’s trade policy and investment regime were very liberal in the 1990s. The Fijian Cabinet endorsed an Investment Policy Statement in 1996 that aimed to make the investment approval system more investor friendly, based on principles of transparency, and which was market driven rather than regulatory in nature. Furthermore, the election manifesto of the People’s Coalition Party which won the 1999 general election contained a specific policy promise,

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491 Ibid. p. 7.
among others, ‘to enhance tourism development by encouraging large scale foreign investments’. Given Fiji’s prevailing investment regime in the 1990s, another WTO Member could argue that it expects the granting of ‘government approval’ on foreign investments would continue to be based predominantly on commercial imperatives.

Since joining the WTO, Fiji has reviewed and deregulated its investment policies in an effort to make its investment climate internationally competitive. The Fiji Foreign Investment Act 1999 was reviewed and amended in 2004. The two Acts identify tourism as a restricted activity and place limits on equity holdings by foreign establishments. As of 2005, these limits required an operator of leisure cruises to have at least 51% equity held by Fiji citizens. Any activity involving investment in the cultural heritage of the Fiji Islands needed at least 51% equity held by Fiji citizens, while a tourism business or venture or a facility ancillary to the tourism business had to have at least F$100,000 in fixed assets.

These limitations were designed to curb the level of export leakage of tourism receipts in Fiji. However, five years later, all of these restrictions on equity were dropped when the Foreign Investment Regulation 2009 was gazetted. The only restricted activity relating to tourism contained in schedule 1 of the Foreign Investment Regulation 2009 relates to cultural heritage. It requires that any activity involving investment in the cultural heritage of Fiji must have at least F$500,000 in owner’s contribution or paid up capital for companies in the form of cash from the operational date, to be fully brought into Fiji within the implementation period.

*Your Guide to Investing in Fiji*, produced by Investment Fiji in 2015, advises that all foreign investments are now required to obtain a Foreign Investment Registration Certificate from Investment Fiji prior to establishing a business in Fiji. The Foreign

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494 Ibid.
495 Ibid

Under these laws foreign investors have access to all sectors of the private economy, except for the ‘reserved and restricted list’ of a limited number of economic activities that are specifically reserved for local investors or where FDI is restricted. These are set out in the Foreign Investment Regulations 2009. Investment Fiji is the gatekeeper for ensuring that the registration of foreign investors complies with the regulation, including the reserved and restricted lists. According to sections 5 and 6 of Fiji’s Foreign Investment Act 1999 activities that are either reserved or restricted for national enterprises may be reviewed regularly and the Minister of Trade can add to or delete from the lists any activity following the review.

Fiji’s present tourism policy follows a similar pattern. It is far more liberal than when Fiji made its GATS commitments on market access. In May 2007, Cabinet endorsed the Tourism Development Plan (2007-16) which provides a comprehensive guide for developing the tourism industry. The Fiji Tourism Development Action Plan 2007-09 and the Tourism Regional Strategies were also adopted in 2007. The objective of the Tourism Development Plan (2007-16), supported by the national budget, was to make the existing investment approval system even more investor friendly.

The uncertainty about the meaning of the market access GATS commitments could pose serious challenges for policy makers in managing the tourism sector if they wish to introduce new constraints in the future. For instance, the Fijian government might want to limit the number of hotels in particular locations, such as Nadi Bay, Lautoka and the Mamanuca Islands which already have a high concentration of foreign-owned

501 Ibid.
resorts and hotels. Under a narrow reading of Fiji’s mode 3 limitation, or an adverse interpretation of the nullification and impairment argument, the government of Fiji would find it difficult to rein in and regulate enclavisation of hotels and resorts, even though such development might have significant social, cultural, environmental and economic ramifications for the local people, such as increased tourism-related crimes, public access to beaches, problems associated with waste disposal or affordable access to the provision of water.

5.5.3.2 National Treatment

The scenario is even more problematic for Fiji on national treatment. Article XX.2 of GATS says that a limitation entered for market access does not need to be repeated for national treatment where the inconsistency is the same. That means whatever interpretation is given of ‘normal government approval and registration’ would also apply for national treatment. That could provide protection for restricted activities that were set out in the foreign investment laws as of 1995 and additions since then, depending on how Fiji’s GATS entry is interpreted. But even the most generous interpretation still leaves Fiji vulnerable in several ways, because no additional national treatment limitations are listed for mode 3 in hotels and restaurants.

By scheduling no limitations, the Fijian government seems to imply it does not consider the linking of foreign investment with local economies is important in the tourism context. Once granted market access, a foreign investor cannot be discriminated against vis-à-vis treatment available to local investors. With subsidies not listed as an exemption, this means equal access to any government subsidies in hotels and restaurants by both foreign and local investors, and limits the scope of governmental assistance to local small businesses in the tourism sector.

Moreover, given the uncertainty on the definition of ‘like services suppliers’ it could be difficult for the Fijian government to pursue differential policies that favour local and smaller hotels, although such hotels may have lesser adverse impacts on the environment and contribute by way of backward linkages to local communities. Fiji would have to rely on the problematic general exception provision as a defence in a

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dispute under the WTO.

There is a further, major problem that the national treatment commitment does not reserve the right to discriminate in relation to land, which is an essential element of investment in hotels and similar accommodation. There are four main types of land holdings in Fiji: State (Crown) Lands, Freehold Lands, Native Leases, and vakavanua or Native Lands.\textsuperscript{503} While freehold land only accounts for 16\% of total land in Fiji,\textsuperscript{504} native land and native leases make up almost 84\% of Fiji’s total land area.\textsuperscript{505} In principle, native land has been set aside by law to be used by the indigenous Fijians only. In practice, some native land, especially land suitable for sugar cane cultivation or resort development, has been leased out under customary arrangements.

For the iTaukei (indigenous Fijians) in Fiji,\textsuperscript{506} nothing is more important than land. It is so important that conflicts over proposed land reforms have been linked to the military coups in Fiji.\textsuperscript{507} Significantly, during the 1987 and 2000 coups land ownership emerged as a major political and social issue and the rhetoric of the coup leaders about indigenous land rights spilt over into disputes over resort-based tourism. For example, the 2000 coup led to a number of hostage-taking incidents in prominent tourist resorts, most notably Turtle Island, one of Fiji’s top boutique resorts.\textsuperscript{508}

Despite these land ownership sensitivities, the Fijian government did not include any limitations on foreigners owning or leasing land in Fiji in its 1994 schedule of commitments for Mode 3. This means that a foreign investor through its government can potentially challenge the Fijian government in the WTO dispute settlement system for breach of the GATS national treatment rule.

\textsuperscript{504} Ibid.
\textsuperscript{506} The 2013 Fiji Constitution stipulates that all Fiji citizens shall be known as Fijian. The indigenous people referred here are native Fijians (iTaukei).
5.5.3.3 Other Obligations

Because of these market access and national treatment commitments, Fiji also has obligations to comply with the disciplines on domestic regulation under Article VI of the GATS. They are especially problematic in several areas. First, any measures of general application, including Fiji’s approval of foreign investment applications, must be administered in a ‘reasonable, objective and impartial manner’. Administration of these measures that is seen as subjective or unfairly disadvantaging foreign investors could be challenged.

Second, Article VI:3 calls for completion of authorisation within a ‘reasonable timeframe’ after submission. An important change introduced in 2004 reduced the approval time from 15 days to 5 days for Investment Fiji to issue a written notice of the grant or refusal of an application for a Foreign Investor Certificate.\(^{509}\) Recently, Investment Fiji adopted an ambitious approach to streamline and improve the current foreign investment approval regime further and launched the *Online Single Clearance Window* in July 2015.\(^{510}\) This initiative is an Internet-based gateway – a one-stop shop – in which an investor anywhere in the world can deal directly with the various Tier One agencies of Government: Fiji Revenue and Customs Authority, the Reserve Bank, Investment Fiji and the Registrar of Companies. As the Prime Minister of Fiji pointed out in his launch speech, a potential foreign investor can use the *Online Single Clearance Window* to register and reserve a business name, obtain a tax identification number, approve a share issue and obtain a Foreign Investment Approvals Certificate with one electronic form and a single payment gateway.\(^{511}\)

The objective of this latest initiative is to facilitate and fast-track application and approval of foreign investment projects. However, it makes it difficult to scrutinise applications effectively. Adopting such a short period may mean any subsequent moves to provide more time for vetting applications is considered to be

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\(^{509}\) Section 5 (d) of the Fiji Foreign Investment (Amendment) Act 2004.

\(^{510}\) The Online Single Clearance Window initiative was launched by the Fijian Prime Minister on 9 July 2015 along with the Fijian Trade Policy Framework (2015-2025).

‘unreasonable’.

The third problem, arising under Article VI:5, relates to introducing new ‘technical standards’ that may nullify or impair the benefits expected by another WTO Member. Such new standards potentially include requirements to comply with environmental impact assessments, approval from indigenous communities, ecological requirements, labour practices, and other regulatory requirements in the tourism sector.

A final concern relates to the obligations on current payments and capital transfers in sectors where Fiji has made commitments.\(^{512}\) The implications of this obligation are discussed below in relation to a proposed tourism project between China and Fiji.

5.5.4 Fiji’s Attempt to Revise Its Tourism Commitments

5.5.4.1 GATS 2000 Negotiations

During the GATS 2000 negotiations Fiji attempted to address the vagueness of its original GATS commitments, particularly the land issue, by including new Horizontal Commitments.\(^{513}\) The market access entries focused on Mode 3 and Mode 4. On Mode 3, the horizontal commitments detailed the ‘government approval’ process, specifying the steps for obtaining a Foreign Investment Certificate in accordance with relevant laws in Fiji. Approval for the project would be subject to the relevant authority’s satisfaction that the investment would be of net benefit to Fiji, including the utilisation of local goods and services and employment of local workers. On Mode 4, it specified the requirement of economic needs tests on the application for work permits for foreign workers, which were time bound for 3 years maximum.

On national treatment, the new schedule included limitations with respect to taxation treatment, eligibility for subsidies and access to concessional finance across all the four modes of supply. Fiji entered ‘unbound’ for current and future measures at national or sub-national levels, according rights or preferences to members of disadvantaged social groups or organisations in relation to the acquisition, establishment or operation of any commercial or industrial undertaking in the service

\(^{512}\) GATS Article XVI footnote 8, and Article XI.
sector. On Mode 3, there was a requirement for at least two of the directors of a public company and at least one director of a private company to be ordinarily resident in Fiji.

To address the land issue in relation to Mode 3, the new limitations on national treatment included the need for the relevant Minister to approve the purchase or lease of freehold land, or the lease of State land. The purchase, lease or any other transaction regarding Native lands was unbound. In addition, speculative sale of land with unimproved values was also banned.

Although Fiji’s GATS 2000 initial offer sought to insert a number of important limitations on market access and national treatment, it did not resolve the concerns relating to the tourism services sub-sectors because those horizontal commitments applied to all service sectors except hotels, motels and other tourist accommodation; and restaurants. The WTO Secretariat advised that these horizontal limitations could not apply to ‘tourism services’ commitments that were made during the Uruguay Round.\(^\text{514}\) The reason was that any amendments to the existing schedule would be regarded as a reversal of its previous commitments and therefore must be subjected to the GATS Article XXI rule on modification of schedules. Consequently, the concerns over the treatment and utilisation of land relating to hotels or restaurants are yet to be resolved in the GATS negotiations.

5.5.4.2 PICTA

Fiji took a different approach in its trade in services schedule for PICTA, with important variations to its original GATS schedule. First, it introduced a horizontal section for market access that set out in detail the government approval and registration process for foreign investment under Mode 3. Table 4 below, lists the content of Fiji’s horizontal commitments offered during the PICTA TIS Protocol negotiations, which was elaborated in much more detail than Fiji’s GATS 2000 offer.

Table 4. PICTA Trade in Services Protocol: Fiji’s Horizontal Commitments\(^\text{515}\)

\(^{514}\) This advice (which the author is aware of) was given informally to the Fiji officials when they were preparing the initial offers.

\(^{515}\) Fiji’s Revised Offers for 7th round of PICTA-TIS negotiations, 8-10 February 2012.
<table>
<thead>
<tr>
<th>Sector or Subsector</th>
<th>Limitations on Market Access</th>
<th>Limitations on National Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>These ‘horizontal commitments’ apply to all sectors included in this schedule, except for hotels, motels, and other accommodation (CPC 641) and restaurants (CPC 642)</td>
<td>3) The establishment or takeover of a commercial presence in the Republic of Fiji is subject to notification and examination by the Chief Executive of Investment Fiji or relevant successor authorities, in order to obtain a Foreign Investment Registration Certificate for the specific commercial activity or activities being undertaken. In addition to the satisfaction of any specific foreign investment policy requirements detailed in the sectoral part of this schedule and taking into account all information, undertakings and representations in respect of the proposal, the relevant authority will approve a proposal if convinced that the investment is likely to be of net benefit to the Republic of Fiji. In forming this judgement, the relevant authority will consider, among other things:</td>
<td>1, 2, 3, 4) Unbound with respect to taxation treatment, eligibility for subsidies and access to concessional finance from a Government agency or statutory body.</td>
</tr>
<tr>
<td></td>
<td>a) the effect of the investment on the level and nature of economic activity in the Republic of Fiji, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in the Republic of Fiji, and on export from the Republic of Fiji;</td>
<td>Unbound for current and future measures at national or sub-national government levels according rights or preferences to members of socially or economically disadvantaged groups, or to organisations providing for the favourable treatment of members of socially or economically disadvantaged groups or their organisations, in relation to acquisition, establishment or operation of any commercial or industrial undertaking in the services sector. For the purposes of this schedule, socially or economically disadvantaged groups include, but are not limited to, citizens of the Republic of Fiji who are:</td>
</tr>
<tr>
<td></td>
<td>b) the degree and significance of participation by Fijian citizens in the commercial presence and in any industries in the Republic of Fiji of which the commercial presence forms or would form a part</td>
<td>(a) women;</td>
</tr>
<tr>
<td></td>
<td>c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in the Republic of Fiji;</td>
<td>(b) youths;</td>
</tr>
<tr>
<td></td>
<td>d) the effect of the investment on any existing industry or industries in the Republic of Fiji of which the commercial presence forms or would form a part;</td>
<td>(c) elderly;</td>
</tr>
<tr>
<td></td>
<td>e) the effect of the investment on competition within any industry or industries in the Republic of Fiji;</td>
<td>(d) physically or mentally disabled;</td>
</tr>
<tr>
<td></td>
<td>f) the compatibility of the investment with national industrial, economic, social and cultural policies, taking into consideration industrial, economic, social and cultural policy objectives enunciated by government authorities at any sub-national level likely to be significantly affected by the investment;</td>
<td>(e) low-income earners; or</td>
</tr>
<tr>
<td></td>
<td>g) the likely effect of the investment on the external balance of payments of the Republic of Fiji; and</td>
<td>(f) living in rural or other disadvantaged regions.</td>
</tr>
<tr>
<td></td>
<td>h) the contribution of the investment to the Republic of Fiji’s ability to compete in world markets</td>
<td>3) At least two of the directors of a public company and at least one director of a private company must be a resident in the Republic of Fiji</td>
</tr>
<tr>
<td></td>
<td>The relevant authority also reserves the right to reject proposals for the establishment of a commercial presence that are adjudged contrary to the national interest, meaning circumstances where vital interests and development of the Republic of Fiji</td>
<td>3) Unbound for the purchase, lease or any other transaction regarding Native and State lands.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4) Unbound, except as indicated in the market</td>
</tr>
</tbody>
</table>
The validity of a Foreign Investment Registration Certificate is conditional upon:

- verification by the Reserve Bank of Fiji of the inward transfer of the new capital, if required, in the investment proposal; and
- substantial operation of the commercial presence within the timeframe set by the relevant authority.

Foreigners applying for work permits will normally be subject to economic needs tests. Therein, the relevant authority will consider, but need not limit consideration to:

- Whether an applicant’s specialized skills and expertise are available locally;
- If an applicant’s specialized skills and expertise are available locally, whether the supply of such skills is sufficient;
- the general state of the labour market in the Republic of Fiji;
- the general state of the industry in which the applicants proposes to work; and
- general economic conditions.

Work permits obtained according to the provisions above are granted for an initial period of one year, and maybe extended for a further two years.

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The horizontal entry for national treatment in the GATS 2000 and PICTA schedules both exclude subsidies and concessional finance, as well as taxation treatment, and preserve the right to give preferential treatment to various social groups, for all four modes. Purchase, lease and other transactions regarding native and state lands are explicitly excluded from the rules. As with the GATS 2000 offer, the PICTA horizontal limitations does not apply to hotel accommodation and restaurants.

By contrast, the market access commitments for hotel and other forms of tourist accommodation and restaurants in PICTA were slightly more detailed than the GATS schedule. The mode 3 entry still says that ‘normal government approval and registration is required for all foreign investors’. However, the greater specificity under PICTA TIS Protocol related to registration, rather than approval.
The implications of the GATS 2000 and PICTA schedules for interpretation of Fiji’s existing GATS commitments are debatable. A WTO Member bringing a dispute on behalf of a tourism company could argue that Fiji’s attempt to introduce new restrictions shows they do not apply to the original GATS schedule. That argument is reinforced by the explicit exclusion of hotel accommodation and restaurants from the horizontal entry in the GATS 2000 and PICTA Services schedules. However, Fiji could argue that it has merely set out in more detail what it has protected under the GATS. Moreover, Fiji never signed the PICTA Services Protocol and the GATS 2000 negotiations were never concluded, so neither schedule has any formal legal status.

5.6 The Potential Risk of FDI in Tourism: A Fiji Case Study

The following case study on a major tourism investment proposal highlights the regulatory and institutional problems of the tourism liberalisation model that Fiji has adopted – one that is driven by commercial imperatives to increase FDI. This case is particularly relevant because the home country of the investor/resort developer (hereafter refer to as Country A) is a Member of the WTO, and will doubtless be aware of Fiji’s GATS commitments. In addition, Country A may seek in the future to establish its own services and investment agreement with Fiji that would confer greater rights on Country A’s investors in the tourism sector and impose greater regulatory constraints on Fiji’s ability to regulate those investors.

5.6.1 The Project Proposal

The information discussed in this case study is of confidential nature. After serious concerns were raised in July 2015 on the motives of developer, Investment Fiji has decided to withhold its approval on the issuance of a Foreign Investment Certificate pending a thorough review of the proposal. The case is currently under internal investigation and could have criminal implications. Thus, except for examination purpose, the actual name of the project and other sensitive information of the case can not be revealed in this paper.

In early 2015, Country A approached Fiji on the possibility of negotiating a bilateral WTO-compatible FTA, covering trade in goods, services and investment, between the two countries. After a few rounds of consultations, it was agreed that a ‘feasibility study’ on the pros and cons of a FTA be undertaken first before the two parties decide whether formal negotiations should commence. A MOU on this feasibility study was signed during the Fijian Prime Minister’s state visit to that country in July 2015. The study is expected to be completed within a twelve-month timeframe from the date of signing of the MOU.
During a high-level official visit by Country A to Fiji in 2015, a number of Memorandum of Understanding (MOUs) were signed. One of these MOUs was a proposed project by one of Country A’s business entities to build a mega tourist resort in Fiji. Prior to the signing of the MOU, a ground-breaking ceremony took place on the site of the proposed project, attended by the President of the company, and senior Fijian government officials. The ceremony was extensively covered by the Fiji Sun and TV One on national news.

The proposed project covers 1,600,000 square metres of land located in an area between Nadi and Lautoka. The developer was proposing to invest more than US$500 million in the project directly and claims it would inject over US$2 billion into the local economy. The project includes the construction of luxury resorts, hotels, a marina, sports facilities (such as tennis courts and golf courses), conference facilities, as well as holiday villas and apartments to be sold to individual investors. Construction was scheduled to begin in May 2015 and be completed by December 2018. Although the project is massive in size covering a huge land mass and seashore, an Environmental Impact Assessment has not been carried out.

Almost half the land mass of 1,600,000 square metres is to be used for the construction of holiday rooms (hotels, villas and apartments) to be sold to individual private investors. The advertised price of those yet-to-be-built rooms had a starting price of approximately F$8,500 per square metre. The developer claimed to have secured a 15-year contract with Swiss hotel management company for managing the project, promising annual revenue of no less than F$52,000 per room, which is equivalent to an 8% return for individual investors.

Since May 2015, the developer had produced glossy promotional brochures and booklets advertising this project in Country A. It has also launched an aggressive online advertising campaign via popular social media.

The developer used a number of false claims and misleading information to sweeten the deal. These claims included: Fiji being the world’s only cancer free country; Fiji citizens share Commonwealth education and medical resources; Fiji nationals enjoy visa free status with over 100 countries; and that Fiji is a good springboard for easier emigration to other neighbouring countries like Australia and New Zealand. Of grave concern is the developer’s claim that, in collaboration with Fiji officials, potential
investors can obtain Fiji citizenship in 3 months through real estate investment.

Those false claims suggested that the proposed project was not a genuine tourism FDI, but might be a money laundering scheme using investment as a disguise to sell Fiji passports to overseas nationals. The proposed project has been allowed to advance to this stage with officially sanctioned facilitation and publicity. Serious concerns were raised after a recent visit to the developer’s office by senior Fiji trade officials in 2015. In August 2015, the Ministry of Industry, Trade and Tourism held an urgent meeting with Investment Fiji, which subsequently decided to withhold the approval in issuing the developer a Foreign Investor Certificate pending a review of the proposal and further investigations.

5.6.2 Regulatory Loopholes

The Fiji Department of Immigration is responsible for the processing and issuance of investor permits for non-citizens, residency permits and Fiji citizenship. According to Section 9(2)(c) of Immigration Act 2003, an Investor Permit is granted to non-citizen investors to be engaged in a business project approved by Investment Fiji. The permit is normally valid for 3 years.

A Residence Permit on assured income was introduced in 2007 with the objective of attracting wealthy elders to reside in Fiji for their retirement. Under Section 48 of the Immigration Regulations 2007, a Residence Permit may be issued to a person who has assets outside Fiji at his/her disposal of an amount sufficient to ensure that he/she will not become a charge on public funds whilst residing in Fiji.

According to the Fiji Department of Immigration, the minimum age for the principal applicant to qualify for a Residence Permit is 45 years and any deviation is subject to approval by the Permanent Secretary of Immigration. The validity of the permit is normally for 3 years with documentary proof that F$100,000 has been remitted from offshore and deposited in a resident account in a local bank. Such

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520 Authority is under Section 9 (2) (b) of the Immigration Action 2003.
permit holders are not allowed to work or be engaged in any business activities for the purpose of earning an income unless approved by the Permanent Secretary.

There is a potential loophole that is relevant to the Fiji case study. The immigration policy states that if the principal applicant has purchased a property in Fiji and the value is equivalent to or more than F$100,000, the required deposit of F$100,000 may be waived unless the transaction of acquiring the property was not done locally. Dependents of the principal applicants may apply for co-extensive permits to reside with the principal applicant with an additional F$30,000 for a family of two or fewer, F$40,000 for a family of up to five members and F$50,000 for more than five family members.

The existing immigration policy on Residence Permit on Assured Income makes residency in Fiji relatively easy. It means any foreigner can potentially acquire Fiji residency with a sum of F$100,000 for an individual or F$150,000 for a family of five or more. According to the Citizenship of Fiji Decree 2009, 522 after residing in Fiji for a total of 5 years of the 10 years immediately before the application is made, foreigners holding a Residence Permit can become naturalised citizens of Fiji. In view of this loophole, it is unsurprising that the developer of the proposed project has promised potential buyers an alternative option of unconditionally buying back the room or villa after the clients have obtained Fiji citizenship after five years.

This regulatory loophole is similar to those in the United States relating to ‘birth tourism’. The US is one of the few countries in the world that automatically grants citizenship to any child born on American territories regardless of the parents’ nationality. According to recent news reports, ‘birth houses’ and ‘maternity hotels’ became big businesses in the US with wealthy parents, paying up to US$80,000 for the sole purpose of giving birth in the US to obtain citizenship for their children, earning in-state tuition to US universities for them and permanent residency for the parents. 523

In Fiji’s case, it is legal within the current regulatory framework and existing immigration policy for non-Fiji citizens to apply for residency in Fiji under different categories of permits pursuant to immigration Acts and investment regulations. However, the original intention of attracting rich elders to retire in Fiji under the Residence Permit on Assured Income may well end up becoming a platform to sell Fiji citizenship of convenience under the pretext of tourism FDI.

The problem is compounded by the legal requirement imposed upon Investment Fiji to process foreign investment proposals within 5 working days. Such a short processing period means it is practically impossible for officials to vet the projects properly.

5.6.3 Implications of the GATS

The proposed project highlights several legal uncertainties for Fiji’s investment regime in relation to its GATS commitments. If, after a thorough review of the project, Fiji wants to stop the project it may have to choose between two options. First, the Fijian government could use its discretion to decline the developer a Foreign Investment Certificate. Second, it could immediately tighten the relevant regulations, including blocking the regulatory loopholes in its immigration policy; tighten controls on and monitoring of cross-border capital movements in and out of Fiji; introduce new technical standards in the tourism sector; and require existing and future developers to abide by those new laws. Under either option, the Fijian government faces at least three areas of legal uncertainties in the context of its GATS commitments.

The first uncertainty relates to the interpretation of the ‘normal government approval and registration’ requirement under Mode 3; the second relates to footnote 8 of Article XVI of the GATS; and the third relates to Article VI on domestic regulation of technical standards and licensing requirements.

On the question of ‘normal government approval and registration’, the developer could argue, based on one reading of Fiji’s GATS commitment on Mode 3, that it has already satisfied the requirements. This could be justified by the fact that the developer had followed the existing procedures to register their company in Fiji; had
secured land and obtained consent from the mayors of Nadi and Lautoka; a ground-breaking ceremony took place with full knowledge of the Fijian government and the attendance of senior government officials, followed by the signing of a MOU between the developer and the Government of Fiji during a high-level official visit.

In its defence the Fijian government could use the vagueness in its GATS schedule to argue that a Foreign Investment Certificate has yet to be issued so the final ‘government approval’ had not been granted. Although Fiji might indeed have the final say on the approval of this project the fact it was allowed to advance to such a stage without dissent raises questions about the soundness of the investment approval process. The rejection of the project could be challenged under Article VI:1 of the GATS as it relates to the administration of domestic regulation in a sector where Fiji has taken commitments. If the Country A decided to take up the case to the WTO on behalf of the developer, Fiji could find itself caught between the need to defend its investment regime and great reluctance to offend an increasingly important player in Fiji’s political economy.

The second uncertainty relates to Footnote 8 of Article XVI:1 on market access, which might constrain Fiji’s ability to control the cross-border movement of capitals relating to the development. This rule aims to protect the movements of capital resulting from the supply of services in a cross-border manner (Article 1:2 (a), Mode 1) or through commercial presence (Article 1:2 (c), Mode 3), provided that a Member made a commitment on market access with respect to the relevant mode of supply. The obligation to allow movement of capital ‘in relation’ to commercial presence means that Fiji is required to allow transfers into its territory related to the proposed project, although that does not extend to repatriation of capital.

In view of the questionable circumstances surrounding the proposed project, there is a risk that this provision might become a tool for money laundering, making it difficult

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524 ‘If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article 1 and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article 1, it is thereby committed to allow related transfers of capital into its territory.’

for the Fijian government to control the conduct of foreign investors. If the Fijian government can demonstrate that the developer is engaging in deceptive and fraudulent practices, and its laws on fraud are GATS-compliant, it could invoke Article XIV(c)(i) of the GATS to justify tightening the rules on capital transfers. However, the necessity test and the chapeau of Article XI remain a barrier to a successful defence.

The third area of concern raised by this case relates to Article VI:5 of the GATS. Technical standards in the context of hotels and restaurants include water supply and discharge, air emission limits, waste discharge, and other standard requirements necessary for the protection of the environment. Typically, good governance of the tourism industry would require an EIA to be done first, among other requirements, before a tourism project (especially the construction of a large-scale resort or hotel) is considered for approval. However, the criteria of Article VI:5 imports the requirement from Article VI:4 (b) for technical standards to be ‘not more burdensome than necessary to ensure the quality of the service’. Newly imposed technical standards, including an EIA study relating to the establishment of resorts and hotels in Fiji, could be subsumed to the commercial standard of the quality of services supplied. The requirement that regulations are not ‘more burdensome than necessary’ to business, effectively requires Fiji to show that the EIA is there is not a less trade-restrictive alternative available to achieve its policy objective, and that objective relates to the quality of the service.

If Fiji were found to have breached its obligations it could invoke Article XIV (b) of the GATS (necessary to protect human, animal or plant life or health). However, technical standards introduced under the new legislation may not be considered the least trade-restrictive way of achieving that objective and could still fall foul of the necessity test. The necessity test in this regard is deeply problematic because there is almost always the possibility of having a less trade-restrictive alternative to a

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527 As noted earlier, the necessity test can be viewed as containing three main elements: 1) the measure that is subject to the test; 2) the objective which the measure seeks to achieve; and, 3) the link of necessity between the measure and the objective. WTO, Necessity Tests in the WTO: Note by the Secretariat, S/WPDR/W/27, 2 December 2003. Available http://www.ictsd.org/downloads/2008/04/necextest.pdf (last accessed 23 August 2015).
particular policy choice. Yet, if the least trade-restrictive measures are used, they are not always the most effective way of meeting the environmental policy objectives.

Finally, both Article VI and Article XI would not allow measures that were disguised barriers to trade. Country A could argue that measures to protect the environment through domestic regulation or under the general exceptions were a pretext to restrict its exercise of rights that Fiji has committed to in its schedule.

5.7 Can FDI Liberalisation under Mode 3 Contribute to Achieving Sustainable Tourism Development in the PICs?

Flows of FDI from developed countries to developing countries are meant to enhance the degree of competition in domestic service markets and transfer best practices from abroad. The impacts of trade in services agreements in attracting investment to developing countries, and the benefits of those flows, are commonly overstated, including in relation to tourism. Contrary to common perceptions that tourism-related FDI is extensive and dominates the tourism industry in developing countries, the UNCTAD study *FDI in Tourism: The Development Dimension* has found tourism-related FDI is largely concentrated in developed countries with as little as 10% in developing countries.528

To advance this rationale, scholars like Delimatsis have advocated services liberalisation through the GATS to lock in reforms, making them irreversible for future governments.529 Making binding commitments through the GATS is believed to have a signalling effect to both domestic and foreign investors about the government’s commitment to an effective, investment-friendly regulatory regime.530

While investment flows could be stimulated by lowering trade barriers, there are sound reasons to believe that for the PICs, even liberalising investments across all services sectors and agreeing to remove all obstacles to multinational companies to access local markets might not attract desirable FDI.

530 Ibid.
First, the determining factors for the poor inflow of foreign investment into the PICs include their unique characteristics such as small size, remoteness, high transportation costs and the lack of domestic demand. Even the Forum Secretariat has conceded that ‘states that have faithfully followed the prescriptions for economic reform of their external advisors, such as Samoa, have found that this has not been rewarded by any significant increase in foreign direct investment’.\textsuperscript{531} In reality, most multinational corporations (MNCs) would pursue their optimal business opportunities in typically large markets like China, the US and India where they could make the biggest profits in the shortest possible time.\textsuperscript{532}

Second, the assumption that FDI is always good for a country’s development, and that a liberal investment policy towards multinational corporations is sufficient to ensure positive effects, is also problematic. The playing fields in investment are already tilted in favour of the MNCs because of their inherent competitive advantage.

One of the key market access barriers to trade in services that foreign firms may face in developing countries relates to preferential treatment given to local business operators. These preferences may include, for example, in relation to subsidies, grants, ownership of services activities, employment opportunities and other preferences to local businesses. In Tonga and Vanuatu, for instance, this would include getting access to the ‘reserved’ or ‘restricted’ list of activities which these countries maintain under their respective foreign investment regulations.

Delimatsis has argued that discrimination against foreign participation in such commercial activities is anti-competitive and may be detrimental to consumer welfare.\textsuperscript{533} However, this economic efficiency argument ignores the social and political implications of such affirmative policies in protecting the survival of local SMEs. Extending full national treatment to foreign players would most likely crowd out small local businesses and constrain future government interventions that aim to promote local SMEs.

\textsuperscript{531}Pacific Islands Forum Secretariat, \textit{The Pacific ACP-EU Partnership: The Way Forward}, Suva, PIFS, 2004
Third, apart from concerns about crowding out, foreign firms might simply concentrate their operations in the most profitable commercial areas and refuse to serve others. This is particularly true in sectors such as telecommunication, water and electricity supply and transportation. The tourism industry and its many related activities also depend on these basic services to function. The multinational corporations might even leave the country in situations of financial difficulty or political instability or engage in speculative activities that exacerbate financial instability.

Further, as this thesis has stressed, the much-cited barriers to trade in services are in fact regulations. While some regulations may be unnecessary and cumbersome from a trade perspective, a different type of regulatory policy arises when there is a positive externality from local service production. This may be the case with the promotion of cultural services through tourism activities. Because of the positive externality associated with the preservation of local culture, it may not be desirable for foreign artists to compete with local artists on a ‘level playing field’, since that can lead to sub-optimal provision of the local service.\textsuperscript{534} If such a service is beneficial to the country but the provision of positive externalities is not captured by market prices, it may require affirmative state interventions such as the provision of a subsidy.

Consequently, care must be taken in defining the terms under which liberalisation of any services, including tourism, occurs within the context of the GATS. If national treatment status is granted to foreign firms without reservation, as in the case of Tonga, Samoa and Vanuatu in their sector-specific commitments, the government becomes legally obliged to make available to foreign firms any treatment it offers to the local service providers. When Pacific governments lose the flexibility to give discriminatory treatment to local service providers, they lose the ability to internalise the positive externality. In this respect, trade liberalisation reduces welfare because it restricts the government from dealing with domestic policy concerns and implementing measures that are socially desirable. Since the perceived benefits from

\textsuperscript{534} Footnote 10 to Article XVII states that ‘specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers’. This provision implies an intrinsic benefit from being local and hence having the cultural attributes of being local that you can use to commercial advantage is not a breach of national treatment.
local provision of some services change over time, either due to changing values or cultural norms, governments need to maintain the flexibility to give preferences to local service providers, as well as retaining the ability to extract spillovers from foreign providers such as the provision of local employment. Flexibility also ensures the present views on the role of government do not unduly constrain future government policies.

The GATS’ emphasis on liberalising rules governing services in all modes of supply aims at squeezing policy space for development. Therefore, any premature trade liberalisation undertaken by a particular PIC, especially when it lacks an effective regulatory regime, is likely to have long lasting effects. For instance, at the time of finalising its WTO accession, Tonga did not have technical regulations, standards or certification procedures for licensing, yet it agreed to comply fully with the WTO rules, including the GATS and the agreement on Technical Barriers to Trade.\footnote{Mitchell, A.D and Wallis, J, ‘Pacific Countries in the WTO: Accession and Accommodation, the Reality of WTO Accession’ in Lee, Horlick, Choi and Broude (eds.), Law and Development Perspective on International Trade Law, (Cambridge University Press: The Law and Development Institute, 2011), p. 186.}

Finally, the GATS as a \textit{de facto} investment agreement through mode 3 has focused on the definition of investors’ rights and has paid little attention to human right obligations. According to the Office of the High Commissioner for Human Rights, the GATS with its existing rules and scheduling practices skews ‘investment liberalisation in favour of investor’s rights, losing sight of their conditional nature and possibly leading to the detriment of rights and interests of other actors.\footnote{Office of the High Commissioner for Human Rights, \textit{Human Rights and Trade}, the 5th \textit{WTO Ministerial Conference, Cancun, Mexico, 10-14 September 2003.}

Even without any GATS commitments, there is nothing to prevent the PICs inviting the kind of investment that will help them achieve their development goals. Without the GATS rules that constrain the Pacific governments’ ability to regulate in certain ways, the PICs would retain the autonomy to set the regulatory frameworks to protect and enhance their environmental, social and development needs according to national circumstances.

\section*{5.8 Conclusion}

\footnotetext[536]{Office of the High Commissioner for Human Rights, \textit{Human Rights and Trade}, the 5th \textit{WTO Ministerial Conference, Cancun, Mexico, 10-14 September 2003.}
Given the importance of the tourism sector in the PICs as a pathway to development, it is critical to understand the implications of making tourism services liberalisation commitments under the current GATS framework. The current rules of the GATS seek to lock the PICs into the growth model of tourism through agreements belonging to the Second Moment and constrains their ability to deliver sustainable tourism development or ensure a desirable form of FDI. An alternative approach is required to replace the neoliberal philosophy that now dominates the Pacific governments’ trade policy towards tourism development.

Unless the current GATS provisions are amended to accommodate the developmental and human rights aspirations of the people of both the developed and developing countries as part of a Third Moment, which seem unlikely, small states like the Pacific island countries need to adopt a cautious approach to services liberalisation using the GATS legal framework. This is because once a country concedes its policy space and development options under the rules of the WTO, it is difficult to move away from neoliberal imperatives of the Second Moment to a Third Moment. This caution applies to the successive rounds of GATS negotiations or in WTO-compatible and GATS-plus FTA negotiations, such as the investment and services chapters under the EPA, PACER Plus and the PICTA Trade in Services protocol.
CHAPTER 6: SERVICES LIBERALISATION UNDER REGIONAL ECONOMIC INTEGRATION INITIATIVES IN THE PACIFIC

6.1 Introduction

The growth of regional economic trading blocs has been one of the major developments in international economic regulation in recent decades, building on the neoliberal foundations of the WTO. These regional blocs are commonly given effect through WTO-compatible regional trade agreements (RTAs) or free trade areas/free trade agreements (FTAs) whose approach to law and development is firmly situated in the Second Moment.\(^{537}\) As of 7 April 2015 some 612 RTAs, counting goods and services separately, had been notified to the WTO.\(^{538}\) Of these, 406 were in force.\(^{539}\) Virtually all countries are now parties to at least one agreement or bloc.\(^{540}\)

In the Pacific, economic integration has been on the agenda of the Pacific Islands Forum since its establishment in 1971. The concept of regionalism at that time was part of the First Moment, but over time, it has become progressively more neoliberal. At its very first meeting, a senior officials committee was created to examine the possibility of an economic union.\(^{541}\) However, as noted by Morgan, it was quickly realised that the issue of deep economic integration in the Pacific region was complex and politically difficult because of the diverse interests, varied resource endowment and demands of donors.\(^{542}\) The idea of economic integration, particularly through a free trade area among Forum Member States, resurfaced in the 1990s due to increasing globalisation and external pressure from the PICs’ major development partners, Australia and New Zealand. Those factors forced the Pacific leaders to consider economic integration as a means to bring about economic growth and

\(^{537}\) For the purpose of this thesis, the term Free Trade Agreement (FTA) is used to describe a regional WTO-compatible trade agreement negotiated amongst the Pacific Island Countries (as in PICTA) or between the PICs with their major donors (as in EPA or PACER Plus) with the aim to reduce trade barriers with each other.


\(^{539}\) Ibid.


\(^{542}\) Ibid.
prosperity in the region.\textsuperscript{543}

The standard justification for embracing economic regionalism in the Pacific revolves around the idea that PICs could only survive in a globalised world if they gradually integrated into the global economy using regional economic integration initiatives as ‘stepping stones’ to avoid marginalisation. This idea has been promulgated largely by the international development agencies, notably the Asian Development Bank (ADB) and the PICs’ major development partners, in addition to a series of studies commissioned by the Pacific Islands Forum Secretariat (PIFS).\textsuperscript{544}

The Pacific Plan, endorsed by Forum leaders in 2005, became a rhetorical device that was supposed to provide a framework for Pacific regionalism. As noted by Kelsey, the Pacific Plan’s four pillars – economic growth, sustainable development, good governance and security through regionalism – were all premised on a neoliberal model of trade-driven economic integration through free trade agreements.\textsuperscript{545}

After six years of implementation, a 2011 Australia Strategic Policy Institute report, which was critical of Australia’s position in the region, called for Australia to ‘downplay the Pacific Plan’ because it had ‘lost momentum’ and urged the Australian government to change its approach to regionalism in the Pacific, an approach that genuinely takes into account the developmental needs of the PICs rather than free trade.\textsuperscript{546} The Pacific Plan was subsequently reviewed in July 2013 to reflect this approach and the final report was submitted to Pacific leaders on 31 October 2013.\textsuperscript{547}

\textsuperscript{543} The concept of a trade-led development strategy through the establishment of a free trade area in the Pacific region was endorsed by the Forum Economic Ministers Meeting in 1997.

\textsuperscript{544} For instance, a 2005 Asian Development Bank commissioned report \textit{Towards a New Pacific Regionalism} proposed a new approach which would place ‘good governance and economic growth as its highest priorities … aimed at strengthening economic management … lowering costs and more effective regional transport and communications, and a binding instrument based on mutual obligation involving trade, aid, and governance commitments’. The report had argued that market integration could increase provision of services and create economic opportunities for the Pacific people. See, Grynberg, R., Hyndman, M. & Siva, S. \textit{Towards a New Pacific Regionalism}, (Manila: ADB, 2005), p.14. The ADB’s view was supported by a 2008 Australian-funded study \textit{Research Study on the Benefits, Challenges and Ways Forward for PACER Plus} which suggested that the Pacific needed to move forward with deeper regional integration in order to avoid economic marginalisation. See, A. Stoler et al, \textit{Research Study on the Benefits, Challenges and Ways Forward for PACER Plus}, Final Report, (Suva: PIFS, June 2008). p.4.  


\textsuperscript{547} A soft copy of the Pacific Plan Review 2013 is available from www.pacificplanreview.org/
In May 2014, Forum leaders adopted the *Framework for Pacific Regionalism* which replaced the Pacific Plan as the new instrument to deepen regional integration. The *Framework* claimed to be heralding a new paradigm that progresses beyond regional cooperation towards deeper forms of integration. Building on the four pillars of the Pacific Plan, the *Framework* promulgated a significantly different approach to regionalism - moving away from a purely voluntary model of regional cooperation under the Pacific Plan towards a binding approach to implementing regional decisions and agreements. The *Framework* therefore still regards the ongoing negotiations for the controversial free trade agreements, including trade in services, as the pathway for development in the region.

This chapter questions whether the trade-driven development model of regional economic integration as envisioned in the Pacific Plan and the *Framework* will really advance the PICs’ national and regional development efforts. It focuses in particular on the trade in services.

The chapter is divided into three sections. By way of overview, section one explains the political context to the negotiation of the various regional economic integration initiatives in the Pacific. This section also examines five key studies pertaining to trade in services liberalisation in the Pacific that were commissioned by the PIFS and the Australian government to justify the push of economic regionalism through FTAs amongst the PICs, as well as between the island economies and their major donors. None of the reports from these studies questioned the trade-driven model of development for the Pacific. Instead, all of them recommended trade liberalisation as a pathway to address the many development challenges facing the PICs including the quest to integrate into the global economy. Deficiencies in the research methodology applied in these studies are highlighted. Nonetheless, the PICs agreed to prioritise trade in services in regional free trade agreement negotiations based in part on those reports.

Section two examines the proposition that the Pacific Island Countries Trade Agreement (PICTA) can be a ‘stepping stone’ to greater regional economic integration.

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cooperation, including the liberalisation of trade in services and labour mobility. Reflecting on the development provisions of Article V of the GATS in relation to economic regionalism, it observes that the services commitments made by the 14 PICs under PICTA exceed their obligations and warns of the potential implications of the draft legal text of the trade in services chapter under the extended Pacific Agreement on Closer Economic Relations (PACER Plus). It scrutinises the optimistic assumptions, alluded to by the former Secretary General of PIFS, that a WTO-compatible free trade agreement on services liberalisation between the PICs and their two larger neighbours might lead to ‘deeper regional integration’, and unlock ‘the potential benefits of regional trade in services’. 549

Because labour mobility is considered the most important component of a trade in services agreement by the PICs, section three takes a closer look at the case of labour mobility in the context of Australia and New Zealand’s temporary labour market schemes. It explores the purported benefits of the existing schemes offered by these two countries and the likelihood and implications of including a binding agreement of labour mobility for low and unskilled workers under PACER Plus.

The chapter concludes by asking whether the pursuit of the current model of regional economic integration - driven by free trade and economic considerations, negotiated under pressure, and bound by WTO compatibility – may leave no room for Pacific governments to seek more equitable and fairer approaches to development. Are they legal captives forever of the growth model of development that characterizes the Second Moment? Or given their growing questions about the benefits of that model, is there still some space for the PICs to develop a different development pathway as part of the Third Moment?

The experiences of bruising trade negotiations have raised doubts about the motivation of the EU, Australia and New Zealand for seeking closer regional relations through the Economic Partnership Agreement (EPA) and PACER Plus. With little consensus amongst the negotiating parties on the benefits to the PICs from the inclusion of services liberalisation in a WTO-compatible free trade agreement, the chapter sets the ground for serious reconsideration of the PACER Plus negotiations.

549 Welcoming Remarks delivered by the Secretary General of the Pacific Islands Forum Secretariat at the Pacific ACP Leaders Meeting held on 28 August 2012, Rarotonga, Cook Islands.
altogether or at least downscaling it in favour of genuine regional development initiatives designed with the development needs of the PICs in mind.

6.2. Regional Economic Integration: EPA, PICTA and PACER Plus Negotiations

6.2.1 The Economic Partnership Agreement (EPA) Negotiations

While the EPA, PICTA and PACER Plus RTAs are inter-related, they each have their own dynamics and need to be examined separately. For example, negotiations of the EPA and PACER are directly linked, both influence and impact the respective negotiation processes. Negotiations between the EU and the Pacific ACP (PACP) states over an EPA began in 2002 with an initial deadline of 31 December 2007. The period between 2002 and 2004 was the preparation phrase. When the EU and the PICs officially launched the EPA negotiations on 10 September 2004, they agreed to defer substantive negotiations to the end of 2006. This was intended to defer triggering an obligation under PACER to begin negotiating a free trade agreement with Australia and New Zealand. 550

A report by Scollay in 2002 assessed the likely impact of the EPAs with the EU on the Pacific economies. 551 It noted that bilateral trade between the PACP and the EU has been minimal and might remain insignificant trading partners. 552 This is backed up by recent European Commission statistics confirming that the PACP share of EU trade in 2014 was just 0.06%. 553 However, preferences associated with the Lomé Conventions were particularly important for exports of sugar from Fiji 554 under the Sugar Protocol; 555 tropical tree crops (coffee, cocoa, palm oil, coconut oil) from PNG,

550 Article 6 of PACER contains a trigger provision which requires the PICs to enter into negotiations with Australia and New Zealand should the PICs decide to negotiate a FTA with a regional bloc like the EU or any country whose economy is larger than New Zealand. The legal text of PACER is available from: http://www.forumsec.org/resources/uploads/attachments/documents/PACER.pdf (accessed 20 April 2015).


552 Ibid.


555 The ‘Sugar Protocol’ was the EU’s agreement with the ACP Group on sugar which gave preferential treatment to the ACP sugar producers to access the European markets. It formally ended on 30 September, 2009. The sugar trade arrangements between the ACP and the EU are now part of either the Interim or Full Economic Partnership Agreements (EPA) which the parties have negotiated or are in the process of
the Solomon Islands and Vanuatu; and processed tuna from the Solomon Islands, Fiji and PNG. ¹⁵⁵⁶

Despite the limited trade between the EU and the PACP countries, the Cotonou Agreement requires the two parties to negotiate a comprehensive WTO-compatible FTA. This is because the principles set for trade cooperation between the EU and the ACP, as provided by Article 35.2 of the Cotonou Agreement,¹⁵⁵⁷ require it to be a comprehensive strategic partnership building on ACP regional integration. Recognising the limited scope for free trade in goods, Articles 41 to 43 of the Cotonou Agreement allow the EPAs to extend beyond trade in goods to cover trade in services. Article 41 underlines the need to extend special and differential treatment to the ACP suppliers of services. With respect to the EPAs, Article 41.1 provides:

The Parties further agree on the objective of extending under the economic partnership agreements, and after they have acquired some experience in applying the Most Favoured Nation (MFN) treatment under GATS, their partnership to encompass the liberalisation of services in accordance with the provisions of GATS and particularly those relating to the participation of developing countries in liberalisation agreements.

Most goods exported from the PICs into the EU had enjoyed preferential treatment, and this preferential treatment would be significantly eroded under the proposed EPA. To compensate the loss of preferences, the PICs requested a quota for the temporary entry of semi-skilled workers, which in legal terms translates to the EU granting them mode 4 (temporary movement of persons) concessions for these workers. The quota request emerged as a key EPA negotiating issue. In making the request, the PACPs were attempting to secure guaranteed access for Pacific islanders to work in Europe, while creating a precedent for negotiations with Australia and New Zealand under PACER Plus.


¹⁵⁵⁷ Article 35.2 of the Cotonou Agreement provides that ‘regional integration is a key instrument for the integration of ACP countries into the world economy’.
To date, after over a decade of difficult negotiations, only Fiji and PNG have signed interim EPAs on goods. They were concluded in November 2007 under trying circumstances to avoid disruption of trade on their principal exports to the EU.\textsuperscript{558}

The EU’s threat to terminate preferential trade with Fiji and PNG should they not sign onto an interim EPA forced these two countries to break ranks with the rest of the PACP states, which consequently weakened their solidarity as a group to negotiate a more development friendly EPA. In a strongly worded letter to Mandelson (EU’s former Trade Commissioner), the then Cook Islands’ Foreign Minister Rasmussen, who was also the Co-President of the ACP-EU Joint Parliamentary Assembly, accused the Commissioner of adopting a harmful strategy of divide and rule and expressed the general feeling of the Pacific leaders ‘that PNG and Fiji initialled the Interim Agreement because of fear that they would lose their preferential trade arrangements with the European Union’.\textsuperscript{559}

The sense that PNG and Fiji accepted the EU’s terms only to save their sugar and canned tuna industries confirmed the negative perception that the EU had used bullying tactics in the one-sided EPA negotiations. This negative experience when negotiating with the EU tainted the perceptions and further exacerbated tensions between Pacific officials and Australian and New Zealand negotiators, as discussed later in the chapter, when these two large Pacific neighbours also adopted a divide and rule strategy for the PACER Plus negotiations.

\textbf{6.2.2 PICTA, PACER and PACER Plus}

Following the 1999 meeting of trade ministers, the Forum Leaders Meeting endorsed in principle the establishment of an FTA among the PICs as a ‘stepping stone’ to greater regional integration. This FTA, originally called the Pacific Regional Trade

\textsuperscript{558} Under these interim EPAs, with the exception of some most sensitive products such as meat, fish and vegetables, PNG and Fiji would liberalise 88% and 87% of all EU imports respectively over a period of 15 years. See, EC Fact Sheet, \textit{The Pacific: Fiji and Papua New Guinea}, Fact Sheet on the Interim Economic Partnership Agreements, January 2009.

Agreement (PARTA) became known as the Pacific Island Countries Trade Agreement (PICTA). The PICTA signatories made a commitment to expand and diversify trade in the region, purportedly as a means of improving the living standards of all their nationals by progressively eliminating tariffs and other trade barriers over a period of twenty years (up to 2021).

As observed by Fijian academic Wadan Narsey, there were internal and external forces, both economic and political, driving the establishment of PICTA. The internal economic imperative was the result of recognition by the PICs that their preferential trade with industrial economies had already been affected by unilateral liberalisation within their trading partners, and was eroding even further through the operation of the WTO agreements. The political considerations driving PICTA included the perceived ability of the PICs to speak with a united voice in international fora, as well as the perceived advantage of a larger regional market due to economies of scale that would make the region stronger in relation to the rest of the world.

As succinctly captured in Kelsey’s paper Big Brothers Behaving Badly, the PICs were bullied by the governments of Australia and New Zealand into signing PACER in 2001. PACER is a framework agreement between the fourteen PICs and Australia and New Zealand that provides for a future free trade and economic integration arrangement with a view to establishing a single regional market. Under the provisions of PACER, the PICs had to begin discussions with Australia and New Zealand towards negotiating a free trade agreement by 2011 at the latest, unless certain ‘triggers’ brought the process forward.

Article 6 of PACER stipulates that if one or more PICs enter into negotiations for an FTA on goods with any other developed party or concludes an FTA with developing or least developing countries, they must offer to undertake consultations with a view to negotiating an FTA with Australia and New Zealand. This ‘trigger’ protected Australian and New Zealand trade interests in the event that the PICs began

560 PICTA is a trade agreement amongst the 14 PICs. The Goods Agreement under PICTA entered into force on 13 April 2003. The inclusion of services in the PICTA was endorsed by the Forum Trade Ministers in 2001.
562 Kelsey, J., Big Brothers Behaving Badly: the implications for the Pacific Islands of the Pacific Agreement on Closer Economic Relations (PACER), (Suva: PANG, 2004).
negotiating for FTAs and offered improved market access to other countries.

The PACER Agreement was framed in the knowledge that the PICs were about to undertake negotiations with the European Union for a reciprocal free trade agreement – the EPAs – which were meant to conclude by December 2007. Australia and New Zealand considered the Pacific’s negotiations with the EU for an EPA as having activated the ‘trigger’ of PACER. As a result of pressure, Forum trade ministers unanimously agreed at the 2007 FTMM to hold initial consultations with a view to negotiating a comprehensive regional agreement (PACER Plus) involving all Members of the Forum.

The power and resource asymmetry between the PICs on one hand and Australia and New Zealand on the other played a critical role in influencing the process of the PACER Plus negotiations. The following discussion centres on the politics involved in the informal processes relating to the PACER Plus negotiations. It is based on personal observations of how the governments and negotiators of the region’s two large donors, through efforts such as the provision of aid, capacity building initiatives and commissioning of studies, led the PICs into agreeing to launch formal negotiations on PACER Plus despite their earlier resistance to having parallel negotiations with both the EU and Australia and New Zealand on a regional FTA.

6.2.2.1 The Politics of Informal Consultation Relating to PACER Plus Negotiations

The first informal consultation on PACER Plus was held in Auckland in May 2008. One of the key issues brought up by the PICs officials at the meeting was the need for an independent adviser to assist the PICs as they moved into negotiations. Participants noted that the PICs’ ministers had endorsed a proposal for a Chief Trade Adviser (CTA) whose office would be supported by legal and trade advisers. The core functions of the Office of the CTA (OCTA) would be advice, coordination,

563 This commitment was included in the Lomé convention’s successor, the Cotonou Agreement.
564 All official meetings prior to the formal launching of the PACER Plus negotiations were considered ‘informal consultations’. Outcomes of such meetings were classified as confidential thus not made available to the public.
facilitation and representation on trade issues. Australian and New Zealand officials were cynical about the CTA proposal and proposed alternative mechanisms through which research and analysis could be provided to the PICs in advance of the formal commencement of negotiations. It was clear at the meeting that Australia and New Zealand were reluctant to fund the Office.

A second round of informal consultation was held in Tonga from 12-14 November 2008. Highlights of the meeting included discussions on the way forward in setting up the OCTA and a preliminary review of the draft roadmap for PACER Plus negotiations prepared by Solomon Islands. At this meeting, Australian and New Zealand officials undertook to officially respond to the OCTA proposal at the next informal consultation.

The third informal consultation took place in Adelaide on 16 February 2009.\textsuperscript{566} Discussions were centred on the draft roadmap prepared by Solomon Islands and the establishment of the OCTA. The roadmap would have allowed the necessary preliminary research and consultation to take place before a decision to launch negotiations was taken. The draft roadmap contained a four-step approach to the PACER Plus negotiations,\textsuperscript{567} outlining that PACER Plus negotiations could not proceed until:

- the Pacific had completed or ceased trade negotiations with the EU;
- a regional office for a CTA had been established;
- national consultations were undertaken in each PIC; and
- consultations on the coverage and modality of negotiations were completed.

The draft roadmap envisaged a timeline over which formal consultations would not begin until 2011, with the commencement of formal negotiations in 2013. The Australian and New Zealand governments were disappointed with the proposed timeline. On the funding of the OCTA, critics have observed that Australia and New Zealand played a ‘good cop, bad cop’ strategy to undermine the PICs’ OCTA


proposal. While Australia did not comment on the OCTA proposal, NZ indicated informally at the meeting that it might consider committing NZ$7million dollars towards the OCTA.  

The fourth and final round of informal discussion was held in Vanuatu from 13-15 May 2009, a few days after the hastily arranged informal Forum Trade Ministers Meeting held in Auckland from 8-9 May 2009. This final informal officials meeting focused on the discussion of key differences between the two sides (Australia and New Zealand on one, PICs on the other), including the timeline for negotiations and the design and funding of an OCTA. At this meeting, Australia had agreed to increase funding from its initial offer of AUD$250,000 to AUD$500,000 per annum for three years. New Zealand, on the other hand, reduced its initial offer from NZD$7M to match the Australian offer of AUD$500,000 per year over three years. There were strings attached to the funding promise. The offers were contingent on several key demands: (a) the announcement of negotiations in August 2009; (b) the design of the office would follow Australia and New Zealand’s preference; (c) the office would not engage in ‘capacity building’; and (d) no other donors were permitted to contribute.

As negotiations progressed to a formal mode, Forum leaders tried to present political unity in public on their positions towards PACER Plus. However, the outcomes documents of two separate ministerial meetings in August 2008 exposed the political realities pertaining to PACER Plus negotiations, which were more nuanced than the public display of solidarity. For example, during the Forum Leaders Summit held in Niue on 20 August 2008, the PIC leaders met separately and displayed their solidarity by issuing a collective press release stressing that:

Because of the importance of the trade issues involved, they agreed on the need for careful preparations by FICs, both individually and collectively, before consultations began with Australia and New Zealand and recognised the need for the early appointment of a Chief

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569 Ibid.
570 Ibid. p.25.
571 Ibid.
Trade Advisor to assist the FICs in both their preparations and negotiations if the shared objectives of all Forum Members were to be realised.\textsuperscript{572}

Such caution about entering into PACER Plus negotiations with Australia and NZ was not, however, reflected in the Forum Communiqué of the Forum Leaders’ Summit, where Australia and New Zealand were present. Instead, the Communiqué ‘reaffirmed the continuing importance of pursuing greater economic integration and trade as a regional priority … in particular the need for officials to formulate a detailed road map on PACER Plus, with the view to Leaders agreeing at the 2009 Forum to the commencement of negotiations’.\textsuperscript{573} It was clear that under political pressure, all Pacific leaders conceded to the demands of Australia and New Zealand and agreed to the official launch of PACER Plus negotiations despite their earlier opposition at their own meeting a few hours ago.

To a large extent, the PACER Plus negotiations stalled when Fiji was suspended by the Forum in May 2009.\textsuperscript{574} A legal opinion for the Pacific Network on Globalisation (PANG) argued that it was legally wrong to exclude Fiji from PACER Plus negotiations simply because it had been suspended from the Forum.\textsuperscript{575} Australia and New Zealand were also criticised for not giving the Office of the CTA the independence and the resources necessary to provide meaningful guidance to the PICs, and for not allowing sufficient time for the islands to prepare themselves.\textsuperscript{576} For their part, Forum trade officials continued their ‘inter-sessional’ meetings to progress work on the common priority areas with the aim of building momentum for improved engagement in the PACER Plus negotiations by Forum Members.\textsuperscript{577}

\textsuperscript{572} PIFS, Pacific ACP Leaders Committed to Beneficial EPA with EU, Press Statement (89/08), (Suva: PIFS, 20 August 2008).


\textsuperscript{574} The reasons for suspending Fiji was outlined in a Forum Chair’s statement issued in 2009. See, PIFS, Statement by Forum Chair on suspension of the Fiji military regime from the Pacific Islands Forum, Press Statement 21/09, 2 May 2009.


\textsuperscript{577} PIFS, Forum Trade Ministers’ Meeting (FTMM) Outcomes Document (PIFS (12) FTMM), 11 May 2012.
6.3 Donor Influence

6.3.1 Capacity Building Initiatives

Subsequent to the 2008 FTMM, Australia undertook a number of initiatives to move the PACER Plus process forward. These included sponsoring a capacity building workshop on trade in services in Nadi in 2008 and training modules provided by the University of Adelaide known as ‘The Australian Leadership Award Pacific Trade Fellowship’. This Trade Fellowship programme was designed to train PIC trade officials who were responsible for PACER Plus negotiations. Each PIC was invited to nominate one trade official to participate in a set of modules that involved ten five-day trips to Australia over a period of eight months. The focus of the training reflected Australia and New Zealand’s commercial interest in the liberalisation of services in areas relating to telecommunication, financial services, logistical services, education, health, tourism services and labour mobility.

In addition, the Australian-sponsored Trade Research Initiative offered each PIC AU$65,000 to commission ‘independent’ research on trade priorities and needs, but the selection of topics was subject to a set of predetermined criteria and required approval by the Australian authorities. This strategy of ‘capacity building’ reflected Australia’s consistent attempts to ensure its dominant role in influencing and setting the agenda of the PACER Plus negotiations.

6.3.2 Linking of Development Aid to PACER Plus

The urgency to advance the PACER Plus negotiations was reinforced by a series of moves by the Australian and New Zealand governments. Prior to the Forum Trade Ministers meeting in 2009, the Australian Minister for Trade Simon Crean and Parliamentary Secretary for International Development Assistance Bob McMullan visited Vanuatu, Solomon Islands, Samoa, Tonga and New Zealand from 1 to 6 April 2009 to lobby their political counterparts for a fast-tracking of PACER Plus negotiations. The aim of the tour was to build a ‘consensus’ to minimise dissent.

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578 Penjueli, M & Morgan, W, Speaking Truth to Power: Australian and New Zealand Use of Power Politics to Launch Pacific Free Trade Negotiations, (Suva: PANG, 2009), p. 8
The high-level joint visits of a trade minister and a parliamentary secretary responsible for development assistance sent a clear message to the PICs that the new Australian aid programme would be linked to Australia’s commercial interest in advancing trade and investment liberalisation in the region.

New Zealand was even more explicit in linking development aid to trade liberalisation. In 2009, the newly elected National government brought the semi-autonomous NZAID back into the Ministry of Foreign Affairs and Trade. It was a move that established a direct link between development aid to the Pacific islands and New Zealand’s regional free trade aspirations. Some aid organisations accused the New Zealand government of using aid as a ‘political football’ instead of helping the poor. The politicisation of aid was a deliberate move by the New Zealand government to take control of its aid budget to further its self-interest and ideology in the region, including its conviction on the intrinsic merits of free trade.

### 6.3.3 Selected Studies on the Justification of Regional Services Liberalisation

The theoretical support for claims about the benefits of services liberalisation in the region through FTAs was based on several studies commissioned by the PIFS. Some of these studies were about specific agreements but there was a common theme throughout them, which primarily focused on justifying the liberalisation of services in the Pacific region. These studies were mostly written by consultants and scholars from the US, Australia and New Zealand with minimal contribution from the Pacific island nationals.

As a succinct synopsis of the arguments presented in the studies, the findings of *Research Study on the Benefits, Challenges and Ways Forward for PACER-Plus* highlighted at least three main reasons for including trade in services in both PICTA and PACER Plus. First, unlike goods liberalisation, services liberalisation involves no loss of government revenue since there are no import tariffs on trade in services. Second, services liberalisation, particularly with a liberal investment regime, might encourage higher FDI inflows, greater competition and efficiencies in the Pacific

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economies, which in turn might lead to greater supply and competition in sectors like telecommunications, transport, education and tourism. Third, there is genuine interest and desire among Pacific islands for regional FTAs to increase labour market access for the PICs’ surplus low and unskilled workers into bigger island countries like Fiji and Papua New Guinea under PICTA and Australia and New Zealand under PACER-Plus.

These commissioned studies support the view that trade-driven development was, and remains, the centrepiece of policy advice to the PICs. The five key studies that have touched on the liberalisation of trade in services in the region, all of which have been influential in agenda setting for PICTA and PACER Plus negotiations, are:

- Scollay and Stephenson (2001): *An Analysis of the Costs and Benefits of Extending the Proposed Free Trade Area Agreement for the Pacific Forum Island Countries to the Service Sector*.\(^581\) The study was prepared by scholars from New Zealand and the US;

- Institute for International Trade and Pacific Trade Consult (2007): *The Potential Impact of PICTA on Smaller Forum Island Nations*.\(^582\) The study was prepared primarily by scholars from the University of Adelaide dedicated to promote an open and rules-based multilateral trading system;

- Nathan Associates (2007): *Pacific Regional Trade and Economic Cooperation Joint Baseline and Gap Analysis*.\(^583\) The study was prepared by a US consultancy firm;

- Institute for International Trade (2008): *Research Study on the Benefits, Challenges and Ways Forward for PACER-Plus*.\(^584\) The study was prepared by scholars from Australia, the US, New Zealand, Samoa and Fiji;

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\(^581\) Scollay, R and Stephenson, S. M, *An Analysis of the Costs and Benefits of Extending the Proposed Free Trade Area Agreement for the Pacific Forum Island Countries to the Service Sector*, (Suva: PIFS, 2001). The study was presented to the 2001 Forum Trade Ministers Meeting but was not made available to the general public.


- VituLink Consultancy, Inc and ECORM International Inc (USA) (2012): *Study on Social Impact Assessment (SIA) of Liberalising Trade in Services (TIS) and Temporary Labour Mobility Among Forum Island Countries.* The study was prepared by a US consultancy firm.

i) An Analysis of the Costs and Benefits of Extending the Proposed Free Trade Area Agreement for the Pacific Forum Island Countries to the Service Sector

This study was the first to be commissioned by the Pacific Islands Forum Secretariat in response to the 1999 Forum Trade Ministers’ decision to request the organisation ‘to undertake further work on the effects of extending the Pacific Free Trade Area (FTA) to include Trade in Services (TIS)’. The study justified extending trade in services under PARTA (now known as PICTA) on the assumption that services liberalisation would attract FDI, which would bring a combination of capital, human resources, and technology.

In summary, the study identified three key anticipated outcomes of liberalising services trade under PARTA: improvement in the environment for FDI; increased competition; and support to or reinforcement for domestic economic reform. These outcomes in turn were expected to deliver six benefits: improve efficiency and service quality; lower prices for consumers; encourage faster innovation; create higher employment; increase investment and higher long term growth; and encourage technology transfer.

The study recommended the expansion of services in the PARTA agreement to cover the essential service sectors. The recommendations included liberalisation at an early stage of sectors like telecommunications, financial services, air and maritime transport, health, education, tourism and travel services, and professional services,

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585 This SIA was directed by PACP Trade Ministers to be commissioned in 2009 after the 3rd Round of PICTA Trade in Services negotiations. However, it was commissioned in December 2011 and the final report only completed in April 2012. Available from [http://www.forumsec.org/resources/uploads/attachments/documents/PICTA_TIS_SIA_Report.pdf](http://www.forumsec.org/resources/uploads/attachments/documents/PICTA_TIS_SIA_Report.pdf) (accessed 3 May 2015)

with additional service sectors to be added at a later stage. The study also recommended the inclusion of an annex in the services agreement on the free movement of skilled and semi-skilled categories of workers within the region.

The findings and recommendations of this study were based on selective visits to the PICs and interviews. There was no in-depth analysis of the possible risks associated with services liberalisation in the PICs. The authors of the study admitted the assumed benefits of including services liberalisation in a Pacific FTA were an adaption of a WTO Secretariat’s publication, *GATS – Fact and Fiction*.587

ii) The Potential Impact of PICTA on Smaller Forum Island Nations

The study led by the Australian Institute for International Trade in 2007 concluded that the PICs should implement a comprehensive PICTA on a gradual basis to allow institutional and policy reform. While the study acknowledged some adverse impacts of tariff loss on total revenue to the PICs, it recommended the expansion of services liberalisation in PICTA to reduce the PICs’ dependence on import tariffs and increase benefits from services liberalisation. This recommendation was premised on the following assumptions:

- the liberalisation of services incurs no tariff revenue loss;
- the growth in domestic services sector (due to growth in trade in services) would generate higher revenue for governments from indirect taxation on services; and
- the potential to attract more FDI, as well as remittances as a result of fewer restrictions on the movement of temporary labour.

The report, which was not supported by empirical work or assessment of costs, concluded that PICTA should be seen as a first step in an almost inevitable process; delay would be costly and disruptive in the longer term. The report considered

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political conviction an important element to successful reform and liberalisation of services sectors in the PICs.

iii) Pacific Regional Trade and Economic Cooperation Joint Baseline and Gap Analysis

This study provided an overview of some of the key ‘gaps’ in the trade capacity of the PICs in relation to a PACER Plus agreement and was more balanced. The gaps identified in the PICs’ capacity included: trade policy coordination at the national level; lack of staff and expertise to participate substantially in the full range of trade negotiations; and the lack of enforcement and compliance capacity.

The study observed that services, dominated by tourism, comprised a majority of the GDP of all the PICs except Papua New Guinea. However, apart from tourism, the PICs have very limited service exports to Australia and New Zealand, particularly because of the latter’s restrictions on the movement of natural persons.

The study noted that, given their small size and inherent vulnerabilities, regional trade liberalisation in the services sectors might be more practical and advantageous for the PICs than liberalisation through the multilateral trading system. However, based on some of the recently concluded FTA negotiations by Australia and New Zealand, the study speculated that PACER Plus:

- was unlikely to include agreement on free labour mobility;
- was likely to include an investment chapter with implications for FDI and related land policies in the PICs; and
- would use a ‘negative list’ approach to the scheduling of services liberalisation commitments.

The study also cautioned the PICs to avoid a competitive ‘race to the bottom’ by lowering environmental standards to attract FDI. It concluded that PACER Plus must be more than a trade agreement if it is to succeed at providing a workable framework for deepening regional integration.
Even though this study cautioned the small, resource-constrained economies of the PICs about the threats from trade liberalisation, it contended that the island states could sequence their trade negotiations optimally to minimise the risks and maximise the benefits. For example, the study pointed out that the sequence of placing the EPA negotiations first raised the risk that PICs concessions made in the EPA negotiations would become the basis for PACER Plus concessions to Australia and New Zealand. For this reason, the study argued that it was necessary for the PICs to consider the linkage between the EPA and PACER Plus negotiations. Significantly, while the study questioned the sequencing of the free trade negotiations, it did not challenge the trade-driven model of regionalism in the Pacific.

iv) Research Study on the Benefits, Challenges and Ways Forward for PACER Plus

This study was commissioned by AusAID, and was a unilateral initiative of the Australian Government. A key aim of the study was to provide recommendations and a comprehensive strategy to move the PACER-Plus negotiations forward. Its recommendations were divided into three categories: progress towards a PACER-Plus agreement; the content of the agreement; and areas for further work and research.

The study reiterated the potential for increased labour market access, particularly for low and unskilled Pacific workers into the Australian and New Zealand markets, as the major benefit of PACER Plus. It recommended the inclusion of a GATS-consistent discriminatory quota as part of the trade architecture under PACER Plus. The study noted that the fear of reduced tariff revenue from trade liberalisation in goods would be mitigated by remittances from a successful temporary labour market scheme. It recommended that Australia follow New Zealand’s example and pursue the piloting of temporary labour market schemes with the Pacific, as a means to send a clear signal of its commitment to deepen regional integration.

The study also supported a trade architecture that includes services liberalisation. The authors argued that a services agreement could lead to greater supply and competition in sectors, such as education, transport and tourism. They concluded that economic globalisation was inevitable and irresistible and the PICs must not be ‘left behind’ by
not fostering a closer integration relationship with the regions’ two developed countries.\textsuperscript{588}

In proposing a way to move PACER Plus forward, the study recommended a preparatory phase of up to two years and an implementation period of ten years to coincide with the EPA implementation schedules, with deadlines for the elimination of any barriers before 2021.

\textit{v) Study on Social Impact Assessment (SIA) of Liberalising Trade in Services (TIS) and Temporary Labour Mobility among Forum Island Countries.}

In 2002, when the first Social Impact Assessment (SIA) on PICTA was commissioned by the Forum Secretariat, it was heavily criticised for significant omissions and factual errors, especially in the economic and social impact country profiles.\textsuperscript{589} As the PICTA negotiations evolved to include trade in services, Pacific governments came under increasing pressure from civil societies and NGOs to commission a new and serious SIA on the social impacts of including services trade in PICTA.

At their meeting on 20-21 October 2008 in Nadi, Fiji, the Pacific ACP Trade Ministers directed the Forum Secretariat to commission an SIA on services liberalisation among the PICs, to be conducted after the 3\textsuperscript{rd} round of PICTA trade in services negotiations in 2009.\textsuperscript{590} Despite the ministerial mandate, the unorthodox selection process for consultants and the timing of the release of the final report called into question the usefulness and relevance of this study to the PICs. For unknown reasons, the first call for ‘Expression of Interest’ to undertake this SIA was only made in July 2011 and was followed by a ‘Revised Call for Expression of Interest’ in September 2011. According to the revised terms of reference, the SIA was to


commence in October 2011 and be completed by December 2011, with the final report due by January 2012. In spite of the stated timeframe, the selected team of consultants was only engaged in December 2011 to carry out the SIA study. The final report was released in April 2012, two months after the PICs had concluded its seventh and final round of PICTA services negotiations.

The study focused on five services sectors, namely, business services, health, tourism, transport and education, using a combination of literature review, in-country consultations, surveys and national workshops. Five case studies were also conducted, which related to tourism, transport, communication, financial services and construction. On the surface, the study seems to use a methodology consistent with the revised terms of reference to cover a wide scope of sectors, and projected a perception that the consultants consulted many relevant stakeholders. On closer examination, it reveals a disturbing picture.

First, given the time constraint, the country visits for the case studies and workshops were conducted over the festive period of December and January when most stakeholders were not available for consultation. As a result, feedback by email from government officials and the 54 responses to questionnaires (with an average of fewer than 4 replies per PIC) formed the basis of analysis. Of those who responded to the questionnaire, the majority were government officials (57%), with 17% from the private sector, 17% from NGOs and civil societies, while 2% of the responses came from trade unions. Similarly, about 70% of those participants who attended the workshops were government officials with most of them declaring little knowledge of the concept of international trade.

Second, in the literature review, comparisons were drawn from countries like Sri


Lanka, South Africa, Latin American countries, Turkey and the UK with almost no reference to literature emanating from the Pacific region. Since these countries are so different in many aspects from the PICs, inferences and findings based on such comparisons greatly undermined their relevance to the impact assessment.

Third, the conduct of the ‘case studies’ demonstrated a rather casual approach to research. For instance, Samoa was chosen as a tourism case study to determine the potential social impacts of further liberalisation under the PICTA TIS Protocol. The study profiled consultations with the Samoa Tourism Authority, Hotels Associations and 42 arts and craft vendors from the flea market in Apia. The consultant justified restricting the survey to Apia because of the limited time and budget. However, Savaii Island (Samoa’s largest island where most tourism activities take place) is merely an hour away by ferry and would have cost only $24 Samoan Tala (approximately USS$10.00) for return transfers. The consultants’ exclusion of tourism operators based in Savaii from its case study revealed the very narrow scope of the findings which did not reflect reality on the ground.

Further, feedback from market vendors, hotels and tourism authorities were usually biased towards favouring more tourist arrivals, but reveal little about the social impacts of tourism on other members of society. Restricted by the terms of reference, the study did not explore the more contentious issues in the tourism sector relating to conflicts of land, rural poverty, environment degradation, workers’ rights, or the competing priorities of government budget allocations vis-à-vis the tourism industry and the general public.

**6.3.3.1 Critique of the studies**

The five studies stressed the benefits to be expected from services liberalisation under regional economic integration. They largely ignored the potentially adverse impacts and how any of these potentially associated problems could be mitigated when the domestic services markets were to be liberalised. The adjustment and other social costs are of particular concern to the PICs, especially when they do not have an adequate regulatory regime to safeguard societal interests or formal safety nets to rely on.

In view of these major shortcomings, the studies cannot be considered to satisfy the
Forum Secretariat’s initial purpose when commissioning the studies: ‘to fulfill its objective of providing Members with enough information to effectively manage the liberalisation of trade in services, and to cushion any adverse impacts and accentuate the positive outcomes’.  

The findings and conclusions of the studies offered a very weak foundation upon which the Forum Members could justify regional negotiations for WTO-consistent services liberalisation agreements between unequal partners. Yet these studies provided the intellectual justification for the PIFS to push the free trade agenda via FTAs negotiations in the region.

Furthermore, none of these five studies addressed the mandatory development flexibilities that the GATS requires for a WTO-compatible agreement that included services. As argued below, it is important for GATS Article V to be given a pro-development interpretation based on GATS Article V:3 and other development obligations, including paragraph 26 of the Hong Kong Ministerial Declaration.

6.4 WTO Compatibility – GATS Article V

Article V of the GATS defines what constitutes a ‘WTO-compatible’ free trade agreement pertaining to the liberalisation of services; that is, the minimum that would be required for a free trade agreement to achieve WTO-compatibility on services for the Pacific island countries.

6.4.1 Key Elements of Article V of the GATS

WTO-compatibility or conformity requires that barriers to trade be largely dismantled in all parties to a FTA, with a strong element of reciprocity. A WTO-compatible regional agreement governing the liberalisation of trade in services must satisfy the three conditions stipulated in Article V of the GATS. In summary, these conditions are: ‘substantial sectoral coverage’ in liberalisation commitments, the elimination of substantially all discrimination among the parties, in the sense of Article XVII on

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595 GATS Article V:1 (a)
national treatment;\textsuperscript{596} and no raising of the overall level of barriers to trade in services to services suppliers from countries outside the agreement.\textsuperscript{597} The first two conditions are internal obligations relating to ‘parties’ to the RTA while the third is an external obligation towards ‘third parties’.

Even though these requirements are loosely drafted and the concepts chiefly borrowed from GATT Article XXIV, the issues raised by the interpretation of GATS Article V are complex and determining the compatibility of regional agreements under the WTO is not straightforward.

From a development perspective, it is important to interpret Article V:1 and V:2 in conjunction with Article V:3, which provides mandatory obligations to ensure flexibility and more favourable treatment to developing countries. Article V:3 (a) states that:

Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of countries concerned, both overall and in individual sectors and subsectors.

Article V:3 (b) goes on to specify that:

Notwithstanding paragraph 6, in the case of an agreement of the type referred in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

This favourable asymmetry is crucial for the PICs since it allows them to make fewer sectoral commitments on market access, and reduces the burden on them to eliminate discriminatory measures affecting trade in services in the sectors that they have committed to liberalise.

\textsuperscript{596} GATS Article V:1 (b)  
\textsuperscript{597} GATS Article V:4
On the meaning of ‘substantial sectoral coverage’, the requirements of GATS Article V, as they stand, are potentially onerous and cover all the services sectors. The footnote further clarifies that ‘substantial sectoral coverage’ should be understood in terms of the ‘number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply’. This seems to indicate that not all sectors must be covered under a RTA to meet the ‘substantial sectoral coverage’ requirement. However, it is clear from the Panel ruling in the Canada-Autos case that the number of exclusions must be limited:

It is worth recalling that Article V provides legal coverage for measures taken pursuant to economic integration agreements, which would otherwise be inconsistent with the MFN obligation in Article II. Paragraph 1 of Article V refers to ‘an agreement liberalising trade in services’. Such economic integration agreements typically aim at achieving higher levels of liberalisation between or among their parties than that achieved among WTO Members. Article V:1 further prescribes a certain minimum level of liberalisation which such agreements must attain in order to qualify for the exemption from the general MFN obligation of Article II. In this respect, the purpose of Article V is to allow for ambitious liberalisation to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements. (emphasis added)

The Canada-Autos ruling means that RTAs for trade in services should, in principle, be applicable to all modes of supply in virtually all services sectors. The ruling did not, however, address the application of Article V to developing countries.

6.4.2 Developing Country Flexibilities

Article V of GATS has a Special and Differential Treatment (SDT) component that

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598 See footnote 1 of Article V of the GATS.
599 Panel Report, Canada-Auto, para. 10.271.
explicitly provides for flexibility and more favourable treatment for developing countries in a RTA. Paragraph 3 of Article V not only makes provision for RTAs between developing countries, but also for mixed RTAs between developed and developing countries.

On the meaning of ‘substantially all discrimination’, the requirement set out in GATS Article V:1 (b) provides for the ‘absence or elimination of substantially all discrimination’ especially but not solely in relation to GATS Article XVII on national treatment, which entitles services suppliers from other parties to treatment no less favourable than that accorded to domestic services and suppliers. If there are no market access restrictions, granting unqualified national treatment among Members of a services integration agreement would be equivalent to free trade in services.

Article V (b) (ii) explicitly lists four specific GATS articles in which measures are excluded from the obligation to eliminate ‘substantially all discrimination’ if those provisions apply to the particular instance. These articles are: Article XI (IMF Provisions on Payments and Transfers); XII (Balance of Payments); XIV (General Exceptions); and XIV bis (National Security). These provisions relate to specific measures a government has adopted, rather than what is in the party’s schedule when it enters into the RTA.

In addition to its internal requirements that focus on the relationship between the parties to a RTA, GATS Article V also contains external obligations that deal with the RTA’s legal relationship with non-Members. Article V (4) states that:

Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement. (emphasis added)

Again, Article V is unclear about how to interpret the meaning of not raising the overall level of barriers to services trade. Because barriers to trade in services actually refer to laws, and in Fiji’s case, for example, decrees and regulatory practices including official administrative decisions, it is virtually impossible to assign a
quantitative value to the qualitative nature of regulatory measures, as can usually be
done for trade barriers associated with the export of goods.

6.4.3 A Pro-development Interpretation of GATS Article V and Other Provisions

Since the precise extent of liberalisation needed for an RTA to meet the ‘substantial
sectoral coverage’ test remains unresolved with reference to developing countries, the
PICs should make use of the development provisions in the GATS to their advantage
in any trade negotiations on services liberalisation involving developed partners. 600
The provisions of GATS Article V:3, the Preamble, Article XIX:2, Article IV:3 and
paragraph 26 of the Hong Kong Ministerial Declaration, provide flexibilities to the
PICs as WTO Members to make minimal services commitments, and should by
analogy inform the interpretation of GATS Article V in relation to the EPA and
PACER Plus.

In a legal analysis on services and investment in the CARIFORUM-EU EPA, Kelsey
has elaborated on the development provisions of Article V. 601 She pointed out that in
negotiating market access commitments, applying a high numerical threshold to
satisfy the condition of ‘substantial sectoral coverage’ under Article V:1 (a) would be
inconsistent with the mandatory development flexibilities in Article V:3 and the
supporting context in the GATS. 602 Article V:3 recognises the difficulties that
developing countries face in relation to the Article V conditions. This provision
makes development flexibility mandatory for developing countries. In this regard,
when negotiating a services agreement under PACER Plus the PICs must be provided
with flexibility with respect to the conditions of Article V:1 (a) on substantial sectoral
coverage; and Article V:1 (b) on the elimination of discrimination. In other words, to
be pro-development ‘substantial sectoral coverage’ must be read subjectively to
reflect each PIC’s volume of services trade, current levels of trade in services

600 Regional NGOs such as PANG have published many discussion papers on the possible implications as well as
analysis regarding options for a new trading arrangement with Australia and New Zealand. They have consistently
argued the importance of a pro-development reading of Article V to mitigate the potentially damaging reciprocal
FTAs. See for example, PANG, New Trading Arrangements with Australia and New Zealand: What Options for
Development? Briefing Paper: 01, October, 2009,
(accessed 5 June 2015).
601 Jane Kelsey, Legal Analysis of Services and Investment in the Cariforum-EC EPA: Lessons for Other
Developing Countries, South Centre Research Paper 31, July 2010. Available http://www.normangirvan.info/wp-
602 Ibid. pp.8-12.
commitments and levels of development.

The GATS Preamble, which provides the context for interpreting Article V, recognises the right of WTO Members to regulate and to introduce new regulations, asymmetries in the development of services regulations and that developing countries have a particular need to exercise their regulatory capacity. A pro-development reading of the Preamble is very important for the PICs because most, if not all, do not have effective regimes that regulate services to meet their national policy objectives. Samoa admitted during its WTO accession negotiations on trade in services that its regulatory framework was still under-developed and required modernisation, with many services in Samoa subject to scarce or no regulation at all.\textsuperscript{603} Under such weak regulatory regimes, extensive commitments to liberalise trade in services under PACER Plus, for instance, would require the PICs to liberalise without first establishing a stable regulatory foundation to safeguard all those externalities associated with the provision of services. A services agreement under PACER Plus must therefore recognise that asymmetry and allow the PICs to enjoy much lower obligations to liberalise. It should contain explicit provisions to protect the policy and regulatory space for the PICs.

Moreover, as far as the liberalisation of trade in services is concerned, the 2005 Hong Kong Ministerial Declaration explicitly recognises the importance of providing flexibilities for developing countries, particularly the LDCs. Paragraph 26 of the Hong Kong Ministerial Declaration reads:

\begin{quote}
We urge all Members to participate actively in these negotiations towards achieving a progressively higher level of liberalization of trade in services, with appropriate flexibility for individual developing countries as provided for in Article XIX of the GATS. Negotiations shall have regard to the size of economies of individual Members, both overall and in individual sectors. We recognize the particular economic situation of LDCs, including the difficulties they face, and
\end{quote}

acknowledge that they are not expected to undertake new commitments.

In contemplating the level of market access and national treatment commitments made in a services agreement under PACER Plus, it is important for the PICs to utilise all the flexibility provisions of the GATS and the context provided by related legal texts, including the Hong Kong Ministerial Declaration. Kelsey argues that PICs that are WTO Members and LDCs (like Solomon Islands) should not be required to make any sectoral commitments beyond their GATS commitments. Developing PICs who are not WTO Members should be required to make very few, if any sectoral commitments; if they are LDCs they should not have to make any at all. Developing PICs (like Fiji and PNG) who are WTO Members should therefore be required to make few sectoral commitments, only on national treatment, and with extensive limitations and sufficiently long implementation periods. Tonga, Samoa and Vanuatu should not make any further sectoral commitments in view of their extensive GATS commitments.

The methodology of scheduling also affects the extent of a country’s commitments, in particular the use of a positive list approach rather than the negative list Australia and New Zealand initially preferred. One way of limiting the scope of services liberalisation under PACER Plus is to use a ‘positive list’ rather than a ‘negative list’ approach in scheduling the commitments. The ‘negative list’ is an approach to commitments under which the obligations to liberalise for national treatment and MFN treatment is disciplined as a general obligation. Measures and sectors which are exempted from that obligation are explicitly inscribed in the list and liberalisation takes effect on all those which are not included in the schedule of limitations.

Under the ‘positive list’, on the other hand, the sectors subject to liberalisation, and any conditions and restrictions on that, are specifically and explicitly inscribed in the country’s schedule for both national treatment and market access. No obligations are

604 Kelsey, J., A Pro-Development Reading of GATS Article V and Agreements on Free Trade in Services, University of Auckland, Auckland, 2009.
605 Ibid.
606 Ibid.
607 One of the key recommendations of the Australian funded study Research Study on the Benefits, Challenges and Ways Forward for PACER Plus was ‘…schedules of obligations on commercial services trade should take the form of a negative list (as in ANZCER)’. See, Institute for International Trade, Research Study on the Benefits, Challenges and Ways Forward for PACER Plus, Final Report, (Suva: PIFS, 2008), p. 7.
undertaken with respect to any sectors which are not specifically inscribed in the schedule. By using a positive list approach, the PICs can choose specific commitments each Pacific state is prepared to undertake and, within sectors concerned, to specify the terms, limitations and conditions on market access, and conditions and qualifications on national treatment. A negative list on the other hand carries high risks of error and omission, and exposure to future unknowns as circumstances change.

A pro-development reading of Article V means, in the case of the PICTA TIS Protocol, it would have been sufficient for Tonga, Samoa and Vanuatu to extend their respective GATS commitments to all PICTA Members since they have made extensive concessions already in their WTO accessions. Ironically, Fiji, PNG and Solomon Islands, have more flexibility in determining the extent of services liberalisation in the region in view of their relatively limited GATS commitments.

6.5 The PICTA Trade in Services Protocol

6.5.1 Status of PICTA Trade in Services Protocol

The concept and modality for the implementation of a regional agreement on trade in services as an extension to PICTA was developed in 2003 and presented to the Forum Trade Officials Meeting in 2004. Following the national consultations which took place across the region from 2003 to early 2007, a regional workshop was held in March 2007 to discuss the possible structure and content of a services liberalisation agreement among the PICs. Subsequently, the drafting of the legal text began in December 2007.

The first round of negotiations on liberalising trade in services among the PICs was held in April 2008. After seven rounds of negotiations, the final PICTA Trade in Services Protocol was prepared ahead of the 2012 Pacific ACP Trade Officials and Ministers meetings during which ten PICs initialed the Protocol. Fiji, Kiribati, PNG and Solomon Islands did not. The PICs proceeded with PICTA Trade in

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609 The ten PICs which initialed the PICTA TIS Protocol are: Cook Islands, Federated States of Micronesia, Nauru, Niue, Palau, the Marshall Islands, Samoa, Tonga, Tuvalu and Vanuatu.
Services (TIS) negotiations, for which the last round concluded in February 2012.\(^{610}\) On 28 August 2012, leaders of six PICs - the Cook Islands, Federated States of Micronesia, Marshall Islands, Tonga, Vanuatu and Tuvalu signed the PICTA TIS Protocol and encouraged the remaining PICs to sign within one year.\(^{611}\)

As the key driver behind this initiative, the PIFS seized the opportunity and was eager to announce its achievement. In his welcoming speech delivered at the Pacific ACP Leaders meeting held on 28 August 2012 in Rarotonga, the then Forum Secretary General, Neroni Slade, said:

"With a sense of achievement, I report to Hon Leaders that, further to your directions, and after much hard work and seven rounds of negotiations, the PICTA Trade in Services Protocol was initialled at the recent Pacific ACP Trade Ministers Meeting in Tonga. … This will be a significant step towards facilitating deeper regional integration, and unlocking the potential benefits of regional trade in services… . These regional agreements among Forum island countries will also better prepare Pacific economies for engagement under the Economic Partnership Agreement with the EU, and also with respect to undertaking negotiations with Australia, New Zealand and other developed countries.\(^{612}\)"

The Protocol was opened for signature for a period of one year. Pursuant to Article 35 (1), the Protocol would only enter into force 30 days after the date of deposit with the Depositary (PIFS) of the sixth instrument of ratification or accession. However, as of May 2015, only four of the ten PICs that signed the Protocol have ratified it thus the agreement has yet to enter into force.\(^{613}\) In view of the linkage between the PICTA Trade in Services Protocol and PACER Plus, the following section examines the legal text of the former to ascertain some possible implications for the proposed services liberalisation under the latter.

\(^{613}\) As of May 2015, the four PICs that have ratified the PICTA TIS Protocol are Nauru, Marshall Islands, Samoa and Tuvalu."
6.5.2 Interpreting the Implications of the PICTA TIS Protocol

The PICTA Trade in Services (TIS) Protocol provides a mechanism for the PICs to commit to market openness and non-discrimination for services and service suppliers from other PICTA parties. Services commitments are made with respect to market access and national treatment by service sector and modes of supply, on the basis of a ‘positive list’ modality, in accordance to the rules and principles of the GATS.

The negotiations on services schedules involved an iterative process of request and offers. The submission of draft schedules of commitments began at the third round of negotiations in April 2009. At a PICTA TIS Workshop held in Nadi in August 2009, by trade officials determined there would be three priority sectors, namely Business Services, Tourism and Travel, and Transportation Services (both Maritime and Air Transport). It was agreed that all PICs would make commitments in these three sectors as a minimum. Model Schedules drafted by the PIFS of the three priority sectors were distributed to facilitate the negotiations in September 2009. The PICs were encouraged to undertake additional commitments in other service sectors. The services negotiations continued through four more negotiating sessions, with the seventh and last round held in February 2012 followed by the signing of the Protocol in August 2012.

6.5.3 General Provisions of the Trade in Services Protocol

In terms of coverage, the Protocol covers all service sectors except services supplied in the exercise of governmental authority, central banking and social security, air traffic services, and services procured by government. Each Party is required to accord MFN treatment to services and service suppliers of any other Party for market access and national treatment under the terms, limitations and conditions specified in

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615 As defined by GATS Article 1:3 (c), services supplied in the exercise of governmental authority is extremely limited, being those that are neither on a commercial basis nor supplied in competition with one or more service suppliers.
616 Article 3.4 of the PICTA TIS Protocol.
617 Article 3.5 of the PICTA TIS Protocol. However, aircraft repair and maintenance, selling of air transport services, computer reservation systems, and other ancillary services are covered by the Protocol.
618 Article 15 of the PICTA TIS Protocol. Presumably this only applies, as with GATS, when procurement is not with a view to commercial resale or with a view to use in the supply of services for commercial sale.
its schedule of commitments. For example, if Tonga enters a services agreement with New Zealand after PICTA comes into force, it must also provide other PICTA TIS Parties at least as favourable treatment as that given to New Zealand.

There are two exemptions to MFN treatment. First, it does not apply to existing agreements that are listed in an annex to the Protocol. For example, under the Compact agreements between the Marshall Islands, Palau, the Federated States of Micronesia and the US, American citizens have preferential access to labour and services markets in these three island states. Unless these three countries listed the Compact in the annex as MFN exemptions, they would be required to grant the same preferential access to nationals of PICTA TIS Parties. Second, the MFN treatment does not apply to any future international agreement between developing countries (including least developed countries) in the Pacific Region. This means Members of the Melanesian Spearhead Group (MSG), a political and trading bloc consisting of the region’s larger Pacific economies, are not required to provide MFN treatment to the other PICTA TIS Parties if the MSG enters into a services agreement among themselves. Similarly, if another sub-regional grouping such as the Polynesian Group enters into a services agreement, they are not required to provide MFN treatment to other PICTA states.

Market access limitations under Article 5(2) are the same as GATS Article XVI and include the number of service suppliers; the total value of service transactions; limits on the total number of natural persons who may be employed in a particular service sector; and measures which restrict or require specific types of legal entity or joint ventures through which a service supplier may supply a service.

619 Article 5 (1) of the PICTA TIS Protocol.
620 Article 3 (2) of the PICTA TIS Protocol.
621 Compact of Free Association is a type of diplomatic relationship that an independent country has with the United States of America, as an associated country. Presently, there are three sovereign states that have this type of relationship with the United States. They are the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI) and the Republic of Palau. To access all official documents relating to the Compact of Free Association between the US and the Marshall Islands, and FSM, visit http://uscompact.org/index.php. A copy of the Compact of Free Association between the US and Palau, signed 10 January 1986 is available from http://photos.state.gov/libraries/palau/5/home/rop_cofa.pdf.
622 The Melanesian Spearhead Group membership includes Fiji, PNG, the Solomon Islands, Vanuatu and the Kanak Socialist National Liberation Front (FLNKS) of New Caledonia. It was established in 1986. The MSG Trade Agreement came into force in 1993. Fiji joined the MSG and the MSG Trade Agreement in 1996. The FLNKS joined the Group for political purpose in 1989.
623 The Polynesian Group comprises the Cook Islands, Niue, Samoa, Tonga, Tuvalu, American Samoa, French Polynesia and Tokelau. It was established in 2012 as a counter bloc to the Melanesian Spearhead Group.
624 The Compact States consists of the Federated States of Micronesia, Palau and the Marshall Islands.
As noted in chapter 4, commitments under this rule severely restrict the policy space and regulatory autonomy for the PICs. For example, if circumstances changed, the government of an island state may find itself unable to maintain or introduce laws or policies to manage or control the inflow of foreign investments or the ability to conduct economic needs tests to determine whether there is a gap in supply of services that requires the entry of new service suppliers.

The disciplines on domestic regulation under the Protocol are different from GATS Article VI in several ways. All measures of general application affecting trade in services must still be administered in a ‘reasonable, objective and impartial manner’. 625 In addition, Parties are required to establish mechanisms for the review of administrative decisions affecting trade in services if they do not already exist. 626 Moreover, the Parties are encouraged to ‘examine the scope for taking action to facilitate trade in services among the Parties by harmonizing their laws, regulations and administrative practices’, 627 and ‘where possible...co-ordinate with wider regional and international initiatives’. 628

Significantly, Article 12 of the Protocol contains a number of emergency safeguard measures, which have never been agreed under the GATS. A temporary ban or limited entry of foreign service providers in a particular service sector can be adopted in order to allow a Party to correct structural problems within the market such as the threat of the disappearance of local service sectors. 629 For example, if during a particular period an influx of Fijian engineers into the labour markets of a smaller PIC seriously threatens the jobs of local engineers the government of the affected PIC may invoke the emergency safeguard measure temporarily by limiting the number of Fijian engineers allowed entry. However, the measures must: not discriminate among Parties; avoid unnecessary damage to the commercial, economic and financial interests of any other Parties; not exceed those necessary to deal with the circumstances; be temporary and be phased out progressively as the situation improves.

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625 Article 9:1 of the PICTA TIS Protocol is a mirror copy of Article VI of GATS on domestic regulations.
626 Article 9:2 (a) of the PICTA TIS Protocol.
627 Article 21:2 of the PICTA TIS Protocol.
628 Article 21:3 of the PICTA TIS Protocol. It is not clear if these voluntary harmonisation initiatives apply to all services, or only those subject to commitments.
629 Article 12 of the PICTA TIS Protocol.
Under Article 13 of the Protocol a PIC can withdraw or modify commitments when it faces serious balance-of-payment or external financial difficulties or threat thereof, or where necessary to maintain a level of financial resources adequate for the implementation of its programme of economic development.\textsuperscript{630} However, there are stringent conditions, similar to those specified under Article XII of the GATS. As with the GATS, Article 13 also requires that the application of restrictions to safeguard the balance of payments ‘shall not be adopted or maintained for the purpose of protecting a particular service sector’.

The language of Article 14 on General Exceptions and Security Exceptions is the same format used in the GATS Articles XIV and XIV bis, respectively. Replicating the GATS general exception construct is alarming, as the stringency of the legal test and the cost of legal defence will make it extremely difficult for a PIC to invoke the exception to protect societal interests, such as the necessity to protect public morals or human, animal or plant life and health.\textsuperscript{631}

Finally, Parties will have a once-only right to withdraw commitments they have made during or after the first review of the Protocol, which will take place after five years of implementation, as stipulated under Article 27 of the PICTA TIS Protocol. However that provision in para 3 is subject to the next paragraph 4 which says it has to consult the other parties and offer compensatory adjustments to any party that objects – and if it does not or they do not agree the other party can suspend concessions. For any subsequent modification or withdrawal of commitments after the first review, the initiating Party must follow the GATS model and compensate in the form of new commitments in other sectors if required, or if it is adjudged to have breached its obligations to face retaliation in the form of withdrawal of commitments by the affected Parties.\textsuperscript{632}

The Protocol adopts a standard dispute settlement mechanism which requires the disputing parties to consult first with a view to an amicable solution before resorting to formal dispute settlement.\textsuperscript{633} Should consultations fail to resolve the dispute, it

\textsuperscript{630} Article 13 of the PICTA TIS Protocol.
\textsuperscript{631} Article 14:1 (a), (b) of the PICTA TIS Protocol.
\textsuperscript{632} Article 27 (4) states that a Party can also withdraw commitments before the first review, but only subject to approval by the Parties.
\textsuperscript{633} Article 25 of the PICTA TIS Protocol.
then goes through a settlement mechanism similar to that in the PICTA Trade in Goods agreement.\textsuperscript{634} There are two procedural steps. The first is mediation, to be conducted by a mediator agreed by the disputing Parties or, failing agreement, by the Secretary-General of the Forum. If mediation fails, any of the Parties may request arbitration to be conducted by an arbitrator agreed by the disputing Parties, or failing agreement, by the Secretary-General. Where a Party fails to comply with the arbitrator’s award, the other Party may suspend with respect to the defaulting Party any concessions it has made either under the PICTA TIS Protocol or even the PICTA Trade in Goods agreement, equal to the value of the benefits lost as a result of the action of the defaulting party.

Similar to the GATS, the Protocol also contains an in-built agenda of progressive services liberalisation. The Protocol calls for further rounds of negotiation, to begin no later than five years after the entry into force of the Protocol, with a view to greater liberalisation of trade in services between the Parties.\textsuperscript{635} However, this timeframe for the next round of negotiations coincides with that of the first review of the Protocol.

\textbf{6.5.4 PICTA Services Schedules of Commitments}\textsuperscript{636}

When negotiations on the Protocol concluded in 2012, all PICTA Parties submitted a schedule of services commitments, including those PICs who subsequently did not sign. Four PICTA Parties (the Federated States of Micronesia, the Marshall Islands, Samoa and Tonga) also included exceptions to the MFN obligation.\textsuperscript{637} The reluctance of the majority of the PICTA Parties, including significant players like PNG and Fiji, to sign and ratify the Services Protocol reflects the growing concerns about the benefits of free trade under the prevailing WTO model. The decision by these PICs not to sign and effect the Protocol despite a long process of negotiations was indicative of the emergence of a Third Moment in the Pacific.

\textbf{6.5.4.1 Horizontal Measures}

\textsuperscript{634} Article 26 of the PICTA TIS Protocol.
\textsuperscript{635} Article 28 of the PICTA TIS Protocol.
\textsuperscript{636} The Schedules of Commitments are an integral part of the PICTA TIS Protocol. However, the Schedules are not made readily available to the public and remain ‘Forum Eyes Only’ documents.
\textsuperscript{637} The MFN exceptions mainly refer to preferential agreements on access to labour and services markets such as the Compact states’ preferential agreement with the US and Samoa’s Treaty of Friendship with New Zealand.
All schedules submitted by the PICs include a number of Horizontal Measures or limitations that preserve the legal right of the respective government to apply certain measures across all of the sectors included in each country’s schedule of service commitments. These limitations may restrict certain types of economic benefits or restrict access to certain economic opportunities to foreign service suppliers, or they may require certain types of requirements or obligations to be met by foreign investors and services providers.

The most common horizontal limitations on market access and national treatment are those related to land ownership, the provision of subsidies, and the requirements to train local nationals.638 Eight PICs protected the right to apply an economic needs test to foreign investment (Mode 3) but only two PICs placed threshold limitations on foreign ownership. Three PICs required foreign investments to employ local nationals. Only Fiji preserved the right to adopt measures to protect socially disadvantaged groups across all service sectors.

6.5.4.2 Mode 4 Categories on Market Access

All PICs have also included a section on the temporary movement of natural persons (Mode 4) within their services schedule. These set out the categories of service suppliers from other PICTA Parties that are guaranteed entry and the related terms and conditions. The time period allowed for each category varies according to the individual PIC, mostly reflecting the current immigration regulations on working permits for foreign nationals.

The worker categories that have been included in the PIC schedules of commitments, with the indication of the time period allowed, are predominantly the following.639

- Services Salespersons (50 days to 2 years)
- Intra-corporate Transferee (1 to 3 years)
- Personnel engaged in Establishment (1 to 3 years)

638 Twelve PICs invoked horizontal limitations on land ownership while eleven PICs placed conditions on subsidies and training requirements.
• Business Visitors (30 days to 2 years)
• Independent Service Suppliers (1 year)
• Persons to fill positions for which no nationals available (6 months to 2 years)
• Temporary employees (90 days)
• Manager (up to 3 years)
• Specialists (up to 3 years)

As pointed out by ILO, youth unemployment is a major concern in the PICs and many Pacific governments are working towards mainstreaming youth employment into their national development plans.\(^{640}\) However, on the regional front it is clear that regional cooperation on labour mobility under the PICTA TIS Protocol is designed only to provide employment opportunities for skilled personnel from the Parties to the Protocol and to facilitate the movement between the territories of the Parties. The purported benefits of this scheme are further undermined by the MFN exceptions on all existing preferential agreements on labour and services markets in the Compact states, Tonga and Samoa (which includes an MOU) to establish a Polynesian Leaders Group for Polynesian States and Territories. The MSG’s recent move to conclude its own MOU on its Skills Movement Scheme also diminished the relevance of the PICTA labour mobility scheme, because the MSG MOU does not extend the preferential access to non-MSG countries.\(^ {641}\)

### 6.5.4.3 Sectoral Commitments

Each PIC’s service schedule also contains specific commitments with respect to the twelve main categories of service sectors that correspond to the classification used in the WTO.\(^ {642}\) Nine of the 14 PICs committed seven or more service sectors. In other words, the large majority of schedules go well beyond the three priority sectors (business services; travel and tourism services; and transport (maritime and air services) designated by PIC Trade Ministers for liberalization. They also exceeded commitments made by those PICs who are WTO Members. For instance, Fiji has no

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\(^{640}\) ILO, *Youth Employment Promotion in the Pacific Island Countries*, (Suva: ILO Office for the Pacific Island Countries, 2009).

\(^{641}\) The MSG’s Skills Movement Scheme came into effect in early October 2012.

GATS commitments in any of the three priority sectors.\textsuperscript{643} Even newly acceded PICs like Samoa and Tonga did not commit maritime transport services under the GATS.\textsuperscript{644}

Figure 4 summarises the commitments by the PICs under the TIS Protocol for all service sectors, plus the additional category of ‘other services’.\textsuperscript{645}

![Figure 4: Number of Committed PICs to Liberalise the 12 Principal Service Sectors under PICTA TIS Protocol](image)

The PICs’ market access commitments with respect to the three priority sectors are summarised below:

- **Business Services**: all 14 PICs made some commitments on Professional Services and 10 included liberalisation on Other Business Services, which cover Computer Services, Research and Development, Rental and Leasing Services.

- **Travel and Tourism**: all 14 PICs made commitments to liberalise at least some parts of this sector. Nine PICs limited their commitments to either higher end hotels and restaurants or those above a certain size or investment value and 8 have made commitments on Travel Agencies and Tour Operators.

- **Transport (Maritime and Air)**: 13 PICs have included the Transport sector in their schedule of commitments. For Maritime Services, 12 have made commitments,

\textsuperscript{643} WTO Doc. GATS/SC/32 (Fiji Schedule of Specific Commitments), 15 April 1994.

\textsuperscript{644} WTO Doc. GATS/SC/143 (Tonga Schedule of Specific Commitments), 28 January 2008; WTO Doc. GATS/SC/147 (Samoa Schedule of Specific Commitments), 5 June 2012.

\textsuperscript{645} The chart only indicates the coverage of commitments made by various PICs in the 12 principal services sectors. Some of the commitments relate to a single sub-sector within a sector and does not reflect complete commitment of all subsectors.
while 11 have committed to liberalise their Air Transport Services.

For the remaining eight principal service sectors, plus the additional category of ‘other services’, 10 PICs made commitments on Communication Services (9 commitments targeting the liberalisation of telecommunication); 8 on Construction Services; 5 on Distribution Services; 10 on Education Services; 5 on Environmental Services; 11 on Financial Services (10 commitments on insurance and 11 commitments cover banking services); 6 on Health Services; 4 on Recreational, Cultural and Sporting Services (including Sporting Services, Entertainment, News Agencies or Libraries and Museums); and 1 PIC has included a commitment on Energy Services (wind power production).

6.5.4.4 Implications of PICTA TIS Protocol for PACER Plus

As highlighted above, the PICTA Services Protocol is directed at legally locking the PICs in a liberal trade-driven model of development in the area of trade in services. The initial agreement is not expected to be static. Coverage is expected to expand over time beyond the initial number of sectors and commitments. According to Article 31 of the Protocol, following the first five-year general review of its operations there will be further reviews at five-yearly intervals, with the purpose of considering, among other things, the ‘progress in liberalisation and the desirability of further negotiations to broaden or deepen regional economic integration’.

The summary of horizontal and specific sector commitments made by the PICs highlights three dangers of using the PICTA TIS Protocol as a stepping stone to greater services liberalisation under either the EPA or PACER Plus. First, all the PICs have unilaterally gone beyond the ministerial mandate of focusing services liberalisation on three priority sectors to include commitments on all twelve service sectors as classified by the WTO. Second, non-WTO PICs (including least developed countries) made comprehensive liberalisation commitments across many sectors, subjecting their trade in services to the rules and disciplines of the WTO. Third, the component on labour mobility under the Protocol only focuses on skilled employment with no provisions for the semi-skilled or unskilled workers.

646 Non-WTO PICs include the Cook Islands, FSM, Kiribati, Nauru, Niue, Palau, Marshall Islands, and Tuvalu.
The PICs have willingly adopted a more ambitious approach to services liberalisation among themselves, without being fully informed of the implications. The 2012 social impact study that was commissioned by the PIFS failed to fully identify the potential consequences of services liberalisation in the region. All the PICs lack an adequate and effective regulatory regime to safeguard against the consequences of services liberalisation vis-à-vis competing development objectives. The Protocol’s provision for a once-only opportunity to review and withdraw commitments after a period of five years affirms the nervousness of the negotiators about the unforeseen consequences of services liberalisation in the Pacific. However, a five-year interval is a short period for experimentation, especially with the possibility that negotiations such as EPA and PACER Plus might be concluded within this timeframe. In this regard, there is a risk that the PICTA TIS Protocol could be an ‘express highway’ to the EPA and PACER Plus, rather than a ‘stepping stone’ that offers valuable experience for regional integration.

The willingness of the smaller and non-WTO PICs to embrace an ambitious services agreement raises a deeper concern about the advice that Pacific leaders received from their trade officials, consultants and advisory organisations such as the PIFS. By subjecting themselves to the multilateral trade rules of the WTO which aim to constrain the policy choices of their governments, these PICs are unnecessarily giving up their policy space to choose strategies and options that best serve their unique national circumstances and development priorities. As mentioned earlier, it is worth noting that the region’s largest economies and WTO Members, PNG and Fiji, have both opted not to sign the PICTA Services Protocol in order to preserve their policy space in trade in services.

6.6 The PACER Plus Negotiations

6.6.1 The Status of Negotiations

Following the Forum Leaders decision of August 2009 for Members to commence the PACER Plus negotiations, senior Forum officials met on 14-15 April 2010 in Port Vila, Vanuatu to consider the priority issues agreed at the Special Forum Trade

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647 PIFS, Study on Social Impact Assessment (SIA) of Liberalising Trade in Services (TIS) and Temporary Labour Mobility Among Forum Island Countries, VituLink Consultancy, Inc and ECORM International Inc, (Suva: PIFS, 2012).
Ministers Meeting in October 2009. Ten inter-sessional meetings had been held by May 2015.

The first five inter-sessional meetings focused on advancing negotiations in six common priority areas determined by Forum Members: labour mobility; development assistance; sanitary and phyto-sanitary measures; technical barriers to trade; rules of origin; and customs procedures.

At their meeting in July 2013, Forum Trade Ministers agreed that the coverage of PACER Plus negotiations be extended to include four more priority areas: standards and conformity assessment procedures; trade in goods; trade in services; and investment.648 It was at this meeting that a roadmap was adopted that stressed PACER Plus ‘should be comprehensive in scope and facilitate the progressive and substantial liberalisation of trade in goods, services and investment’.649 The roadmap agreed that in recognition of the PICs’ level of development, PACER Plus ‘should provide appropriate flexibility, including special and differential treatment, to the PICs’.650 Importantly, the roadmap was clear that ‘PACER Plus must be consistent with the WTO obligations for all WTO parties and involve realistic commitments to WTO rules for other parties’.651 The rapid finalisation of chapters and annexes on all aspects of trade in goods and the commencement of negotiations on trade in services and investment were identified as top priority areas of action in subsequent inter-sessional meetings.

The Eighth Inter-sessional Meeting on PACER Plus negotiations took place in Wellington, New Zealand from 29 September to 3 October 2014. The meeting was attended by officials from the sixteen Forum countries, including Fiji which re-joined the negotiations after returning to democratic rule in September 2014. The purpose of the meeting was to continue the text-based negotiations of PACER Plus focusing on labour mobility, development assistance, trade in services, investment, legal and institutional issues, trade and revenue data information exchange, and product specific

649 Ibid.
651 Ibid
rules. The tenth Inter-sessional Meeting took place in Port Vila, Vanuatu from 5-7 May 2015. The main objective of the meeting was to further negotiate the draft legal text of PACER Plus.

In the PACER Plus negotiations, the PICs had been consistent in demanding concessions from Australia and New Zealand on two key issues: development assistance and labour mobility. Australia and New Zealand on the other hand were more interested in negotiating a WTO-compatible chapter on trade in services, and a chapter on investment.

It may be premature to draw solid conclusions from the draft legal text of PACER Plus because negotiations are still ongoing. However, examination of the draft legal text on the chapter on trade in services as of 3 October 2014 raises a number of concerns over the development interests of the PICs. It is timely to recall that in 2009, the then Australian trade minister Simon Crean argued that ‘Australia has learnt the lessons of the EPA negotiations with the European Union. … Unlike the EPA, PACER Plus is not just a trade agreement, it is fundamentally concerned with developing the capacity of the Pacific region’. 652 The New Zealand government, through its Ministry of Foreign Affairs and Trade’s official website, claims to view PACER Plus as a political agreement aiming to secure an outcome that advances the economic development of Forum Island countries. 653 As discussed below, the content and structure of the October 2014 draft legal text contradict those public political commitments from Australia and New Zealand.

6.6.2 The Draft Chapter on Trade in Services under PACER Plus

The draft chapter on trade in services is based on the legal framework of the GATS. However, the terminology used in the ‘definitions’ and other operative provisions makes the legal text more ambitious, complex and opaque. The text is as an attempt by Australia and New Zealand to broaden the scope of and lock-in liberalisation commitments beyond the minimum requirement of GATS-compatibility. This would severely constrain the PICs’ policy space. However, the draft also has a limited

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number of flexibility provisions that are not in the GATS. This reflects attempts by the PICs to preserve policy space and flexibility as they grapple with the uncertainty or confusion with respect to the dismantling of applicable laws and regulations relating to the services sectors chosen to be liberalised. For ease of reference, the draft chapter on trade in services under PACER Plus is hereby referred to as the ‘TIS Chapter’.

6.6.2.1 Definitions, Scope and Coverage of the TIS Chapter

The structure of the draft TIS Chapter under PACER Plus is similar to some of the FTAs New Zealand and Australia have negotiated with other countries in recent years. For example, in the NZ-China Free Trade Agreement, chapter 9 covers trade in services. That chapter begins with ‘definitions’ rather than a preamble or an article on development objectives.654

The offensive interest of Australia and New Zealand is explicit from the beginning with Article 1 on ‘definitions’. Under the TIS Chapter, a ‘service supplier’ is defined as ‘a person of a Party that supplies, or seeks to supply a service’. The inclusion of ‘seeks to supply’ confers a broader coverage beyond GATS Article XXVIII (g). It reflects a higher level of ambition and establishes a link with investment and cross-border services. This linkage is further strengthened by the definition of ‘commercial presence’ under the TIS Chapter, which replaces the GATS usage of a ‘juridical person’ with ‘an enterprise’.655 This change of terminology reflects Australia and New Zealand’s desire to broaden the coverage of investment to include pre-establishment in addition to post-establishment.656 In replacing a ‘juridical person’ with ‘an enterprise’, it also avoids the local equity threshold requirement of more than 50% as stipulated under the GATS definition of a ‘juridical person’.657

The TIS Chapter Article 2 on ‘scope and coverage’ is modelled on GATS Article 1,  

655 In the draft legal text, an ‘enterprise’ means any entity constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship, association, or similar organisation, and a branch of an enterprise.
656 Pre-establishment and post-establishment rights refer to the pre-entry and post-entry rights of foreign investments.
657 GATS Article XXVIII (n).
covering all measures affecting trade in services under the four modes of supply within the territories of central, state, regional, or local governments and authorities, and non-government bodies in the exercise of powers delegated by them. Adopting the GATS language means the Parties to PACER Plus must meet Article 3.2 of the GATS that requires the central government to take 'such reasonable steps as may be available to ensure compliance'.

Whilst the scope under the GATS is already very broad, Article 2 also contains specific reference to air transport services, and extends coverage specifically to speciality air services; ground handling services, and airport operation services (which is common in NZ FTAs and reflects its commercial interests). Speciality air services include non-transportation air services such as aerial fire fighting, sightseeing, spraying, surveying, mapping and more. Ground handling services include airline representation, administration and supervision, and fuelling of an aircraft, with the exception of managing or operating essential centralised airport infrastructure.

6.6.2.2 Non-Discrimination: MFN Treatment and National Treatment

Article 3 covers the MFN treatment. Article 3.2 (in square brackets, indicating disagreement between the negotiating parties thus far) permits a country to list MFN exemptions in an annex. The bracketed exemptions include the preferential treatment agreements amongst the MSG Members such as the MSG Skills Movement Scheme.658

In addition, the PICs are keen to retain some policy space that allows them to adopt or maintain any measures that accord differential treatment amongst themselves. This special treatment is sought either collectively or otherwise, or to other developing countries pursuant to any future bilateral or regional agreements, provided their share of services trade does not exceed a specified percentage of world trade (calculation methodology not defined).

This demand for preferential treatment is most probably intended as leverage to urge

658 The MSG Skills Movement Scheme is an intra-regional labour movement agreement (for skilled and professional Pacific personnel) between the MSG Members. It came into force on 30 March 2013.
Australia and New Zealand to extend concessions to the PICs from their pre-existing arrangements with other countries to which they are Party. In particular, insistence on this provision is regarded as a bargaining chip to be used in exchange for concessions on the temporary movement of natural persons.

### 6.6.2.3 Domestic Regulation

Article 10 of the TIS Chapter is a blanket adoption of the GATS language drawn from GATS Article VI, which views domestic regulation from a market perspective. As Bossche observed, examples of domestic regulations that may constitute barriers to trade in services include sanitation standards for restaurants; technical safety requirements for airline companies; a requirement that all professional services are offered in the national language; a restriction on the number of pharmacies allowed within a geographical area; a prohibition on banks to sell life insurance; specific professional qualification requirements for accountants; and an obligation for all practising lawyers to be a member of the local bar association.\(^6^5^9\) In other words, under the principles of Article 10 important societal values relating to services may be subordinated to the commercial considerations reflected in the GATS’ concept of ‘barriers to trade’.

Article 10:1 requires each Party, in sectors where specific commitments are undertaken, to ensure that all measures of general application relating to licensing requirements, qualification requirements and technical standards that affect trade in services are administered in a ‘reasonable, objective and impartial manner’.\(^6^6^0\) These terms have important implications for the PICs. As discussed in chapter 4, in order to comply with obligations under Article VI:1, the Members must satisfy each of these standards cumulatively in sectors where it has made specific commitments. Transplanting the same text of Article VI:1 of the GATS to Article 10:1 of the TIS Chapter, a foreign resort developer in Samoa could establish a violation of Article 10:1 if the developer could demonstrate that Samoa’s adopts a technical measure of general application affecting the tourism sector is administered in an ‘unreasonable’ way, even if the administration of the same measure is considered ‘objective’ and

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\(^6^6^0\) Article 10:1 of the draft TIS Chapter.
‘impartial’.

Article 10:2 (a) requires ‘each Party to maintain or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures, which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services, including correction of the contested final administrative actions...’. In this respect, Article 10:2(a) not only requires that licensing requirements, qualification requirements and technical standards do not constitute ‘trade barriers’, it also has the potential to divert scarce resources towards law reform conducive to the market ahead of any other legislative reviews that may otherwise be considered higher on the development agenda of a PIC.

Article 10:4(b) of the TIS Chapter is a reproduction of Article VI:5(a)(ii) which suggests the grandfathering the pre-existing domestic regulatory measures. It means that those measures could be maintained even if they are not in conformity with Article 10:1 requirements. Under the TIS Chapter, this provision might had already introduced a strong bias in favour of Australia and New Zealand as these two metropolis countries have a much better regulatory regime on services than the PICs who do not have adequate regulations on many services activities.

6.6.2.4 Services Liberalisation versus Other Societal Values and Interests

The promotion and protection of public health, consumer safety, the environment, employment, economic development and national security are core tasks of governments. To achieve them, governments may need to adopt legislation or take policy measures that explicitly or unintentionally conflict with the trade in services rules.

The current draft text does not refer to the limited GATS-type general and security exceptions, although it is likely they will be located elsewhere in the PACER Plus text with cross reference to the TIS Chapter. For reasons explained earlier, the general exception in the GATS agreement, if repeated in TIS, will not provide effective

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protection. Given the weak regulatory regimes of the PICs, the absence from the legal text of any detailed and improved provisions on these exceptions in order to give Pacific governments the policy space and legislative autonomy to protect and promote society values and public interests belies the sensitivity to development claimed by Australia and New Zealand.

6.6.2.5 Increasing Participation of the Pacific Island Countries

Despite assertions from Australia and New Zealand that PACER Plus is a development agreement for the Pacific, the draft TIS Chapter contains little indication of how the PICs may benefit from free trade in services under a regional agreement.

Article 4 of the draft text refers to increasing participation of the Pacific islands in services trade through negotiated specific commitments pursuant to market access, national treatment and other additional commitments. These commitments relate to (a) the strengthening of their domestic services capacity and its efficiency and competitiveness **inter alia** through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and information networks; (c) and the liberalisation of market access in sectors and modes of supply of export interest to the islands.

Although Article 4 is an adaptation of GATS Article IV, it leaves out Article IV:3 which refers to giving special priority to the LDCs in the implementation of commitments in view of their special economic situation and their development trade and financial needs. This omission directly affects all Pacific LDCs, subjecting them to the same level of obligations as their bigger neighbours when many of the PICs LDCs and small island developing states are not even WTO Members.

Technology and technical know-how play an important role in strengthening the national capacity of the PICs in their quest for sustainable development. Cooperative actions to assist them are limited to procuring technology on commercial basis, with performance requirements that refer to technology transfer not permitted. A genuinely pro-developmental agreement would at least see Australia and New Zealand commit to facilitate and finance, as appropriate, access to development, transfer and diffuse environmentally sound technologies and corresponding know-
how to the PICs on favourable terms, including on concessional and preferential terms.

Article 4 of the draft text also has GATS-plus language on the need for all parties to establish contact points to facilitate access for service suppliers to information concerning the commercial and technical aspects of the supply of services; the registration, recognition, and obtaining of professional qualifications; and the availability of services technology. Whereas Article IV: 2 of the GATS imposes obligations on the developed countries to facilitate the access of developing countries’ service suppliers to information related to their respective markets, Article 4 of the draft TIS text requires all Parties to the agreement to establish such contact points. Hence, instead of assisting the PICs to gain easier access to information, the islands are now burdened with the financial and administrative requirements to establish contact points to service foreign service suppliers. Moreover, the obligation to supply information is also onerous on the PICs. Irrespective of whether the PICs may be able to secure some concessions from Australia and New Zealand in labour mobility and development assistance, the draft legal text of the TIS Chapter reveals the promise of a development-friendly PACER Plus to be rather hollow.

6.7 Labour Mobility as Leverage for PACER Plus Negotiations

6.7.1 Background

One of the major challenges facing most PICs is the demographic pressure from high rates of population growth and a high rate of unemployment and under-employment, particularly among youth. According to a 2006 World Bank report, the projected changes in excess labour supply between 2004 and 2015 are worrisome for most of the PICs because their economies cannot absorb employable youths into their labour markets. This may lead to problems of high unemployment and other related social concerns, such as increased crime, including domestic violence.662 The report projected that by 2015 there would be over 370,000 working age (15-54 years) people in Fiji not employed in the formal sector who could become the potential supply of

labour for overseas employment. For Papua New Guinea, the number of excess labour would exceed 3.6 million by 2015.

Since most PICs have weak demand for labour within their economies to absorb all working age people into the labour force, finding an opportunity to trade those labour services abroad becomes a pressing option to relieve the pressure of unemployment. Many Pacific governments see temporary access for their unskilled and semi-skilled people to work in services industries in more affluent countries such as the EU, Australia and NZ as their most important services export. According to Prasad in a 2007 study titled *Regional Economic Integration and Labour Mobility*, temporary labour movement out of the Pacific islands and movement within the region could have beneficial impacts on both the micro and macro levels. 663 Temporary employment abroad offers a way for PICs to address rising unemployment while at the same time providing alternative incomes for families and foreign reserves to pay for imports.

Given these anticipated benefits, Pacific leaders have spent much of their political capital over the years arguing for concessions on labour mobility during the EPA and PACER Plus negotiations, seeking to secure guaranteed entry for their semi-skilled and unskilled workers to work in the European or Australian and New Zealand labour markets. For instance, even though there was no requirement to include trade in services as part of the EPA, Pacific negotiators indicated a willingness to do so in the hope of securing commitments to allow semi-skilled Pacific islanders to work in EU Member States on a temporary basis. 664

They tried to develop a precedent for that with the labour mobility component of the PICTA TIS Protocol, but what they ended up with had little relevance to their initial goal. There are two particular problems with the strategy. First, the main objective in PICTA was to allow easier movement of Pacific islanders across national territories to address the shortage of skilled professionals in the various PICs. Because the demand

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663 Prasad, B., *Regional Economic Integration and Labour Mobility*, (Suva: University of the South Pacific, 2007).

for skilled professionals is relatively small, and larger PICs normally have sufficient surplus labour to fill the gap, the problem of ‘brain drain’ may not be a serious concern under PICTA. However, if such a scheme is extended to include the EU or Australia and New Zealand, the likely outcome would be an exacerbation of the ‘brain drain’ problem as most skilled Pacific islanders would opt to seek better pay and working conditions in the latter’s labour markets.

Second, the stated objective of labour mobility schemes under either an EPA or PACER Plus is to provide employment opportunities to the PICs surplus semi-skilled, unskilled and unemployed youths. The Mode 4 component of the PICTA TIS Protocol has limited precedent value for establishing a labour mobility scheme within an agreement such as PACER Plus because Mode 4 commitments made by the PICs under the PICTA TIS Protocol mainly relate to the employment of skilled professionals.

From the EU’s perspective, mode 4 under the GATS is oriented towards the movement of professional and tertiary-educated people, although it does not technically exclude semi-skilled and unskilled labour. During EPA negotiations, the EU made it clear that it was unlikely to offer a scheme that would create opportunities for the categories of workers proposed by the Pacific. In a letter dated 20 October 2006, signed jointly by the European Commission’s then Deputy Director for Trade (Karl Falkenberg) and the Director General for Development (Stefano Manservisi), the EU rejected almost all of the proposals by Pacific governments. In rejecting the proposal on mode 4, the Commission’s letter stated that the PACPs’ ‘ambitions in this area go far beyond the possible offers that we will be able to make in the end’ and offered instead to ‘facilitate your contacts with our Member States’.

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665 For example, Canada has a Seasonal Agricultural Worker Bilateral Programme with CARICOM member countries which began in 1966 and was later extended to Mexico in 1974. Canada specifically listed both its bilateral seasonal worker’s schemes in its final list of GATS Article II (MFN) Exemptions at the end of the Uruguay Round.

666 In a letter from the EC’s former Deputy Director for Trade, Karl Falkenberg and the Director General for Development, Stefano Manservisi, to former Pacific Lead Spokesman Kaliopate Tavola dated 20 October 2006, the EC stated that ‘your ambitions in this area go far beyond the possible offers that we will be able to make in the end’.


668 Ibid. p.7.
Largely as a result of the EC’s refusal to provide a meaningful quota on mode 4, the negotiations over a comprehensive Pacific EPA stalled. Following the technical round of EPA negotiations in September 2008, the PACP proposed a ‘rendezvous clause’ for services, which in effect led to the suspension of services negotiations.669

6.7.2 Labour Mobility and PACER Plus

For the PACER Plus negotiations, the Pacific leaders opted for a defensive position and considered deals on labour mobility as one of the few potential development gains from an arrangement they knew would have real costs to their small economies. Consequently, the Pacific Forum leaders made a guest worker scheme the central feature of the annual Pacific Forum meeting in Port Moresby in 2005.670 While the New Zealand government was receptive to the proposal at the Forum, Australia flatly opposed the idea. Instead, then Prime Minister John Howard announced his government would fund a regional technical college to train Pacific nationals in areas that could fill the occupational shortages in Australia.671 A pilot guest worker scheme was introduced three years later in 2008 under the Rudd government in what was termed as ‘a new era of Australia-Pacific Cooperation’.672

Given the labour shortages in the horticulture industries in both Australia and New Zealand, operators in these two countries are struggling to find reliable workers to harvest their fresh produce.673 Responding to the industry’s calls for assistance New Zealand introduced the Recognised Seasonal Employer (RSE) programme in April

2007, which allows its employers to recruit foreign workers from South East Asia and the Pacific for seasonal work in horticulture and viticulture. By April 2008, a year after its operation, 92 companies had been approved as RSE participants and 4,070 workers from the Pacific and South East Asia (Thailand, Malaysia, Indonesia and the Philippines) had RSE visa applications approved and 3,923 of the visas were used.\textsuperscript{674} PICs chosen to ‘kick start’ this programme included Kiribati, Samoa, Tonga, Tuvalu and Vanuatu, some of which already had access to New Zealand labour markets. More than 20 per cent of the RSE visas (811 of the 3,923) were given to workers from the four South East Asian countries and the rest were granted to the five PICs.\textsuperscript{675}

Politically, it was clear that the government of New Zealand saw the RSE Programme as a leverage for the creation of the PACER Plus. In March 2008, New Zealand’s then Trade Minister Phil Goff openly promoted the RSE scheme as a pilot project for Australia, stating that:

… I think Australia as a whole will be interested in looking at our experience and seeing whether that is something that might be a possibility in terms of a regional agreement. Certainly it’s something that the Pacific nations have been seeking and would be a major inducement for those countries to become part of an integrated economy in the Pacific region.\textsuperscript{676}

Reflecting the Rudd administration’s hope of a rapprochement between Australia and the PICs, Australian officials visited New Zealand in May 2008 to study the RSE scheme, as part of a process for developing a Cabinet submission for consideration. The Australian pilot scheme for seasonal workers, known as the Pacific Seasonal Worker Pilot Scheme, was eventually announced by the Prime Minister at the Pacific

\textsuperscript{675} Ibid. p.4.
\textsuperscript{676} ‘New Zealand pushes Australia to accept migrant workers under FTA’, \textit{Pacific Beat, Radio Australia}, 7 March 2008.
Leaders Summit in Niue in August 2008. The Scheme was to run until June 2012. In the first year (2008), Australia only issued 56 visas compared to the 100 visa cap for that year. Numbers increased to 67 visas in 2009; 392 visas in 2010 after the 100 visa cap was lifted; and another 590 by March 2012. Although the pace of arrivals was increasing, the cumulative total was just under 1,100 Pacific arrivals under the Pilot Scheme up to March 2012, well below the total 2,500 visa cap for that period. Of these arrivals, over 80% have been from Tonga; PNG, Vanuatu and Kiribati made up the remaining 20%, contributing around just over 200 workers.

On 8 September 2011, the Australian government announced that Nauru, Samoa, Solomon Islands and Tuvalu had been invited to participate, including a limited extension of the pilot scheme to workers from East Timor to work in the tourism industry in Broome, Western Australia. On 18 December 2011, the Australian Government announced the pilot scheme would become an ongoing Seasonal Worker Programme commencing on 1 July 2012 with the total number of visa places for seasonal workers capped at 12,000 over four years. The programme focuses on the horticultural industry and seasonal workers who are citizens of East Timor, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu are allowed to participate. As a goodwill gesture towards Fiji for returning to democratic rule after its September 2014 election, Australia has indicated that the programme would be extended to include Fijian workers. On 2 April 2015, a MOU was signed between Australia and Fiji that officially marked the inclusion of Fiji in

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679 Ibid. p.2.
680 Ibid.
681 Ibid.
682 Ibid.
684 Ibid.
685 Ibid.
Australia’s Seasonal Workers Program.687

In the midst of growing unemployment and rising poverty levels in the PICs, Pacific leaders welcomed such initiatives by Australia and New Zealand due their potential economic benefits. It was evident from their recently concluded FTAs that both Australia and New Zealand do not see GATS Mode 4 covering workers in seasonal labour schemes.688

While Australia and New Zealand have both stated that PACER Plus would not be a traditional trade agreement,689 they did not appear to have thought through the full implications for negotiation processes and outcomes.690 As a result, political rhetoric was often contradicted by actions. On labour mobility, the PICs have two basic demands, namely the increase in the quota levels under Australia’ Seasonal Worker Programme and New Zealand’s Recognised Seasonal Employer Programme, and the extension of these schemes to new occupational areas where the PICs could fill the gaps in the labour markets of Australia and New Zealand.691

In response to the Pacific request, Australia informed the 2014 Forum Trade Ministers Meeting that it was unable to commit to expand its Seasonal Worker Programme.692 Whilst New Zealand announced an increase of the quota level from 8,000 to 9,000,

688 For example, under the NZ/China FTA, NZ agreed to accept up to 1000 skilled Chinese workers in specified occupations in which NZ has an identified skill shortage, no more than 100 of which could be in any one profession. The sectors to which this commitment applies are set out in an exchange letter. The agreement is subject to five-yearly reviews and can be suspended for political reasons or end within 3 months notice if unemployment rises dramatically. This precedent suggests that, even if a quota were obtained under PACER Plus for mode 4 labour mobility, that quota would still be subjected to economic and political conditionalities and, as a side letter to the treaty, is not subject to its enforcement mechanisms.
690 For example, under the NZ-China Free Trade Agreement, Annex 11: Commitments on Temporary Employment Entry by Natural Persons only cover (with limited quotas between 150-200 people in each category at any one time) traditional Chinese medicine practitioners; Chinese Chefs Mandarin teaching aides; martial arts coaches; Chinese tour guides; and skilled workers to work in specified skilled occupations.
Australia only committed to undertake a review. Thus far, it is obvious that the governments of Australia and New Zealand intend to keep those labour mobility schemes unilateral in nature to ensure the programmes’ implementation meets their market needs tests, and are consistent with the prevailing immigration policies and political considerations.

A labour mobility scheme can be a mutually beneficial development arrangement if it is properly regulated and managed, and consistent with the RTD. The challenge for the governments of Australia and New Zealand is whether they have the political will to address the development needs of the region and adopt a truly ‘new approach’, independent of their free trade aspirations. Commentators in the region have pointed out that, despite the PICs’ demands, there is little indication that new and binding access to Australian and New Zealand labour markets will be included in the PACER Plus agreement. As Morgan observes, the governments of Australia and New Zealand view the success of the seasonal labour mobility schemes as ‘employer driven’, which depend wholly on unmet demand for labour. The schemes specify that only where workers cannot be sourced locally to fill the shortage of fruit pickers can farmers consider hiring Pacific island labour.

It is therefore not surprising that Australian and New Zealand trade negotiators insisted on including the equivalent GATS provision under Article 2 (scope and coverage) of the draft TIS Chapter of PACER Plus, which states that ‘nothing in this Chapter shall apply to measures affecting natural persons seeking access to the employment market of another Party, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis’.

While labour mobility schemes like the RSE could have the potential to improve remittance flows, ease unemployment pressures in the PICs and possibly assist with

693 Ibid.
695 Ibid.
696 Article 2 paragraph 4 of the draft Trade in Services Chapter of PACER Plus. Draft text as of August 2015.
rural community development, such arrangements also come with social costs. As observed by Maclellan, the first year of New Zealand’s RSE programme highlighted a number of issues. These included significant social costs like family separation, the negative impact on children’s welfare and education, the extra burden on the elderly left in the village, the lack of supporting services and pastoral care in New Zealand, poor housing, low union coverage, lack of standardized disputes procedures and so on. Kelsey also noted that countries that are economically dependent on remittances are vulnerable in economic downturns, and for political reasons as in the case of Fijian security workers employed by the Middle-East countries.

6.8 Conclusion

PACER-Plus and a comprehensive EPA are the two most significant regional trade agreements the PICs are currently negotiating, in terms of size and potential impact. By agreeing to commence formal negotiations, the PICs embraced the eventuality of replacing their current preferential trade arrangements with reciprocal liberalisation that favours their two largest regional neighbours.

This chapter has argued that it is not in the interest of the PICs to enter into a WTO-compatible free trade agreement with Australia and New Zealand, using trade in services as the point of analysis. The recent history of manipulation to secure the launching of PACER Plus has shown that the development rhetoric of Australia and New Zealand readily gave way to commercial imperatives.

In questioning whether the PICTA TIS Protocol could be an effective ‘stepping stone’ for greater services liberalisation in the region, the chapter examined the key provisions of the Protocol’s legal text and concluded that the PICTA TIS Protocol is not an appropriate platform to wider and deeper services liberalisation with the PICs’

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698 Kelsey, J., Chapter 6: Trade in People, Serving Whose Interests? The Political Economy of Trade in Services Agreements (Oxon: Routledge-Cavendish, 2008), pp.189-220. According to Kelsey, Fiji’s dominant human export in the mid-2000s was sending security workers to conflict zones. The Fijian army, for instance, offered attractive job options for its soldiers to work as UN peacekeepers. Other soldiers or even civilians sold their military skills, through transnational recruitment agencies, to offshore armies or security firms.
bigger trading partners. Given Australia and New Zealand’s dominance of key services in the region, a GATS-compatible or a GATS-plus Trade in Services Chapter under PACER Plus will result in the closure of policy space for the PICs, loss of licensing revenue, increased compliance costs, and exclusion of cultural, social and environmental priorities in national development strategies.

The chapter also challenged the idealistic rhetoric on regionalism that has enticed the Pacific governments to embrace the trade-driven development paradigm – that the quest for legally binding commitments from Australia and New Zealand to allow Pacific nationals to work in their labour markets is worth sacrificing other services sectors. Whether labour mobility should and will be included as part of a comprehensive PACER Plus agreement remains unclear, but indications suggest that Australia and New Zealand are using labour mobility (seasonal workers schemes) as a ‘bargaining chip’ to advance the PACER Plus negotiations, with no intention of making binding and meaningful commitments.

Despite Australia and New Zealand’s enthusiastic promotion of PACER-Plus as a pro-development agreement, their actions in the negotiations have suggested otherwise. It would be unfortunate if these two countries continue to use their economic and political dominance in the region to obtain the maximum benefits for their countries’ respective commercial interests and overlook the long-term benefits of making a positive difference to the lives of nearly eight million people in their backyard.

The reluctance of the majority of the PICs to sign the PICTA TIS Protocol, especially large economies like Fiji and PNG, and the prolonged PACER Plus negotiations reflects the PICs growing concern about the benefits of the prevailing neoliberal model of development and their struggle in trying to adopt alternative pathways. The obligations under PICTA TIS Protocol are significant on paper, but are unlikely to be treated so seriously by the other PICs. In particular, without Fiji and PNG ratifying the agreement, the impact will be limited and the threat of enforcement will have few consequences. Hence, with the exception of the newly acceded WTO Members – Samoa, Tonga, and Vanuatu - there is space for the Third Moment to take root in many PICs. It remains to be seen whether Pacific leaders are willing and able to stand up against the major powers in PACER Plus and the EPAs, and if there will be the
same reluctance among the parties to MSGTA2 to bring it into force, the implement and enforce it. If MSGTA2, PACER Plus and the EPAs were to come into force, the space closes dramatically and the PICs may indeed be trapped in the neoliberal agreements that typify the Second Moment.

In conclusion, the chapter contends that the PICs major powers and development partners, particularly if the EU, Australia and New Zealand are sincere about their commitments to the shared prosperity of the region, an alternative approach is required that replaces the existing practices of addressing the development needs of the region by one that is independent of their free trade aspirations. Absent such a paradigm shift, Pacific regionalism may be in danger of going the way of most multilateral institutions – that is, captured by the richer and bigger countries to maintain the Pacific within a regional hegemony dominated by Australia and New Zealand. And unless these two larger development partners’ vision of regional cooperation reaches beyond a free trade agenda that is dictated by the neoliberal ideology, the PICs may ‘remain on a journey without a destination’ on their quest toward a Pacific regionalism that is beneficial to the islands.

CHAPTER 7: PROSPECTS FOR A THIRD MOMENT OF LAW AND DEVELOPMENT IN THE PACIFIC

7.1 Introduction

This thesis has used tourism, as a service sector of fundamental economic and social importance to the PICs, with a focus on Fiji, to show how the region is increasingly bound through commitments in the GATS and other agreements to a neoliberal model as part of the Second Moment. At present, in an effort to expand the tourism industry and attract more tourists to the region, Pacific states follow a GATS-consistent approach to liberalise and deregulate their tourism-related laws (including investment regimes) and introduce investor friendly policies to support the market, while

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compromising the government’s role to support the social, protect the environment and provide direct relief to the poor.

That is symptomatic of the broader dilemma that confronts the PICs. On one hand, they are seemingly trapped in the Second Moment, partly from external pressure and partly their own acceptance of the neoliberal model of development. On the other hand, there are signs that at least some of them are looking for ways to break through this model and realise a different development agenda. The previous chapters show there is still room for most PICs, aside from the accession countries, to pursue an alternative pathway to sustainable tourism that is consistent with the RTD as part of a Third Moment. This chapter examines the barriers that trade in services agreements place in the way of that happening and what would need to change, again using tourism as the example.

Ideally, the tourism sector should be developed under a well consulted and carefully considered national development plan, taking into account the interests of all stakeholders and balancing the three pillars of sustainable development. Trade in services agreements, and the states and interested commercial players that benefit from them, make that increasingly difficult when a right to development approach would conflict with their interests.

This chapter uses a framework developed by Indian-based non-government Equations to assess the implications for sustainable tourism of GATS commitments proposed for liberalisation by the PICs in their regional initiatives and to help develop an alternative that is consistent with the RTD. Equations researches and specialises in sustainable tourism and has a particular focus on the challenges posed by trade in services agreements.\textsuperscript{700}

The Equations model focuses on tourism development impacts at destinations on how it affects the lives and livelihood of local communities, their social milieu and their environment. It conducts critical assessments along five important axes: policy;

\textsuperscript{700} Equations, \textit{A WTO-GATS-Tourism Impact Assessment Framework for Developing Countries}, (Bangalore: Equations, 2005).
economic; environmental; social; and institutional. This holistic approach is applied below using the example of Fiji, and signals the benefits of applying this methodology to enable other PICs to critically examine whether the commitments that their respective governments made on tourism services under the GATS or FTAs are consistent with promoting sustainable tourism.

As well as the value of the model itself, the choice to use an NGO approach to project a development focused perspective has been influenced by reality in the Pacific, where government officials and sometimes even Pacific Leaders use the voice of NGOs and civil society to express frustration and alternative views in order to avoid a political showdown with their major donors. Moreover, regional NGOs such as PANG have been instrumental in research and critical analysis of the development implications of FTAs in the Pacific. The participation of NGOs and civil society in PACER Plus, for example, encourages public debates in the Pacific to challenge the continued adherence to the neoliberal model of development and provokes discussions on possible alternative paths.

7.2 A Third Moment Approach to Sustainable Tourism in the Pacific

7.2.1. The policy axis

Under the Equations model, a good tourism policy must prioritise sustainable tourism and outline concrete strategies and action plans to achieve it. As discussed in chapter 5, ‘sustainable tourism’ differs from ‘sustainable growth in tourism’. The former reflects the sustainability principles enshrined in internationally accepted declarations such as the Global Code of Ethics for Tourism, adopted by the UNWTO in 1999. These principles refer to the environmental, economic and socio-cultural aspects of tourism development, and seek a suitable balance between these three dimensions to guarantee the long-term sustainability of tourism. The sustainable growth model focuses on the expansion of the tourism industry, facilitated by the deregulation of laws to remove trade barriers; the provision of generous incentives to attract inward investments; and a tendency to subsume important societal interests and concerns (such as the protection of the environment, workers’ rights, or to help the

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701 Ibid. p.5
702 Ibid. p.11.
disadvantaged members of society) to the commercial imperatives of tourism operators or foreign investors.

If the PICs are to achieve sustainable tourism, policy-making in the tourism sector must be an outcome of a participatory and consultative process. All relevant stakeholders and most importantly, in the Pacific context, local communities, land owners, women and other minority groups, need to be informed of and involved in the process of policy formulation. Policies that are formulated by the state without a consultative process, and are designed to conform to the constraints of trade in services obligations, could fail to recognise the complexities of tourism development. Such policies may then lead to failures of sustainable tourism projects intended to benefit the region and the local communities in which those projects are developed.

7.2.2 The Economic axis

On the economic axis, the assessment should determine whether growth of tourism in the Pacific island economies is effectively linked to improving the prosperity of local communities, and the equitable sharing of benefits between tourism operators and ordinary industry workers, among other factors. In particular, a development strategy that is committed to sustainable tourism, while still recognising the paramount importance of the tourism industry as an earner of foreign exchange and as a source of economic activity and employment, could seek to maximise the tourism dollars retained in the PICs by reducing the ‘tourism leakages’ and improving its ‘linkages’ with other economic sectors. For example, as discussed in chapters 4, 5 and 6, the GATS, PACER Plus and PICTA TIS Protocol posed constraints on market access, national treatment and domestic regulation. Since the objective of such treaties is progressive liberalisation and contain legal provisions that make commitment reversal difficult, tourism services locked under these economic treaties have the potential to contribute to further tourism leakages.

The tourism industry has the potential to provide increased market opportunities for domestic agriculture and fisheries. Realisation of this potential requires solid steps to develop the capacity of local suppliers to assure the quality and reliability of supply required by the tourism sector, known as ‘tourism linkages’. For example, the ‘Fijian Made and Buy Fijian Campaign’ is an initiative endorsed by the Fijian Cabinet in 2011 to support the government’s import substitution policy aimed at promoting
production of items which are mainly imported, but can be easily produced or grown locally. For tourism, this initiative encourages local skilled crafters to get into business and make authentic handicrafts depicting the fine culture and heritage of the country. Fiji’s current GATS commitments do not prevent this kind of measure. This means a development friendly FTA should include provisions for Fiji to develop such Fijian Made domestic industries rather than rules to constrain government policy and measures to assist such local firms.

The ‘tourism leakages’ factor is what the industry denotes as the amount spent by tourism operators on importing goods and services for tourists. According to the findings of Naidu and St. John-Ives, tourism in Fiji has long been dominated by foreign travel agents, airlines, ground transport operators and hotel chains, which have led to minimum gains for local industries. Without revealing the calculation methodology, the Reserve Bank of Fiji has recently estimated that 60 percent of the money earned through tourism ends up leaving Fiji.

Tourism is a labour intensive-sector in Fiji as it creates many jobs directly through tourism activities and indirectly through other ancillary sectors it supports. The World Tourism and Travel Council has estimated that the Fijian tourism industry was directly or indirectly responsible for 112,500 jobs and 37.0% of GDP in 2014. In this regard, tourism was responsible for over one-third of total paid employment, or almost one in every three jobs in the economy.

An important question is what type of jobs the local people are employed in and whether such employment is consistent with international labour norms and standards. According to Naidu and St. John-Ives, tourism and related industries have, on average, paid below poverty line wages to workers with an increasing proportion of casual workers who were unable to claim cost of living adjustments, pension schemes

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703 For more information on this ‘Fijian Made and Buy Fijian Campaign’, see the official website of the Ministry of Industry, Trade and Tourism, www.mit.gov.fj
704 Whether restrictions on imports might raise issues under the General Agreement on Tariffs and Trade (GATT) is beyond the scope of consideration in this thesis.
and other benefits.\textsuperscript{708} A development-friendly tourism strategy must therefore ensure workers receive a decent wage. In addition, workers’ rights such as those enshrined under the ILO, as well as those rights contained in the Bill of Rights of the 2013 Fiji Constitution, are respected. A broad interpretation of the domestic regulation disciplines under GATS Article VI:5 might treat employment requirements as ‘technical standards’, and stricter new requirements might be considered burdensome than necessary to achieve quality. But such an attempt to constrain new employment protections in that way would be very controversial. The Fijian government therefore must be cautious on making future commitments under the GATs or any FTAs to ensure workers rights and a decent wage are not compromised in exchange for any other trade imperatives.

7.2.3 The environmental axis

To assess the \textit{environmental} impacts, it is necessary to examine whether tourism expansion in the PICs contributes to the degradation of their ecosystems or the depletion of natural resources. In this regard, the governments of the PICs need legislative instruments to regulate the protection of the environment.

In the case of Fiji, there have been suggestions that it should enact environmental legislation to provide the government with the legal frameworks within which planning and decision-making authorities would ensure natural resources are utilised in a sustainable way, and that the fragile ecosystems are protected.\textsuperscript{709} This is particularly important in the face of current problems of the GATS rules which are based on the growth model. For example, environmental sustainability is difficult to achieve under the GATS when its rules place no restrictions on the size of the market, the number of service providers and that niche tourism operators being squeezed out when they are not part of the integrate global supply chain.

Fiji is party to numerous treaties and conventions pertaining to the environment. For example, Fiji signed the Convention on Biological Diversity (CBD) at the Earth


Summit held in Rio de Janeiro in 1992, where it pledged support along with more than 150 countries to halt the continuing decline of global biodiversity. The Convention places clear obligations on Contracting Parties. Specifically, Article 6. General Measures for Conservation and Sustainable Use states that the Contracting Parties shall prepare national strategies, plans or programmes for the conservation and sustainable use of their biological resources.

The 1999 Sustainable Development Bill (SDB) was Fiji’s initial legislative response to this obligation. The SDB was a comprehensive piece of legislation, which lay the foundation for appropriate policies for the management of the environment in Fiji. The SDB required all Government ministries, departments and agencies to insist on a compulsory process of EIA for all proposed developments, undertakings or activities which were likely to have an adverse effect on human health, society or the environment.

Although the SDB was ready for parliamentary approval in 2000, the coup in the same year led to the overthrow of the democratically elected government. A streamlined version of the SDB, called the Environment Management Act (EMA), emerged in 2005. The EMA, along with two other regulations made under it, came into force on 1 January 2008. Even though the EMA provides a useful mechanism that compels Fijian entities to assess their business decisions in light of environmental issues, a 2013 study has found the increased accountability was largely motivated by the business entities’ fear of closure or avoidance of fines, rather than increased awareness of social responsibility and the need to take care of the environment.

The post-2006 government has introduced some bold sustainable development

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initiatives. For instance, the endorsement of the Green Growth Framework (GGF) on 29 July 2014 as a new master plan and key policy tool for promoting inclusive and sustainable development in Fiji suggests, at least on paper, that the Fijian government is shifting towards embracing a more sustainable development model.\textsuperscript{715} The Prime Minister officially launched the Framework on 1 June 2015.\textsuperscript{716} Sustainability is now advocated by political leaders as the criteria against which all national development projects are measured.\textsuperscript{717}

For the GGF to become a truly effective tool for sustainable development with environmental concerns at the core of policy formulation and project approval, social considerations would have to be an integral part of the decision-making process. In the tourism sector, this requires major investment projects to undertake social impact assessments in addition to the environment impact assessments. This necessitates the enactment of legislation to ensure societal interests are well protected, just like the environment, but which may encounter problems with Fiji’s GATS obligations. There are real risks that the introduction of stricter environmental and social impact assessments might be considered ‘technical standards’ that exceed what is permitted by the domestic regulation disciplines under GATS Article VI:5, in tourism related sub-sectors where Fiji has made GATS commitments. This risk would flow through to tourism-related commitments in PICTA or PACER Plus.

7.2.4 The social axis

When analysing the trade in services model against the sustainable tourism model, it is difficult to make linkages with specific commitments under the GATS because the entire instrument exists, by construction and design, to liberalise tourism services, rather than promoting social concerns.\textsuperscript{718} As a result, the GATS can also be considered gender-biased, because it screens out serious social issues involving women and children in the tourism industry throughout the Pacific, such as sex


\textsuperscript{717} See, for example, Government of Fiji, \textit{Country Statement at the Food and Agricultural Organisation (FAO) Conference}, delivered by Fiji’s Prime Minister and Minister for iTaukei Affairs and Sugar Industry, 8 June 2015, FAO HQ, Rome.

tourism. The possibility that a government might defend a measure as ‘necessary to protect public morals’ under Article XIV: General Exception is not just inadequate and unpredictable; it also subordinates the state’s responsibilities and the rights of its people to commercial priorities and interests.

Article 2 of the UNWTO’s Global Code of Ethics for Tourism states that tourism activities must respect the equality of men and women, and should promote individual human rights of the most vulnerable groups, including children. It explicitly highlights the problem of sexual abuse and exploitation of children as part of tourism. The Code urges all states, whether the countries visited or the countries of the perpetrators, to penalise such acts through national legislation, even when the acts are carried out abroad.

Globally, child sex tourism takes place in an organised, predetermined manner, and also takes place opportunistically once tourists or travellers arrive at their destination. In the Pacific, according to a 2006 UNICEF study on five PICs (including Fiji), there was evidence that some opportunistic child sex tourism existed in the Pacific, but not the highly organised child sex tourism networks that exist in other parts of the world. For example, in Fiji, which has one of the more developed tourist industries of the five countries studied, the researchers noted a high correlation between child commercial sex work and areas frequently inhabited by tourists. More recently, the Fiji 2013 Human Rights Report by the US Department of State suggested commercial sexual exploitation of children continued to occur in Fiji.

Through the commitments the Fijian government has made to international conventions and declarations, in particular those relating to the rights of children such

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721 Ibid. Article 2 (3).
723 Ibid.
as the *Convention on the Right of Child*,\textsuperscript{725} it has the obligation to protect the rights of every child in Fiji, including from sexual exploitation. The right of children is explicitly protected by the Fiji Constitution. Section 41(1) (d) stipulates that every child has the right ‘to be protected from abuse, neglect, harmful cultural practices, any form of violence, inhumane treatment and punishment, and hazardous or exploitative labour’.\textsuperscript{726} The law imposes a duty on law enforcement agencies, tourism operators, as well as parents and guardians to ensure children are protected from the exploitation of sex tourism.

Apart from sex tourism, women face other abuses and exploitation in the tourism industry. For example, in the formal employment sector within the tourism industry, most women tend to be working in low paid jobs such as room cleaners, bar attendants and receptionists. According to the findings of a 2011 UNWTO report, women in tourism worldwide, including Fiji, are ‘still underpaid, under-utilised, under-educated, and under-represented’.\textsuperscript{727}

In the informal sector, women constitute the majority of small farmers but their access to land, credit, technical know-how is often far less than that of men. While there is no *de jure* discrimination with regard to access to credit in Fiji,\textsuperscript{728} socio-cultural stereotypes often prevent women from exercising entrepreneurial activities thus making them difficult for women to take advantage of the reserved or restricted list of tourism activities. In Fiji, as observed by Cotula, banks often require husbands to act as loan guarantors before granting loans to women.\textsuperscript{729} Moreover, the Fijian society is largely patriarchal and thus inheritance and transfer of property is largely confined to men.\textsuperscript{730} Females in the ethnic Fijian society only become inheritors of property and receive royalty from leased land to resorts and hotels if they inherit the chiefly title.\textsuperscript{731}

\textsuperscript{725} Fiji ratified the Convention on 13 August 1993.
\textsuperscript{726} The Constitution of the Republic of Fiji, p.37.
\textsuperscript{728} For example, the Money Lenders Act, the Bank Act of 1995 and the Fiji Development Bank Act of 1996 are all gender neutral on paper.
\textsuperscript{731} Ibid. p.47
Importantly, as discussed in chapter 5, the Fijian government’s attempt to rectify its GATS mistake on land and the difficulty if faces means there is still legal uncertainty over the treatment and utilization of land relating to hotels and restaurants in Fiji.

It is worth recalling that the Declaration on the RTD contains an important clause obliging all States to take steps to ‘eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights’. In this regard, the government of Fiji, and by extension, all Pacific island states, should ensure, inter alia, equality of opportunity for all, may it be in accessing basic social services, accessing credit, or playing an active role for women and youth in the decision-making process. However, such an approach is inconsistent to the GATS model.

### 7.2.5 The institutional axis

On the *institutional* axis, it is important to understand the interface between tourism and the decision-making process relating to the formulation of tourism development plans and strategies. An open and participatory decision-making process should involve all relevant stakeholders of the Fiji tourism industry, including indigenous people (iTaukei). The role of indigenous people in tourism development in Fiji is of particular significance for two main reasons. First, tourism activities intrude into regions, islands and villages inhabited for centuries by indigenous people. As native inhabitants, they are most likely to be the first and most affected by adverse environmental, social and cultural impacts of tourism development. Second, tourism development utilises resources such as native land, water, forests and other environmental resources over which the iTaukei have customary rights. For tourism to benefit the iTaukei, it is necessary to involve them in decision-making, including their inputs in the formulation of tourism development policies.

In Fiji, the Ministry of Industry, Trade and Tourism (MITT) is responsible for formulating policies with regard to international trade and negotiates the official national position on bilateral and multilateral issues regarding trade. The

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732 DRTD, Article 6, para.3.
733 Fiji does not give express constitutional recognition to customary law as a general source of law. However, there are existing Acts dealing with Fijian customs including Fijian Affairs Act, Native Land Act, and Native Land Trust Act.
administrative control of MITT with regard to the field of external trade covers all matters relating to foreign trade, including negotiations of free trade agreements, trade missions, and the marketing and promotion of Fijian products and services abroad.

In the context of trade negotiations, a sustainable tourism approach would be based on MITT conducting extensive national consultations, and engaging proactively with all relevant stakeholders prior to adopting negotiating positions. More broadly, a RTD approach would see officials tasked with the responsibility to negotiate trade agreements that are well informed of the negotiating positions derived from such extensive consultations. The lack of a participatory process in decision-making risks leading officials to make serious mistakes at the negotiating table with potentially dire consequences for sustainable tourism development. For example, most government officials in the Pacific, including Fiji, are not well-informed on the fact that services liberalisation under the complex regime of the GATS or FTAs has the potential to seriously constrain their policy choices and regulatory autonomy. As discussed earlier, Fiji’s mistake in the GATS schedule regarding the treatment of land is a very important lesson on the risk of using the GATS framework for tourism liberalization.

The RTD also provides for ‘a process that expands the capabilities or freedom of individuals to improve their well-being and to realise what they value’. This process implies decision-making should be participatory, democratic, inclusive and transparent with consultation across the bureaucracy, private sector and civil society. However, the consultation and decision making processes in Fiji in the recent past fell short of the above standard. Until 2011, the main ministry responsible for external trade policy and treaty negotiations in Fiji was the Ministry of Foreign Affairs and International Co-operation. Consultation was normally carried out through the Cabinet-mandated inter-ministerial Trade and Development Committee (TDC), chaired by the head of the Ministry’s Economic Division. The ‘Focused TDC’ consisted of senior representatives from key line ministries and government agencies. An ‘Extended TDC’ was also established in 2001 by Cabinet, which extended the Committee’s membership to include non-state actors in an attempt to adopt a

735 Since late 2011, the portfolio of trade has shifted from the Ministry of Foreign Affairs to the Ministry of Industry, Trade and Tourism.
‘participatory approach’ in national consultations leading up to official positions in trade and treaty negotiations.

In reality, participation in TDC meetings was far from representative. For the ‘Focused TDC’ meetings, the invited members normally consisted of representatives from a few selected key line ministries and government agencies responsible for trade and finance, including the ministries of Finance, Commerce, Agriculture and the Reserve Bank of Fiji. Representatives of other line ministries and agencies which may have a stake in the ‘development’ process such as Women, Cultural, Health, Environment, Police, Education, Ethnic Affairs, Poverty Alleviation and even Tourism were generally excluded. Even with such limited membership and unbalanced participation, the ‘Focused TDC’ was largely dysfunctional as ministries normally sent relatively junior officials to attend those meetings. Thus, the ‘Focused TDC’ in practice became a forum of information exchange rather than decision making. The composition of the ‘Extended TDC’ membership was even more problematic. The ‘non-state actors’ were usually representatives from large business associations such as the Fiji Chamber of Commerce or the Fiji Hotel Association, while participation by civil society, unions and churches was almost non-existent. In fact, since its establishment more than 15 years ago, only a handful of ‘Extended TDC’ meetings were ever held.

Recognising the deficiencies of the TDC process, the Fijian Trade Policy Framework (2015-2025)\(^{736}\) has mandated the establishment of a National Trade and Development Council (NTDC) to be chaired by the Minister of Trade. The Council is to meet on a regular basis and report to Cabinet. A revamped TDC, which is to be the executive arm of the NTDC, is to be created and chaired by the Permanent Secretary of Trade. The NTDC and the TDC will be supported by technical sub-committees, which must consist of representatives from government, the private sector and civil society. The new institutional structure, once established, has the potential to usher in a more open and participatory decision-making process in the formulation of policies and national negotiating positions on development issues. However, if such a Council becomes yet another ineffective mechanism and its role is to merely endorse government positions, then there will be problems of legitimacy in the decision-making process.

which are inconsistent to those principles under the RTD approach.

7.3 Conclusion
This chapter adapts a model developed by Equations to link the problems with the Second Moment to the potential of the Third Moment. It demonstrates the trade in services approach binds the PICs to a growth model for tourism, and the wider economy, that belongs to the Second Moment and contrasts that to a development pathway that addresses the challenges and advances the right to development, consistent with a Third Moment in the Pacific. To realise that new paradigm requires a holistic approach across policy making, economic decisions, environment protection, social enhancement, and government institutions.

The analysis shows the Fijian government is reticent to buy heavily into trade in services agreements, and supports some elements of the model that could signal a Third Moment. However, when it comes to the development of the tourism sector, the Fijian government is currently still reluctant to engage with other elements of sustainable tourism that require it to concede some traditional political authority. In this regard, the decision to transit from the Second Moment to the Third Moment is less about theoretical debates and more a test of political will and determination to bring about real change for the long term sustainable development of the tourism sector, the economy and the society.
Chapter Eight: Conclusion

8.1 Chapter Summaries

The thesis supports two main conclusions. First, the prevailing neoliberal model of development, embodied in the Second Moment of Law and Development, is not appropriate for the PICs in their pursuit of sustainable development. Second, there are signs of a possible shift towards a Third Moment in the region, but this potential is constrained by the instruments of international economic law, as well as political pressure from the PICs’ key trading partners who are also major donors and development partner, and the reluctance of some governments to take a definitive step.

Chapter one provides the context of trade in services negotiations in the Pacific by tracing changes in trading models, which required a shift from preferences to reciprocity. It highlights the role of the Pacific Islands Forum Secretariat in advancing regional economic integration initiatives and provides some insights on the rationale for choosing tourism as a focus of analysis in this thesis. This chapter thus lays the foundation for subsequent discussion throughout the thesis that demonstrates the failures of the neoliberal model of development in delivering sustainable development goals to the PICs. It also provides the background analysis on the contributing factors leading to the emerging signs of a Third Moment in the Pacific.

The analytical framework of the thesis, set out in chapter two, draws on the theory of ‘Three Moments’ in law and development as advanced by Trubek and Santos. The idea of ‘Three Moments’ of law and development articulates three periods during which different orthodoxies have been widely accepted. Under the First Moment, laws were needed to create the formal structure of macroeconomic control during the post decolonial period. Laws were used to translate policy objectives into action by directing economic behavior in accordance with national development plans. In the Second Moment, law was an instrument to limit state intervention and facilitate markets. Under the Third Moment, law is used not only to create and protect markets but also to curb market excess, support the social, and provide direct relief to the poor.
The analytical framework developed in chapter two allows the thesis to compare and contrast competing development paradigms of development - neoliberalism and the right to development, sourced in the UN Declaration on the Right to Development. This chapter demonstrates that, despite the passage of almost three decades since the adoption of the DRTD, the dominant neoliberal model of economic development continues to prevail in the Pacific. The chapter also highlights actions of the PICs’ developed country partners in using their political influence to advance trade agreements and trade-related aid that bind the Pacific states to the neoliberal model, aggravating the development challenges facing the PICs. This chapter concludes that if the PICs continue to use the neoliberal model of development, as demonstrated through the lens of MDG8 in the Pacific regional initiatives, their space to adopt alternative development pathways will be fast closing, thus trapping them in the Second Moment despite encouraging signs of a Third Moment.

This conceptual framework was linked to the trade in services agreements in chapter four, which analyses of some key provisions of the GATS to illustrate its neoliberal origins and place in the Second Moment. The chapter argues that the GATS framework, based on assumptions of market integration and trade expansion, neglects the important role of government in the context of development. The accession schedules and WTO commitments of Tonga, Samoa, Vanuatu and Fiji, shows how the GATS acts as a legal platform for services liberalization that leads to the loss of policy space and flexibility. This supports the argument of the thesis that if the PICs lock their commitments under the GATS, or more significantly under WTO-consistent or WTO-plus FTAs, it will be difficult for future governments to realise a Third Moment even if such a development pathway is more desirable for the PICs.

Chapter five examines whether sustainable tourism is possible within the present GATS framework. Though tourism liberalisation under the GATS is limited in scope, the chapter cautions the PICs to exercise due diligence in scheduling their service commitments. The chapter supports the argument that the requirement for economic needs tests; environmental impact assessments; the need to adhere to investment regulations; immigration policies; and other laws designed to protect the workers and the environment should be listed out explicitly in the schedules for all relevant sectors.
and modes of supply. As discussed in chapter four, the protection afforded under the GATS for issues relating to environment and social concerns is limited and difficult to operationalise. This means in order to protect such important concerns, it requires more comprehensive carveouts. As Fiji’s case study reveals, any mistakes or oversight in the schedule of specific commitments could have serious implications for policy space. Any subsequent attempts to amend a country’s commitments to rectify the mistake could be costly as compensation is required to satisfy affected parties. This chapter thus provides concrete illustrations of how the PICs can be trapped in the Second Moment under international trade treaties.

The focus of Chapter six is services liberalisation under regional economic integration initiatives in the Pacific. The chapter challenges the idealistic rhetoric on regionalism that has enticed the Pacific governments to embrace the trade-driven development paradigm. It notes that, despite declarations from Australia and New Zealand that PACER Plus is a pro-development agreement for the PICs, the actions of these two countries in the negotiations have suggested otherwise. Unless Australia and New Zealand’s vision of regional cooperation goes beyond free trade, as dictated by the neoliberal ideology, the PICs may find their quest for a Pacific regionalism beneficial to the islands beyond reach.

If Pacific leaders are to avoid the risk of being trapped in the Second Moment, and avail themselves the possibilities of alternative development models, they should have the political will to reject PACER Plus in its current form. The interplays of the political economy and dependency in the Pacific mean some smaller PICs are likely to concede and accept PACER Plus. However, there appears to be more prospect that the MSG countries, particularly Fiji and PNG, might stand up against the political pressure and take leadership in realizing the Third Moment in the Pacific.

Using tourism as the case study, chapter seven offers insights into what a Third Moment of law and development in the Pacific might look like and how it can be realised. It adapts the model developed by NGO Equations to substantiate the right to development approach for the PICs as an alternative pathway to sustainable tourism. The policy, economic, environment, social and institutional axes of this model represent a holistic, inclusive and participatory approach to development.
8.2 Rejecting Neoliberalism in the Pacific

The thesis rejects neoliberalism, a one-size-fits-all market-driven model of development embodied in the Second Moment, as inappropriate to assist the PICs in achieving their development goals, such as poverty alleviation and sustainable tourism. In services, the possibility for an alternative approach, as envisioned by the Third Moment, has been constrained to a limited degree by the complex trade in services regime put in place by the GATS, but potentially to a much greater extent by those FTAs that are still under negotiation or are yet to come into force, because they would limit the PICs’ policy space and regulatory autonomy.

As illustrated in chapters 4 and 5, the burdensome GATS obligations imposed on the newly acceded Pacific WTO members have already greatly limited the national autonomy of those governments to regulate services as a social, rather than a purely commercial activity. Even with Fiji’s limited GATS commitments on tourism, the application and implications of obligations that are enforceable in the WTO could seriously undermine the Fijian government’s efforts to introduce and implement development policies, such as limits on the number of hotels in sensitive areas, requiring joint ventures or subsidising local accommodation providers, in order to plan sustainable tourism development in Fiji or to assist those business activities reserved or restricted for local SMEs. Fiji’s omissions in its GATS scheduling, especially the failure to exclude land ownership from national treatment, underscores the risk of exposing sensitive matters to such disciplines.

The counter-balancing assertions that a liberal investment regime will facilitate the PICs to attract foreign investment are not convincing. The examination of the GATS disciplines on Mode 3, as well as the analysis of the ‘Country A’ project, shows the negative spill-overs of a liberal investment regime when binding limits are imposed on governments or when states face legal uncertainties emanating from their GATS commitments. An investor-friendly investment regime confers rights and protections on the investors, while placing limits and obligations on the state that constrain its ability to exercise its right and duty under the Declaration on the Right to Development to ‘formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all
individuals’.\textsuperscript{737}

From a development perspective, domestic regulation is necessary to preserve and protect the social essence of services that touch people’s daily lives. For example, effective regulation is required to ensure essential services such as water and electricity supply can reach the poor or people living in remote areas. Regulation is required to ensure quality education and health care is accessible and affordable to all nationals, rather than just the affluent members of society. Environmental laws and regulation are required to ensure responsible behaviour so that waste is not dumped into the seas or rivers causing damage to the ecosystems, or that resorts build excessive golf courses that result in the loss of productive land and wastage of water to maintain them. Pacific governments also need appropriate domestic regulation to ensure the benefits of services trade, such as tourism, are spread to all members of society rather than confined in the hands of a few.

There is nothing to stop the PICs from liberalising on a unilateral basis and invite the kind of investment that will help the islands achieve their development goals while retaining sufficient policy space, especially the right to regulate according the national circumstances. Making excessive commitments under the GATS, as illustrated by the accession packages of Samoa, Tonga and Vanuatu, constrains the PICs’ flexibility to adopt development policies which may be considered WTO-incompatible or limit their ability to regulate certain sectors of the economy if and when circumstances require. There are additional risks for other non-WTO countries which may end up doing the equivalent, or something less, but still significant in foreclosing their development options through the FTAs such as PACER Plus or the PICTA TIS Protocol.

8.3 Emerging Signs of a Third Moment: Towards an Alternative Regional Approach to Economic Integration in the Pacific

Using Trubek and Santos’s theory of the Three Moments of law and development, the thesis has argued that recent developments in the Pacific region provide evidence of a

\textsuperscript{737} Article 2(3) of the DRTD.
state of flux that is consistent with the prospect of a Third Moment in the Pacific.

Economic regionalism has the potential to expand the possibilities for, and bring more stability and prosperity into, a region through increased trade, deeper integration and broader cooperation. However, learning the lessons of regional trade negotiations over the years, the PICs are now more sceptical of regionalism that is pursued with limited focus on economic and trade integration. Given their limited exports and comparative disadvantage, traditional FTAs like PACER Plus are most likely to favour the bigger regional players, Australia and New Zealand, who are best positioned to take advantage of their bargaining power and established commercial links. Understanding the importance of embracing broader people’s concerns and the need to allow the PICs to shape their own development agenda, some Pacific leaders and decision-makers are beginning to push for an alternative approach to economic integration in the region.

In recent years, some PICs have begun to resist the neoliberal model of development advocated by their donors and larger trading partners. This resistance is evident in the wavering political commitment to conclude FTA negotiations, resulting for instance, the collapse of the region-wide EPA negotiations. As discussed in chapter 6, PNG threatened to withdraw from PACER Plus negotiations in May 2013 because of Australia and New Zealand’s refusal to accommodate the PICs’ proposals for unique measures such as development assistance and labour mobility, to be included in the agreement.738

The expulsion of Fiji from the Forum in May 2009 and its subsequent exclusion from any Forum activities was a critical turning point that strengthened the resolve of leaders in Melanesia to work together to solve disputes and address development issues in the region without the participation of Australia and New Zealand. Under Fiji’s leadership the PICs have become more aggressive in pursuit of South-South cooperation and seeking to reduce reliance on their traditional relationships, including with Australia and New Zealand.

In 2011, Fiji made the most of its chairmanship of the Melanesian Spearhead Group

(MSG) to get itself included again in sub-regional and regional development initiatives. In August 2011, Fiji hosted an ‘Engaging with the Pacific’ meeting in Nadi just before the leaders of the Pacific Forum countries met in Auckland.739 The meeting was attended by most of the MSG members plus several other Pacific leaders. This event signalled an important message to other Pacific states that the MSG was determined to play a major role in setting the development agenda for the region without the formal involvement of Australia and New Zealand.

The ‘Engaging with the Pacific’ meeting laid the ground work for the establishment of the Pacific Islands Development Forum (PIDF) in 2013.740 The Pacific leaders saw PIDF as a platform for interactions amongst all national players in the Pacific islands – governments, private sectors and civil society - to unite in advancing the PICs’ development interests without the political interference and control of the governments of Australia and New Zealand. This new forum intends to hold annual meetings and allow the PICs to foster a new relationship with development partners, non-government organisations and the private sector. Pacific leaders are expected to sign an agreement to institutionalise the PIDF in September 2015.

The Pacific Small Islands Development States (PSIDS) group at the United Nations in New York has also proven to be a key multilateral vehicle for the PICs to enhance South-South cooperation. The PSIDS is an important political alliance of eleven Pacific islands741 working together to advance common development interests such as climate change, sustainable development in achieving the MDGs, and the sustainable management and conservation of marine resources. The PSIDS are playing an increasingly visible role in the Asian-Pacific Group in the UN. Their increased prominence derives from the PICs’ pursuit of a form of political alliance and engagement that excludes Australia and New Zealand. At the UN Australia and New Zealand belong to the ‘Western Europe and Others Group’ despite their geographical location in the Pacific, which often puts them at odds with the PICs when negotiating critical development issues, such as climate change, at the UN.

739 For a more detailed background relating to the inauguration of PIDF, see, Tarte, S., ‘A New Regional Pacific Voice? Pacific Islands Brief, East-West Center, No.4, 28 August 2013.
741 Fiji, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.
The Australian government was so concerned about Fiji’s dominant role in the PIDF and its refusal to re-join the Pacific Islands Forum that its Foreign Minister, during her October 2014 official visit to Fiji to normalise the diplomatic relationship following the Fiji election, agreed to host a top-level meeting of Pacific leaders to review the Pacific regional architecture in Sydney in February 2015.742 The planned leaders meeting did not take place as Australia later considered another review of PIF was unnecessary given the last one was only carried out in 2012.743 Importantly, Australia could not accept the Fiji Government’s position – the expulsion of Australia and New Zealand from the Pacific Islands Forum as Members but retaining their association with the organisation as Development Partners – as a precondition for Fiji re-joining the PIF.744

Unless Fiji eventually backs down on its currently uncompromising demand, it is unlikely to return to the PIF at the highest political level in the near future. Currently, Fiji is not fully engaging in the PACER Plus negotiations, suggesting a position that it might not sign the agreement when the negotiations are expected to conclude in September 2016.745 Fiji’s stance of passive participation has, however, allowed the rapid conclusion of certain chapters under pressure from the Australian and New Zealand trade negotiators and the urging of the PICs’ own Chief Trade Adviser. It remains to be seen how many PICs would eventually sign and ratify the agreement if and when the negotiations are concluded.

8.4 Trapped in the Second Moment?

This analysis suggests that the emergence of a Third Moment in the Pacific is still in a formative phase because Pacific leaders generally lack the sustained political will to stand up to external pressure from their major donors and development partners. 

743 In the past ten years, there have been a number of reviews of regional organisations and plans. These include the 2013 independent review of the Pacific Plan for Regional Integration and Cooperation (the ‘Pacific Plan’); the 2012 reviews of the Secretariat of the Pacific Community (SPC) and the Pacific Islands Forum Secretariat; the 2007 Regional Integration Framework review, which led to the merger of a number of regional agencies.
745 This proposed deadline for PACER Plus negotiations was announced by the Chief Trade Advisor at the 11th Inter-sessional Meeting in Apia on 4-7 August 2015.
PICs’ ambivalence in regional FTA negotiations sheds light on this struggle.

There is clear evidence that the PICs are subject to political coercion from major aid donors. The EU’s decision to impose a sunset clause on its Market Access Regulation 1528/2007 that forced Fiji and PNG to sign the interim EPAs, and the illegal exclusion of Fiji from PACER Plus negotiations for five years, which was led by Australia and New Zealand, are just two examples. As a result, the PICs are faced with difficult political choices between alternative development strategies or continuing down the neoliberal path to avoid serious short-term consequences for trade and aid.

The PICs’ desperation to secure guaranteed access for temporary employment in their metropolitan neighbours’ labour market also reflects their growing concern with increasing youth unemployment and their economic dependency on temporary migration for remittances. This dependence gives the impression that the PICs have few options to secure employment access in Australia and New Zealand except through concluding PACER Plus negotiations, with the hope that a binding quota of employment for semi-skilled and unskilled Pacific workers will be included in the agreement.

In this regard, the thesis has argued that the seasonal employment schemes of both Australia and New Zealand are employer driven and wholly depend on unmet demand for labour. Such schemes can still be designed that include the participation of Pacific islanders and ensure proper protection of the workers’ welfare, outside PACER Plus. Equally, the PICs desire for improved access in the Australian and New Zealand labour markets could be dealt with through bilateral arrangements. There is a risk that Pacific governments will eventually sign on to a binding PACER Plus agreement in exchange for some voluntary commitments on labour mobility offered by the two bigger trading partners.

If the PICs wish to increase their services trade, a free trade path with a WTO-consistent binding agreement is not the only way or the right mechanism to achieve that. As noted by Wolfenden, if the Pacific needs assistance for regulatory reform in
the services sectors, those reforms could be dealt with through the aid budget.\footnote{Wolfenden, A., ‘Services Negotiations Will Make Regional Trade Agreement More Lopsided Against Pacific’, \textit{Pacific Scoop}, 4 July 2013.}

Importantly, Australia and New Zealand’s refusal to abandon or downscale the PACER Plus negotiations thus far suggests that these two major donors are not yet prepared to engage in a genuine dialogue and mandate an alternative approach that truly holds the PICs’ development interests at heart in order to make Pacific regionalism a win-win situation for all. The ambivalent attitude of the Pacific island negotiators towards PACER Plus negotiations reflects the political realities of asymmetrical power negotiations. Such weakness in political will demonstrated by Pacific trade negotiators currently seems likely to lock the PICs in the Second Moment of law and development, despite some encouraging signs of a Third Moment emerging in the region and beyond.
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