

ARTICLE

Economic Neocolonialism and Free Trade in the Pacific

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Colonial control, signified by the exploitation of one state by another through direct physical coercion, has been challenged internationally by decolonisation movements led by Indigenous peoples. Hard-won successes have been met with widespread celebration. However, the work is not finished. Neocolonialism, in political, cultural and economic forms, still threaten the self-determination of Indigenous peoples. This article provides insight into the shift from a global colonial structure to a global neocolonial structure by analysing a particular instrument of international law and how it perpetuates economic neocolonial dynamics. The chosen instrument is the Pacific Agreement on Closer Economic Relations Plus (PACER Plus), a free trade agreement between Aotearoa New Zealand and some islands of the South Pacific. This article finds that the PACER Plus is a neocolonial legal instrument. It embeds and perpetuates the core-periphery relationship between Aotearoa New Zealand and certain islands in the South Pacific. It preserves the current economic structure of both countries to ensure that Aotearoa New Zealand retains its dominant position as a “developed” country by exploiting the “underdeveloped” Pacific Island signatories. This relationship dynamic indicates that Aotearoa New Zealand needs to confront its ongoing colonial actions and that the international economic system needs to interrogate how its values and structure continue to uphold colonial power dynamics.

I Introduction

Without a qualm [the colonial power] dispenses with its flags, and ... claims, that it is ‘giving’ independence to its former subjects, to be followed by ‘aid’ for their development.

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Under cover of such phrases, however, it devises innumerable ways to accomplish objectives formerly achieved by naked colonialism.

—Kwame Nkrumah¹

Colonial control, signified by the exploitation of one state by another through direct physical coercion, has been challenged internationally by decolonisation movements led by Indigenous peoples. Hard-won successes have been met with widespread celebration. However, the work is not finished. The shadow of neocolonialism still hangs over many former colonies and “independent” states. It continues to threaten the self-determination of Indigenous peoples and exploit their resources by reproducing colonial dynamics through indirect economic, political, social and cultural coercion.

This article provides insight into the shift from a global colonial structure to a global neocolonial structure by analysing a particular instrument of international law and how it perpetuates economic neocolonial dynamics. The chosen instrument is the Pacific Agreement on Closer Economic Relations Plus (PACER Plus), a free trade agreement between Aotearoa New Zealand and certain islands of the South Pacific.²

The analysis in this article is vital to understanding the position of Indigenous people today. Indigenous peoples who are freed from the shackles of colonialism and equipped with self-determination are assumed to be destined for steady improvements in wellbeing and presence on the world stage. Neocolonialism threatens this fantasy. It reminds us that the appearance of self-determination is not the same as actual self-determination, and that removing direct colonial control is not the same as eradicating all colonial power dynamics.

This analysis is also pertinent for interrogating the position of international law. Like any other legal system, Aotearoa New Zealand must assess what power dynamics are embedded within, or perpetuated by, the international legal system. The PACER Plus is a microcosm that reflects the values and structures of the wider international economic legal system. Specific conclusions here provide a stepping stone to raising broader concerns about the system as a whole.

I will answer the question of whether the PACER Plus is a neocolonial legal instrument. In Part II, I outline the scope, methodology and limitations of this article. In Part III, I summarise the key features of the text of the PACER Plus and its wider context. In Part IV, I define criteria for identifying whether or not a legal instrument is neocolonial. In Part V, I apply these criteria to the PACER Plus to determine whether it is a neocolonial legal instrument. I conclude that the PACER Plus is a neocolonial legal instrument. It embeds and perpetuates the core-periphery relationship between Aotearoa New Zealand and certain islands in the South Pacific. It preserves the current economic structure of both countries to ensure that Aotearoa New Zealand retains its dominant position of “developed” country by exploiting “underdeveloped” Pacific Island signatories.

This conclusion indicates a need for Aotearoa New Zealand to confront its ongoing colonial actions, and for the international economic system to confront how its structures and values continue to uphold colonial power dynamics. Aotearoa New Zealand, and other members of the international economic system, must act to provide substantive and structural support for the decolonisation efforts of Indigenous people.

1 Kwame Nkrumah *Neo-Colonialism: The Last Stage of Imperialism* (Thomas Nelson, London, 1965) at 239.

2 Pacific Agreement on Closer Economic Relations Plus (opened for signature 14 June 2017, entered into force 13 December 2020) [PACER Plus].

II Scope, Methodology and Limitations

A *Scope*

The scope of this article is confined to the PACER Plus, though I will consider specific aspects of other international agreements where directly relevant. Within the PACER Plus, I will only analyse the relationship between Aotearoa New Zealand and the Pacific Island signatories, excluding Australia.

Given that the PACER Plus is an instrument of international economic law, I will only analyse it according to economic aspects of neocolonialism. Political, cultural and social aspects will be set aside, except where they are inextricably and directly tied to economic considerations. Economic considerations include systems of production, goods and services exchange, and allocation of resources (including wealth).³

B *Methodology*

The kaupapa of this article is Marxist and post-colonial. Its Marxist nature is reflected in its focus on the economic structure of neocolonialism, emphasis on historical context, and use of the works of Marxist theorists to define terms and develop ideas. This article's post-colonial nature is reflected in its choice of neocolonialism as a framework, its centring of Indigenous peoples, and its commitment "to transforming the conditions of exploitation and poverty" caused by colonial power dynamics.⁴

C *Limitations*

Theory is always rooted in context, particularly place, and does not exist in the abstract. This article concerns particular Pacific Islands and therefore prioritises relevant Indigenous Pacific voices. However, the dearth of research about the Pacific Islands, particularly their involvement in international economic law, means Indigenous Pacific voices could not guide the entire work.⁵ As such, I have supplemented these voices with research written in different geographies, mainly work focussed on neocolonialism in Africa, Asia and South America. This supplementary research influences this article, hybridising theory and place.

This article is filtered through another lens: my own. As a Pākehā person, the Western worldview infusing my work risks academic neocolonialism.⁶ Western modes of research and analysis inform how I structure this article, the research methodology I use, the sources to which I have access, my categorisation of ideas, my weighing of ideas and countless other processes. This can only be partially mitigated by the prioritisation of

3 Charles Jones "politics and economics" in Garrett W Brown, Iain McLean and Alistair McMillan (eds) *A Concise Oxford Dictionary of Politics and International Relations* (4th ed, Oxford University Press, Oxford, 2018).

4 Robert JC Young *Postcolonialism: A Very Short Introduction* (2nd ed, Oxford University Press, Oxford, 2020) at 9.

5 This may be due to the small population and geographic isolation of Pacific Islands limiting the number of potential researchers from the area and impetus for research about the area. I am also hindered because I can only access research written in, or translated to, English. The lack of research in international economic law is likely because Pacific Island Countries [PICs] have entered few international economic agreements and not many PICs are members of the World Trade Organization.

6 Syed Farid Alatas "Academic Dependency and the Global Division of Labour in the Social Sciences" (2003) 51 *Current Sociology* 599 at 602.

Indigenous voices. Highlighting this filter reminds the reader that positionality must be top of mind throughout the reading process.

Finally, empirical research on the impact of free trade agreements on small states and developing countries is very limited.⁷ This is primarily due to the difficulty with determining the causality of any economic changes and the swift proliferation of free trade agreements, with relatively few specialised researchers studying these. Additionally, the PACER Plus has only come into force relatively recently. Therefore, for the most part, my analysis has been restricted to economic theory. This theory can be supplemented and challenged with empirical evidence as it continues to emerge.

III Overview of the PACER Plus

Before outlining the criteria that indicate whether an international legal instrument is neocolonial, I will summarise the context and key features of the PACER Plus. I will begin by outlining the principles of international economic law, including free trade agreements. Then, I will discuss the context of the PACER Plus, including prior agreements amongst the parties, the inception of the PACER Plus and the nature of the relationships between the relevant signatories. Finally, I will discuss the purpose and key features of the PACER Plus.

A *International economic law*

International economic law “refers to the regulation of cross-border transactions in goods, services, and capital, monetary relations and the international protection of intellectual property”.⁸ Because the PACER Plus is a plurilateral free trade agreement negotiated outside the World Trade Organisation framework, it is unnecessary to discuss the general structure of international economic law. Instead, I will focus on the key principles of international economic law that manifest in almost all free trade agreements.

(1) Principles

There are four relevant principles of international economic law: state autonomy, trade liberalisation, fair treatment of foreign investors and non-discrimination. These principles reflect a market-based approach to economics.

State autonomy is a basic principle of international law. The International Court of Justice states that “[e]very State possesses a fundamental right to choose and implement its own political, economic and social systems.”⁹ This includes the right to choose whom to enter into economic relations with. However, it is debatable how much state autonomy is respected with regard to states who have non-market economies (whether socialist or various Indigenous models). International agreements based on market principles “govern structural economic choices for a very large part of the international community”.¹⁰

7 Christopher Stevens and others *The Impact of Free Trade Agreements Between Developed and Developing Countries on Economic Development in Developing Countries* (Department for International Development, July 2015) at vi.

8 Matthias Herdegen *Principles of International Economic Law* (2nd ed, Oxford University Press, Oxford, 2016) at 3.

9 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [258].

10 Herdegen, above n 8, at 65.

This overwhelming hegemony excludes states with non-market economies from effective, large-scale international economic cooperation and often forces them to adopt market economies in the long run. This is especially the case for microstates such as Pacific Island Countries (PICs).

Trade liberalisation occurs primarily through reducing tariffs and eliminating non-tariff barriers to trade (otherwise known as “market access”).¹¹ Liberalisation is based on the claim that free trade enables optimal use of the world’s resources and is mutually advantageous to all states.¹²

Fair treatment of foreign investors is considered international customary law and is also explicitly provided for in many treaties.¹³ Foreign investment has been recognised as one of two “vital complements to ... development” by the international community.¹⁴ However, foreign investment may conflict with the legitimate public interests of the host state.¹⁵

Non-discrimination manifests in two concepts: most-favoured-nation treatment and national treatment. It usually covers foreign nationals, goods, services and investments. Most-favoured-nation treatment operates on the international level by requiring states to extend benefits granted to one state to relations with another.¹⁶ National treatment operates on the domestic level to ensure that any imported products are treated no less favourably than like products of the host state.¹⁷

(2) Free trade agreements

Free trade agreements are treaties between two or more states that aim to liberalise trade between those states. They are one of the main ways that international economic law is operationalised. The principles and features of international economic law are reflected in most free trade agreements. Therefore, free trade agreements also pursue a market-based approach to international economics.

B *Context of the PACER Plus*

(1) Other trade agreements between the parties

Alongside the PACER Plus, three trade agreements are of note. The first is the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA). The SPARTECA is a nonreciprocal trade agreement in which Aotearoa New Zealand offers “duty-free and unrestricted access” for specified products originating from specific member countries of

11 General Agreement on Tariffs and Trade 55 UNTS 187 (signed 30 October 1947, entered into force 1 January 1948) [GATT], arts II and XI(1).

12 Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 154 (opened for signature 15 April 1994, entered into force 1 January 1995), preamble.

13 Martins Paparinskis *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, Oxford, 2013) at ch 1.

14 *Report of the International Conference on Financing for Development* UN Doc A/CONF198/11 (22 March 2002) at ch I, ch II(B)(20). Chapter I contains the Monterrey Consensus of the International Conference on Financing for Development.

15 Herdegen, above n 8, at 7.

16 GATT, art I(1).

17 GATT, art III(4).

the Pacific Islands Forum.¹⁸ It entered into force in 1981. The second agreement is the Pacific Agreement on Closer Economic Relations (PACER). It is designed to implement a step-by-step process of trade liberalisation amongst the signatories.¹⁹ As part of this process, the PACER instigated the PACER Plus, along with the third instrument of note: the Pacific Island Countries Trade Agreement (PICTA). The PICTA is a free trade agreement between 14 Pacific Island members of the Pacific Island Forum (not including Aotearoa New Zealand), and came into force in 2003.²⁰

(2) Inception of the PACER Plus

As the PACER Plus was instigated by the PACER, it is necessary to investigate the inception of the PACER. The Pacific Islands Forum “endorsed in principle a free trade area among Forum Members” in 1999,²¹ following their approval of “reciprocal free trade agreements in 1997”.²² However, this does not necessarily mean that the Forum viewed trade liberalisation as a positive development. For example, Noel Levi, the Forum Trade Ministers’ Secretary-General, was “resigned” to accepting free trade developments, noting that freer trade provided no benefit where PICs share similar products. Levi said that the real strategy was to create a critical mass for engagement with external players so that PICs do not “do nothing while the foundations of [their] economies are being removed”.²³ Here, Levi was discussing the ascendancy of neoliberal globalisation and its push towards trade liberalisation.

The PACER came into force three years later, in 2002. Wadan Narsey claims there are two views of the reasons behind the parties signing the PACER.²⁴ The first view is that PICs only agreed to the PACER after Aotearoa New Zealand (and Australia) put pressure on PICs to allow them to join the PICTA.²⁵ The second view is that PICs agreed to the PACER as a concession to Aotearoa New Zealand and Australia as their most important developed country partners and donors for the foreseeable future.²⁶ The first view appears to be stronger based on Jane Kelsey’s account of the negotiations. She claims that PICs originally envisaged a 20-year process of extending free trade to Aotearoa New Zealand, but art XXIV of the General Agreement on Tariffs and Trade required an agreement to “be implemented in 10 years”²⁷ and “to cover ‘substantially all trade’”.²⁸ Therefore, PICs tried to implement a Pacific Island-only agreement (namely, the PICTA), but Aotearoa New Zealand’s “sustained, and at times unconscionable, pressure” meant that the PACER

18 South Pacific Regional Trade and Economic Cooperation Agreement (opened for signature 14 July 1980, entered into force 1 January 1981) [SPARTECA], art II(a).

19 Pacific Agreement on Closer Economic Relations (opened for signature 18 August 2001, entered into force 3 October 2002) [PACER], preamble.

20 Pacific Islands Countries Trade Agreement (opened for signature 18 August 2001, entered into force 13 April 2003) [PICTA].

21 Wadan Narsey *PICTA, PACER and EPAs: where are we going? Tales of fags, booze and rugby* (University of the South Pacific, Suva (Fiji), 2004) at 4.

22 Jane Kelsey “Free Trade Agreements – Boon or Bane?: Through the Lens of PACER” (2006) 37 VUWLR 391 at 391.

23 Noel Levi “Question and Answer Brief on Free Trade Issues” (23 April 1999) Pacific Islands Report <www.pireport.org>.

24 Narsey, above n 21, at 7.

25 At 7.

26 At 7.

27 Kelsey, above n 22, at 394.

28 GATT, art XXIV as cited in Kelsey, above n 22, at 394.

was implemented as well.²⁹ In Kelsey's words, the "negotiations left a legacy of resentment and distrust that should not be underestimated".³⁰

The PACER required negotiations for the PACER Plus to occur within eight years of the PICTA coming into force.³¹ Pacific Island Forum members agreed to begin the PACER Plus negotiations in August 2009. During negotiations, some PICs expressed concerns that "the inevitable result would be 'one-sided' neo-liberal economic policies harmful to the precarious economies of vulnerable island states".³² These concerns led Papua New Guinea and Fiji to withdraw from negotiations. However, negotiations were eventually successful. It appears that a significant reason for PICs agreeing to the PACER Plus was Australia and Aotearoa New Zealand making it clear that their aid to PICs was linked to the success of the PACER Plus.³³ Australia and Aotearoa New Zealand also used labour mobility provisions as additional leverage.³⁴ The PACER Plus came into force in December 2020.³⁵

(3) Relationships between key parties

The current signatories of the PACER Plus are Aotearoa New Zealand, Australia, the Cook Islands, the Federated States of Micronesia, Kiribati, the Marshall Islands, Nauru, Niue, Palau, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu.³⁶

(a) Historical

A detailed historical account of the relationships between these signatories is not required to support the analysis in this article. By way of brief context, there was no universal colonial experience in the Pacific, though no island was left untouched. Colonialists from a variety of European countries "brought disease, death and dependency", and foreign power structures that dominated Indigenous peoples.³⁷ Ultimately, Britain had the greatest presence out of the competing powers. This links many of the Pacific Island signatories with Aotearoa New Zealand, as Aotearoa was similarly colonised by Britain, resulting in the settler-colony "New Zealand".

(b) Contemporary

PICs "remain heavily dependent on former colonial powers", including Aotearoa New Zealand, for "export markets, imports, investment and aid".³⁸ These ties have been sustained through preferential and nonreciprocal agreements such as the SPARTECA.

29 Kelsey, above n 22, at 394.

30 At 394.

31 PACER, art 5(1).

32 EIU ViewsWire "Asia economy: PACER-Plus negotiations enter the final straight" (19 January 2017) ProQuest <www.proquest.com>.

33 Yolinda Yok Yee Chan "A Law and Development Perspective on Services Liberalisation in the Pacific Island Countries with Particular Reference to Tourism" (PhD Thesis, University of Auckland, 2016) at 187.

34 At 187 and 223.

35 New Zealand Foreign Affairs and Trade "PACER Plus" <www.mfat.govt.nz>.

36 PACER Plus, preamble.

37 Steven Roger Fischer *A History of the Pacific Islands* (2nd ed, Palgrave Macmillan, London, 2013) at 173.

38 Kelsey, above n 22, at 392.

Three particularly prominent features of the economic relationship between Aotearoa New Zealand and PIC are labour migration, tourism and aid.

Reliance on income from labour migration in PICs is significant. For many PICs, remittances are “the single most prominent component of national incomes”.³⁹ Many academics believe that giving PICs access to industrial country labour markets is the only way to provide a sustainable livelihood to Pasifika individuals and sustainable income to PICs.⁴⁰ This is particularly the case for unskilled workers, who face few alternative options for labour-based migration. There is a long history of Pacific migration to Aotearoa New Zealand. Today, Pasifika people are the “fourth largest ethnic group in New Zealand”, with many sending remittances to family in the Pacific Islands.⁴¹ Remittances from Aotearoa New Zealand to PICs total up to NZD \$41 million a year.⁴² Labour migration continues under numerous schemes. One significant scheme is the Recognised Seasonal Employer (RSE) scheme, which was created precisely to encourage Pacific labour migration. It solely targets migration from Pacific Islands and created a stream of 75,350 labourers between 2007 and 2019.⁴³ However, it is “highly constrained in terms of occupation, time period, location and employer”.⁴⁴ Similar numbers of Pacific Islanders have migrated to Aotearoa New Zealand on non-RSE visas over the same period.⁴⁵

For many PICs, tourism is a key development option.⁴⁶ Spending by tourists in PICs in 2018 totalled USD \$3.8 billion.⁴⁷ Tourism contributes significantly to GDP. For example, in 2018, tourism contributed 87 per cent to the Gross Domestic Product in the Cook Islands, 85 per cent in French Polynesia, 64 per cent in Palau and 45.1 per cent in Vanuatu.⁴⁸ A considerable proportion of tourists who travel to PICs come from Aotearoa New Zealand. Such tourists comprised 20.8 per cent of holidaymakers in 2017.⁴⁹

Aid is central to Pacific economies. Many PICs rank highly among developing countries in terms of aid receipts on a per capita basis.⁵⁰ Between 2018 and 2021, 60 per cent of Aotearoa New Zealand’s Official Development Assistance funding (amounting to NZD \$1.331 billion) went to PICs.⁵¹ Similar levels of funding were provided by other states such as China, Japan, the United States and Australia.⁵² Aid is often boosted in times of

39 John Connell and Richard PC Brown *Remittances in the Pacific: An Overview* (Asian Development Bank, Philippines, 2005) at vii.

40 Satish Chand “Labour Mobility for Sustainable Livelihoods in Pacific Island States” in Michael Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, 2006) 127 at 129.

41 New Zealand Immigration *Pacific Migrant Trends and Settlement Outcomes Report* (Ministry of Business, Innovation and Employment, December 2018) at 7.

42 Ministry of Foreign Affairs and Trade *Labour Mobility* at 1.

43 New Zealand Immigration “Recognised Seasonal Employer (RSE) scheme research” <www.immigration.govt.nz>.

44 Ward Friesen “Beyond the RSE: Systems of Pacific Labour Migration to New Zealand” (2018) 44 *New Zealand Population Review* 111 at 111.

45 At 111.

46 David Harrison “Tourism in the Pacific Islands” (2004) 26 *JPacS* 1 at 1.

47 South Pacific Tourism Organisation *2018 Annual Visitor Arrivals Report* (2019) at 12.

48 At 12.

49 South Pacific Tourism Organisation *Annual Review of Visitor Arrivals in Pacific Island Countries* (2018) at vi.

50 Chand, above n 40, at 127.

51 Ministry of Foreign Affairs and Trade “Our aid partnerships in the Pacific” <www.mfat.govt.nz>.

52 Department of Foreign Affairs and Trade “Australia’s Pacific Regional Development program” <www.dfat.gov.au>.

natural disaster—for example, in Vanuatu and Fiji.⁵³ While aid currently prevents some PICs from spiralling into poverty, there are widespread concerns that it is not a sustainable option and can create dependency on donors.⁵⁴

Aotearoa New Zealand and PIC signatories are also members of the Pacific Islands Forum. The Forum is a policy and economic organisation in the Pacific that fosters intergovernmental cooperation amongst member states.⁵⁵ This Forum is where discussions about the PACER and the PACER Plus began.

C Core purposes of, and key articles in, the PACER Plus

(1) Purpose

The PACER Plus is a free trade agreement instigated by the PACER. However, it is a non-conventional, hybrid free trade agreement, as it has the dual purpose of trade and development.⁵⁶ Despite this, the structure of the agreement is of a traditional free trade agreement with development as a minimal “add-on”. This is demonstrated below.

(2) Key articles

Many of the articles in the PACER Plus reflect the core principles of international economic law that are present in most trade agreements. This includes: liberalisation through market access;⁵⁷ fair treatment of foreign investors through “fair and equitable treatment and full protection and security”⁵⁸ and non-discrimination through most-favoured-nation treatment in services⁵⁹ and investment;⁶⁰ and national treatment in services⁶¹ and investment.⁶²

The development aim is upheld through provisions about aid and labour mobility. Aid is provided for in ch 10. The aid includes a Readiness Package for the PACER Plus to help PICs prepare for the implementation of the PACER Plus, a development work programme to support PICs for five years following the implementation of the PACER Plus and a pledge from Aotearoa New Zealand to invest at least 20 per cent of its Official Development Assistance in “Aid for Trade” for PICs.⁶³ However, this pledge does not make a difference since Aotearoa New Zealand already pledges approximately 60 per cent of its Official Development Assistance to the Pacific. In fact, it imposes new restrictions on a large portion of the aid that is already provided, requiring it to be directed towards trade rather than allowing PICs to determine where it is best used. The rest of the aid is focused on

53 Steven Ratuva “New Zealand Aid in the Pacific” (paper presented to Small States and the Changing Global Order: New Zealand Faces the Future Conference, Christchurch, June 2017).

54 Chand, above n 40, at 127.

55 Pacific Islands Forum Secretariat “Forum Secretariat Mission Statement” <www.forumsec.org>.

56 PACER Plus, preamble.

57 Chapter 9 art 5.

58 Chapter 9 art 9

59 Chapter 7 art 3.

60 Chapter 9 art 7.

61 Chapter 7 art 6.

62 Chapter 9 art 6.

63 Chapter 10 art 4(1); and *Implementing Arrangement for Development and Economic Cooperation Under the Pacific Agreement on Closer Economic Relations Plus* (Ministry of Foreign Affairs and Trade, 2018) at [9].

ensuring the smooth implementation of the PACER Plus and does not provide any significant support to PICs beyond that.

Labour mobility is provided for in ch 8 of the PACER Plus, called “Movement of Natural Persons”, as well as “The Arrangement on Labour Mobility” (the Arrangement) which was decided separately. Chapter 8 is consistent with the General Agreement on Trade in Services (GATS) Mode 4 and is limited to highly skilled individuals.⁶⁴ The Arrangement is the only part of the text that applies to medium- and low-skilled workers. The main features of the Arrangement are: an annual meeting aimed at enhancing cooperation and building capacity over time;⁶⁵ Aotearoa New Zealand committing to improving the RSE and exploring opportunities for other temporary mobility opportunities;⁶⁶ Aotearoa New Zealand undertaking to support PIC institutions that manage labour mobility;⁶⁷ and Aotearoa New Zealand cooperating with PICs to improve qualification and registration recognition.⁶⁸ Labour mobility is subject to “labour market demand” in Aotearoa New Zealand and on the condition that temporary workers from PICs do not “undercut wages and employment conditions” in Aotearoa New Zealand.⁶⁹ One of the key objectives of the Arrangement is to “build the labour supply capacity” of PICs.⁷⁰ The Arrangement is non-binding and does not guarantee outcomes beyond what already exists within the RSE.⁷¹

IV What is Neocolonialism?

I have chosen neocolonialism as the framework for this article as it provides a methodology to understand how Aotearoa New Zealand may be retaining colonial influence over PICs despite the lack of a formal colonial relationship. This is important because a neocolonial relationship would be a significant hindrance to Indigenous peoples’ struggle for self-determination in the Pacific.

A Preliminary definition

The general definition of neocolonialism is when nation states influence or control other nation states through indirect economic, political, cultural, social and technological means.⁷² This is in contrast to colonialism, which is “[t]he direct political control of a people by a foreign state”.⁷³ The key distinction between the two is that neocolonialism uses indirect control, whereas colonialism uses direct control. Both are forms of imperialism,

64 PACER Plus, annex 8-A (Schedules of Commitments on Movement of Natural Persons).

65 *Arrangement on Labour Mobility* (Ministry of Foreign Affairs and Trade, 14 June 2017) at [4(1)].

66 At [5(2)].

67 At [9].

68 At [5(2)].

69 At [5(1)].

70 At [3(1)(g)].

71 Alisi Kautoke-Holani “Labour Mobility in the PACER Plus” (2017) 5 *Asia & The Pacific Policy Studies* 90 at 100.

72 William Brown “neo-colonialism” in Garrett W Brown, Iain McLean, Alistair McMillan (eds) *A Concise Oxford Dictionary of Politics and International Relations* (4th ed, Oxford University Press, Oxford, 2018).

73 Henry Bernstein, Tom Hewitt and Alan Thomas “Capitalism and the Expansion of Europe” in Tim Allen and Alan Thomas (eds) *Poverty and Development in the 1990s* (Oxford University Press, Oxford, 1992) 168 at 168.

which is the “domination ... by one country or group of people over others”.⁷⁴ Imperialism can occur to different degrees. For example, neocolonial domination can still be present even if the dominated state retains some ability to resist subjugation. Decolonisation also encompasses both concepts. Decolonisation requires liberation from the physical, structural and psychological effects of colonisation, and therefore requires liberation from both colonialism and neocolonialism.⁷⁵ Although colonial relationships often pre-empt neocolonial relationships, it is not a prerequisite, and relationships can still be neocolonial as long as they meet the above definition.⁷⁶

I will elaborate on this definition by building in criteria from a variety of theorists to make it more nuanced and workable. This will allow us to understand when influence or control crosses the threshold from mere run-of-the-mill politicking into neocolonialism.

B *Criteria indicating economic neocolonialism*

I will select the common characteristics of economic neocolonialism from the work of different theorists in an effort to develop a representative set of criteria that can be used to assess whether an action, relationship or instrument is neocolonial. The criteria I have identified are: a core-periphery relationship; imposition of capitalist relations; monopolistic control over trade; imbalance of local industry protection; dependency, not partnership; exploitation through surplus flows and unequal exchange; indirect, not direct, control; and a previous colonial relationship.

I have selected these criteria because they are all features of a core-periphery global structure. The main premise of this structure is that the world is polarised into “core” and “periphery” states, in which the core states are “advanced” and the periphery states are “underdeveloped”. The “underdevelopment” of periphery states is due to the development of the core states because the core states exploit the periphery states.⁷⁷ While this seems simplistic, these relations are dynamic. They are simultaneously and mutually produced and constantly shifting due to the interactive space between domination and resistance.⁷⁸

This dynamic was created by historical processes outside the scope of this article.⁷⁹ However, it is currently perpetuated by a constant process of exploitation. In simple terms, the core exploits the periphery by imposing monopolistic conditions so that resources are redirected to the core. This enables development in the core but prevents development in the periphery due to a lack of capital and resources for investment.⁸⁰ Therefore, the periphery is reduced to depending on the core to survive: the periphery needs the core to provide demand for exports and foreign investment for the development of industry,

74 Peter Burnell “imperialism” in Garrett W Brown, Iain McLean, Alistair McMillan (eds) *A Concise Oxford Dictionary of Politics and International Relations* (4th ed, Oxford University Press, Oxford, 2018).

75 See Frantz Fanon *Black Skin, White Masks* (2nd ed, Pluto Press, London, 2008).

76 Noah Echa Attah “The historical conjecture of neo-colonialism and underdevelopment in Nigeria” (2013) 5 JASD 70 at 71.

77 Andre Gunder Frank *Capitalism and Underdevelopment in Latin America: Historical Studies of Chile and Brazil* (Monthly Review Press, New York, 1969) at 3.

78 Andre Gunder Frank *Sociology of Development and Underdevelopment of Sociology* (Pluto Press, London, 1971) at 55.

79 See the historical overview in Anthony Brewer *Marxist Theories of Imperialism: A Critical Survey* (2nd ed, Routledge, London, 1990) at 3–10.

80 Frank, above n 77, at 9.

even as the core siphons off most of the profits created. Each significant feature of this process is a criterion below.

(1) Core-periphery relationship

While the core-periphery structure is the foundation upon which the criteria lie, it is also a criterion in itself. The mere existence of a relationship between a “core” state and a “periphery” state is an indication that the relationship might be neocolonial, as it suggests a significant degree of power imbalance, which often exists between colonial states and their former colonies. This type of relationship can be identified by looking at the nature of the states engaging in the relationship, and whether it is a relationship between an “advanced” (core) state and an “underdeveloped” (periphery) state.

Anthony Brewer outlines the key features of an “advanced” (core) state.⁸¹ Core states usually have large industrial and services sectors but a small agricultural sector, and export a wide range of manufactured and primary products but import primary products when another country’s natural conditions are more favourable to producing it.⁸² The exports and other labour-intensive products are produced with cheap labour.⁸³ If the state does have a larger agriculture sector, it is usually helped by modern capital intensive techniques and subsidies.⁸⁴ Generally, the majority of the population are wage earners and trade unions have ensured that some of the benefits of work are shared with the workers. There tends to be well-established institutions of “bourgeois democracy”, with “free elections and guarantees of personal freedom”.⁸⁵ Finally, they host “the headquarters of the main multinational companies and are ... centres of technological development”.⁸⁶

Brewer also outlines the key features of an underdeveloped (periphery) state.⁸⁷ Contrary to core states, periphery states tend to have “large, low-productivity, agricultural and service sectors” and essential “imports of capital goods, intermediate products and raw materials [tend to be] paid for by exports of primary products or labour-intensive manufactures”.⁸⁸ Generally, there is “a small proportion of the population employed in modern industry”, and permanent large-scale unemployment or underemployment.⁸⁹ Overall, “[w]ages and incomes are low (except for a small elite)”.⁹⁰ Finally, “[f]oreign trade generally accounts for a rather large fraction of total national income” and the country “generally trade[s] with advanced countries and not with [other underdeveloped countries]”.⁹¹

(2) Imposition of capitalist relations of production

The second criterion that indicates economic neocolonialism is the imposition of capitalist relations of production on a country. This forces the country to replace Indigenous relations of production with capitalist relations of production. Capitalism dominates the

81 Brewer, above n 79, at 8.

82 At 9.

83 At 9.

84 At 9.

85 At 9.

86 At 9.

87 At 9–10.

88 At 10.

89 At 9.

90 At 10.

91 At 10.

economic, political and social aspects of the country.⁹² But these capitalist relations are not imposed by force. Otherwise, the relationship would be considered colonialism. Under neocolonialism, such economic relations are imposed in indirect ways, such as through free trade agreements and the expansion of multinational corporations into previously non-capitalist countries.

(3) Monopolistic control over trade

The third criterion for economic neocolonialism is the core country imposing monopolistic control over the periphery country.⁹³ “[T]he source or form of this monopoly varies”.⁹⁴ Monopolistic control must be determined on the actual material circumstances. For example, an international trade instrument’s allowance of monopoly conditions may initially be concealed under the rhetoric of competition and free trade. An example is a multinational entering the periphery country’s local industry and creating a monopoly.⁹⁵

(4) Imbalance of local industry protection

The fourth criterion is that there is an imbalance of protection of local industry: core countries experience relatively stronger protection of local industry as compared to that which is experienced in periphery countries. This is because in periphery countries, competition from abroad quickly stifles infant industries, maintaining the dominance of core corporations in the exploited country’s local industries.⁹⁶

(5) Dependency not partnership

The fifth criterion is that the economy of the periphery country is in a position of dependence relative to the core country. Dependence occurs when the economy of a country is conditioned by the development and expansion of another economy, to which the former is subjected.⁹⁷ Therefore, their economy does not compete with that of the neocolonial country, but is instead complimentary to it.⁹⁸ Dependence is essentially a severe imbalance of power within the interdependence of states. This is shown in the imbalance of the relative importance of the economic relationship to each party. To the core country, trade with a single periphery country is marginal, whereas to the periphery country, trade with a single core country is extremely important.⁹⁹

92 Frank, above n 77, at 10.

93 At 7.

94 At 147.

95 Brewer, above n 79, at 171.

96 Samir Amin *L’impérialisme et le développement inégal* (Les Editions de Minuit, Paris, 1976) (translated ed: Alfred Ehrenfeld and Joan Pinkham (translators) Samir Amin *Imperialism and Unequal Development* (Monthly Review Press, New York, 1977) at 108).

97 Theotonio Dos Santos “The Structure of Dependence” (1970) 60 AER 231 at 231.

98 Samir Amin *L’accumulation à l’échelle mondiale* (Editions Anthropos, Paris, 1970) tome I (translated ed: Brian Pearce (translator) Samir Amin *Accumulation on a World Scale: A Critique of the Theory of Underdevelopment* (Monthly Review Press, New York, 1974) vol 1 at 146).

99 Dos Santos, above n 97, at 234–235.

(6) Exploitation through surplus flows and unequal exchange

The sixth criterion is exploitation by controlling surplus flows and unequal exchange. “Surplus” is the difference between a country’s output and consumption.¹⁰⁰ A state can economically exploit another indirectly through a legal instrument by controlling repatriation, or, where the flow of surplus goes, and also by creating conditions that result in “unequal exchange” between the importing and exporting of such surplus.

Core countries impose control over where surplus flows to, ensuring that the majority of the surplus created by a periphery country flows to the core country. This is essentially a redivision of surplus that benefits the core country.¹⁰¹ One critical way in which this happens is when multinational companies enter markets in the exploited, periphery country, produce profits, then remit the vast majority of their profits abroad or otherwise back to their headquarters in neocolonial, core countries.

Unequal exchange occurs when the periphery country has to pay relatively more for imports, and receives relatively less for exports, than the core country.¹⁰² This occurs due to monopolistic pricing and differences in productivity.¹⁰³ The root cause of this is that goods and capital are mobile internationally, while labour is not.¹⁰⁴ Thus, while goods and capital are equalised by competition, there is a significant wage differential between periphery countries and core countries.¹⁰⁵ This affects productivity and therefore the equality of exchange.

One indicator that exploitation through surplus flows and unequal exchange is occurring is a balance-of-payments deficit.¹⁰⁶ This indicates that the outward flow of profit repatriation and unequal exchange outweighs the inwards flow of investment and value from exchange. There is a “trickle up effect”, with money flowing from periphery countries to core countries.¹⁰⁷

(7) Indirect control

The seventh criterion is that exploitation is indirect, rather than direct. This is the crucial difference between colonialism and neocolonialism: the former is direct while the latter is not. This is the only necessary criterion that must be present before a relationship can be considered economic neocolonialism. Without indirect control, there is no neocolonial control.

100 Paul A Baran *The Political Economy of Growth* (John Calder, London, 1957) at 22. I have adopted a simplistic definition to avoid an extended discussion of complicated economic theory. This definition will suffice to approximate exploitation in this case.

101 At 142.

102 Brewer, above n 79, at 203.

103 At 201.

104 At 202.

105 At 203; and Arghiri Emmanuel *L'échange inégal* (François Maspero, Paris, 1969) (translated ed: Brian Pearce (translator) Arghiri Emmanuel *Unequal Exchange: A Study of the Imperialism of Trade* (Monthly Review Press, London, 1972) at 267).

106 Dos Santos, above n 97, at 235.

107 James Lawrie “Free Trade in the Real World: Competing perspectives about the role and impact of trade in developing countries” HiiDunia <www.hiidunia.com> at 6.

(8) Previous colonial relationship

The final criterion is the existence of a previous colonial relationship. This is only a slight indicator of neocolonialism. While colonial dynamics are more likely to transform into neocolonial dynamics due to the previous imbalance of power, a neocolonial relationship can exist without a previous colonial relationship.¹⁰⁸

V Is the PACER Plus a Neocolonial Legal Instrument?

In this Part, I will apply the eight criteria indicating economic neocolonialism to the PACER Plus to determine whether it is a neocolonial legal instrument. An action, relationship or instrument does not need to fulfil every criteria to be neocolonial. Instead, it is a matter of degree and circumstance. Therefore, I will evaluate the PACER Plus according to each criterion, then undertake a holistic assessment to determine whether it is a neocolonial legal instrument.

Timing proves to be difficult when applying the criteria. A neocolonial relationship is not created by one instrument—it evolves over time due to multiple actions, enactment of instruments and development of thought. Some of the criteria would have been fulfilled before the enactment of the PACER Plus. Therefore, the question must be twofold: first, to what extent was the criteria fulfilled before the PACER Plus, and secondly, to what extent does the PACER Plus introduce, perpetuate, encourage or entrench the criteria (and therefore neocolonialism)?

The PACER Plus came into force in December 2020. Due to the recency of its implementation, there is no empirical evidence specific to the PACER Plus to draw on to inform my conclusions below. There is also minimal empirical evidence from other free trade agreements. This means I will primarily draw on economic theory to determine whether a criterion is likely to be met by the PACER Plus. These conclusions should be adapted based on empirical evidence as it becomes available.

Though PICs differ significantly from each other, I will take a broad approach for each criterion and consider them as a group. Detailed examinations of individual economies are desirable, but are outside the scope of this article. I will draw on specific examples from the signatories where relevant.

A *Application of criteria*

(1) Core-periphery relationship

To determine whether Aotearoa New Zealand and PICs are “core” or “periphery” countries, it is necessary to analyse their economic features against Brewer’s criteria. At first glance, Aotearoa New Zealand appears to fit neatly into the “core” country category, whereas PICs fit into the “periphery” category. Therefore, I will analyse them against these categories.

Factors in favour of Aotearoa New Zealand being a core country include its large services sector. Services make the largest contribution to GDP in Aotearoa New Zealand, constituting 65 per cent of GDP in 2018.¹⁰⁹ Aotearoa New Zealand also has a relatively large

108 Nkrumah, above n 1, at ix.

109 Stats NZ “Which industries contributed to New Zealand’s GDP?” (20 November 2020) <www.stats.govt.nz>.

industrial sector, with goods production totalling 19 per cent of GDP that same year.¹¹⁰ Additionally, agriculture made up seven per cent of GDP.¹¹¹ Although Aotearoa New Zealand removed all agricultural subsidies in 1984, huge efficiency gains are achieved through capital intensive techniques.¹¹² The majority of the population is employed, with a 5.3 per cent unemployment rate in September 2020.¹¹³ Although unionism has declined significantly over the past few decades, workers are guaranteed basic rights such as a safe and healthy workplace, minimum wage, sick leave, parental leave, annual holiday leave, public holiday leave, and rest and meal breaks.¹¹⁴ Aotearoa New Zealand has well established free elections and guarantees of personal freedoms.¹¹⁵ The technology sector of Aotearoa New Zealand is small but growing fast, at eight per cent of GDP in 2019 and 12 per cent revenue growth in 2016.¹¹⁶ Aotearoa New Zealand mainly imports labour-intensive goods produced with cheap labour, such as vehicles, fuels and plastics.¹¹⁷ The only factor against Aotearoa New Zealand being a core country is that it generally does not host the headquarters of multinationals.¹¹⁸ This can be explained by Aotearoa New Zealand being a relatively small and geographically distant country, which is not conducive to headquartering a company. Despite this, Aotearoa New Zealand is clearly a core country, particularly in the context of it being part of a broader Western hegemony and a current settler state.

All factors point in favour of PICs being periphery countries. This includes the state of their employment markets: many people are unemployed or underemployed, and the majority of those who are employed are unskilled or work for the public service.¹¹⁹ There are large tourism and agricultural industries, which have low productivity.¹²⁰ PICs are widely considered to be low-income countries, with less than ten per cent income growth between 1990 and 2016.¹²¹ Foreign trade contributes significantly to GDP, with

110 Stats NZ, above n 109.

111 Stats NZ, above n 109.

112 Convention on Biological Diversity “New Zealand: Removal of agricultural and fisheries subsidies” <www.cbd.int> at 1; and Zana van Dijk “Why NZ farmers favour efficiency” (12 February 2020) DairyGlobal <www.dairyglobal.net>.

113 Stats NZ “Labour market statistics: September 2020 quarter” (4 November 2020) <www.stats.govt.nz>.

114 Employment NZ “Minimum rights of employees” (18 October 2018) <www.employment.govt.nz>.

115 As of 2021, New Zealand ranks number one in world in the Corruptions Perceptions Index: Transparency International “Corruption Perceptions Index” <www.transparency.org>. Personal freedoms are guaranteed in the New Zealand Bill of Rights Act 1990.

116 NZTech “Overview of the New Zealand technology sector” (July 2020) <www.nztech.org.nz>; and Technology Investment Network *The Investor’s Guide to the New Zealand Technology Sector* (Ministry of Business, Innovation & Employment and Technology Investment Network, 2017) at 1.

117 Trading Economics “New Zealand Imports” (November 2020) <www.tradingeconomics.com>.

118 Billy Cheung “What Countries Are Most Multinational Corporations Based In?” (13 August 2020) Investopedia <www.investopedia.com>.

119 Economic and Social Commission for Asia and the Pacific *Improving Employment Opportunities in Pacific Island Developing Countries* (United Nations, 2007) at 2–3.

120 At 2–3.

121 Roger P Kronenberg and Hoe Ee Khor “Economic Growth in the Pacific Island Countries—Challenges, Constraints, and Policy Responses” in Hoe Ee Khor, Roger P Kronenberg and Patrizia Tumbarello (eds) *Resilience and Growth in the Small States of the Pacific* (International Monetary Fund, United States, 2016) 3 at 3.

PICs having “unusually high trade-GDP ratios”.¹²² PICs are highly dependent on imports of essential goods (for example, fuel and foodstuffs), while exports are dominated by nature resource-based products and tourism.¹²³ Generally, PICs trade primarily with “developed” countries (with some exceptions for close neighbours).¹²⁴

Aotearoa New Zealand and PICs clearly fit into the categories of “core” and “periphery” respectively. Therefore, they are in a core-periphery relationship, which indicates economic neocolonialism. This relationship existed before the PACER Plus and is likely to be perpetuated by it. The development provisions in the PACER Plus are negligible, so there is unlikely to be a shift in the status of PICs as periphery countries. Given the PICTA already provided market access and trade liberalisation between PICs, the sole purpose of the PACER Plus is to provide the same access to Aotearoa New Zealand. This is likely to increase the dependence of PICs on Aotearoa New Zealand’s imports and exports. I will discuss this in more detail under each of the criterion below. An intensification of each criterion is an intensification of the core-periphery binary.

(2) Imposition of capitalist relations of production

PICs began integrating into the world market long before the PACER Plus, as indicated by the history of trading, colonisation and previous trade agreements. Therefore, capitalist relations of production existed in PICs before entering into the PACER Plus.

However, imposition of capitalist relations of production are embedded and “locked in” by further trade liberalisation measures.¹²⁵ The entire purpose of trade liberalisation is to ensure further integration into the world capitalist market. Trade liberalisation, market access, fair treatment of foreign investors and non-discrimination clauses mandate PICs to undertake measures that expose their markets, and therefore their people and environment, to the global economy. This liberalisation includes those areas of the economies of PICs that are still structured in line with Indigenous production and exchange. To afford imports of essentials, PICs must produce marketable goods and services rather than focus solely on subsistence or traditional production. Therefore, they are strongly incentivised to assimilate to market economic structures to align with the PACER Plus’ requirements, specifically the national treatment clause. Once implemented, the sanctions associated with the PACER Plus (including dispute settlement mechanisms such as consultation, mediation and conciliation) prevent PICs from returning to Indigenous economic structures (or even socialist or protectionist structures) without significant financial, economic, diplomatic and reputational detriment.¹²⁶

This imposition of capitalist relations requires an element of involuntariness. As discussed above, there are indications from negotiations that trade liberalisation was imposed on PICs rather than voluntarily sought out. There was incessant pressure from Aotearoa New Zealand, including linking the success of the PACER Plus with aid amounts and using labour mobility as leverage. From the PICs, there were outcries about the potential for “one-sided” neo-liberal economic policies and clear attitudes of resignation

122 Te’o Fairbairn *Pacific Islands Economies: Trade Patterns and Some Observations on Trade Policy Issues* (Nautilus Institute, 25 September 1994) at 1.

123 At 3.

124 Matthew Dornan and Sachini Muller “The China shift in Pacific trade” (15 November 2018) DevPolicy Blog <www.devpolicy.org>.

125 Jane Kelsey “Global Economic Policy-Making: A New Constitutionalism?” in *International Economic Regulation* (Dartmouth Publishing, England, 2002) 535 at 535.

126 PACER Plus, ch 14.

from those leading negotiations. More generally, the unequal power distribution between Aotearoa New Zealand and PICs shapes the latter's choices and constraints,¹²⁷ making them more likely to have succumbed due to coercion rather than agreeing to the PACER Plus by choice. The dependence of PICs on Aotearoa New Zealand enhances those PICs' inability to refuse Aotearoa New Zealand's requests without risking backlash that could have significant diplomatic and economic effects (discussed further under the fifth criterion). Therefore, capitalist relations of production are imposed on PICs and "locked in" by the PACER Plus.

(3) Monopolistic control over trade

The creation of monopolies in the local industries of PICs was possible before the PACER Plus (as it is in any market). However, the agreement enhances the chance that Aotearoa New Zealand companies will monopolise markets in PICs. I acknowledge that it appears contradictory to suggest that a free trade agreement would enable monopolies. The supposed purpose of free trade agreements is to liberalise trade to enhance competition, which is antithetical to monopoly control. However, free trade agreements have different effects in different circumstances due to the specific provisions of the particular agreement and the characteristics of the signatories.¹²⁸ As discussed in Part III of this article, the PACER Plus provides for market access, non-discrimination and fair treatment of foreign investors. The purpose of these measures is to provide foreign business and investment with access to local markets on the same basis as local business. The result of these measures for these specific signatories is that they open up opportunities for large corporations based in Aotearoa New Zealand to enter and dominate tiny markets in PICs. These corporations are able to do this due to the benefits of relatively larger economies of scale, and the support of more developed infrastructure and technology. These advantages increase the risk of foreign corporations creating a monopoly within the market, because local businesses cannot compete with a company that can draw upon a wealth of resources and expertise from headquarters in a much larger market.

Not only does the PACER Plus enhance the chance of monopolisation, but it may also prevent regulators in PICs from breaking up monopolies once they form. National treatment requires imported products to be treated no less favourably than like products of the host state. Regulator attempts to break up a monopoly in a local market, created by a foreign-owned business, may infringe this rule, as anti-trust regulation applies specific rules to a monopoly that would not apply to domestic businesses in the same market.

This vulnerability is particularly concerning considering that monopolies may threaten the viability of local Indigenous economic structures that exist alongside market mechanisms in many islands, as well as Indigenous-owned business. This is a large-scale problem because the majority of PIC companies are owned and operated by Indigenous peoples of the Pacific (with a few exceptions such as Fiji).¹²⁹ If a good or service is provided with monopoly pricing, consumers may turn away from Indigenous practices and businesses and towards more affordable monopoly provisions. In a case like this,

127 Jane Kelsey "Introduction" in *International Economic Regulation* (Dartmouth Publishing, England, 2002) xv at xvi.

128 Stevens and others, above n 7, at 18.

129 Garth Cant "The South Pacific: Australia, New Zealand and the Pacific Islands – insights into the theory and praxis of Indigenous entrepreneurship" in Léo-Paul Dana and Robert B Anderson (eds) *International Handbook of Research on Indigenous Entrepreneurship* (Edward Elgar Publishing, United Kingdom, 2007) 459 at 467.

regulators may be empowered to take some action, as they can adopt technical regulations to preserve Indigenous technology and production methods.¹³⁰ However, this is unlikely to be helpful as it is a very narrow allowance—the example given within the PACER Plus is using alternative test methods for certain products.¹³¹ No other exception is made for the Indigenous peoples of PICs.¹³²

Although economic theory indicates that the PACER Plus enhances the chance that markets in PICs will be monopolised by Aotearoa New Zealand companies, the definite fulfilment of this criterion depends on whether monopolisation happens in actuality. There is no empirical research about the impact of free trade agreements on markets of small states and developing countries, and whether it increases the likelihood of monopolisation.¹³³ Based purely on the economic analysis above, the criterion is met, subject to empirical proof.

(4) Imbalance of local industry protection

Before the PACER Plus, PICs had guaranteed market access and no tariff barriers in Aotearoa New Zealand because of the SPARTECA (this was not reciprocal).¹³⁴ Therefore, technically, PICs had more local industry protection than Aotearoa New Zealand. However, simply because of the nature of the Aotearoa New Zealand political-economic structure, there is an imbalance of access to economies of scale, capacity, infrastructure and technology between the two. Companies from PICs are likely to struggle to compete in the Aotearoa New Zealand market because they cannot compete with the superior economies of scale and resources accessible by Aotearoa New Zealand companies: they begin from radically different starting points. Overall, Aotearoa New Zealand gains slightly higher levels of protection, despite the SPARTECA.

The imbalance of protection is exacerbated by the PACER Plus. The PACER Plus gives Aotearoa New Zealand trade liberalisation and market access to PICs—achievements that PICs have already gained in the SPARTECA. The PACER Plus strips away PIC protections while leaving Aotearoa New Zealand in the same position. Therefore, the imbalance of access to economies of scale, capacity, infrastructure and technology can play out in full, providing much more protection to the local industries of Aotearoa New Zealand than those in PICs.

This criterion has a similar impact on Indigenous peoples of the Pacific as the third criterion. Protections of Indigenous business and practices in PICs are stripped away with no corresponding benefit of being able to compete in new markets. This endangers the long-term viability of their businesses and disrupts the economic structure of PICs as homegrown initiatives struggle to survive.

There is no analogous empirical evidence from similar free trade agreements to draw on. Therefore, based purely on the economic analysis above, the criterion is met—subject to empirical proof.

130 PACER Plus, ch 6 art 13(b).

131 Chapter 6 art 13(b).

132 Though there are exceptions for the Indigenous peoples of New Zealand and Australia: PACER Plus, ch 11 art 6(1), ch 7 and annex 7-A (Schedules of Specific Services Commitments).

133 Stevens and others, above n 7, at vi.

134 Jacqueline Wenham *PICTA, PACER and Cotonou: Summary of literature review findings, key themes and implication for New Zealand and the Pacific* (Pacific Cooperation Foundation, March 2006) at 24.

(5) Dependency not partnership

Prior to the PACER Plus, PICs were dependent on Aotearoa New Zealand. A key metric to determine dependence is the relative importance of the economic relationship between the countries. From the point of view of PICs, their economic relationship with Aotearoa New Zealand is very important. Aotearoa New Zealand is the top three importer or exporter for Fiji, Samoa, Tonga and the Cook Islands.¹³⁵ Aotearoa New Zealand contributes significantly to their GDPs through aid, providing consumers for tourism, and a path for labour migration and therefore remittances. From the perspective of Aotearoa New Zealand, its economic relationship with PICs is relatively less important. Though PICs provide convenient seasonal labour through the RSE, the Aotearoa New Zealand government is primarily interested in retaining a good relationship with PICs for non-economic purposes—mainly for regional security and a developing Pacific national identity.¹³⁶ Aotearoa New Zealand's imports from and exports to PICs are too minimal to register in official statistics.¹³⁷ Therefore, the relative importance of the economic relationship is stark; PICs view the economic relationship as much more important than Aotearoa New Zealand does.

The PACER Plus intensifies PICs' dependence on Aotearoa New Zealand. It removes tariff and non-tariff barriers on imports from Aotearoa New Zealand, lowering their costs relative to imports from non-signatories. This increases the likelihood that PICs will opt for Aotearoa New Zealand imports over imports from other countries. The same shift is unlikely to happen with imports into Aotearoa New Zealand from PICs, because Aotearoa New Zealand is a signatory to many other free trade agreements with countries that have the benefits of economy of scale (whereas PICs do not).¹³⁸ Breadth of choice and cost is likely to incentivise Aotearoa New Zealand to continue importing primarily from larger partners instead of PICs. Despite this, even a significant increase in imports to Aotearoa New Zealand from the PICs' point of view would be a negligible increase from Aotearoa New Zealand's perspective: Aotearoa New Zealand's other imports are simply too plentiful, and PICs' production capacity too small.

Aotearoa New Zealand has also used the PACER Plus to increase control over certain sectors that are significant to PICs. This is indicative of an increase in dependence because Aotearoa New Zealand has more influence over economic outcomes in PICs. Aotearoa New Zealand achieved this by tying aid to trade liberalisation in negotiations and within the PACER Plus, reiterating complete control over labour migration to Aotearoa New Zealand through ch 8 and the attached Arrangement, and reducing tariffs related to tourism through trade liberalisation clauses. Reducing tariffs removes a significant source of income for PIC governments, meaning that they need to encourage more tourism to yield the same amount of income that they did previously (by taxing various aspects of

135 Dornan and Muller, above n 124.

136 Paper to the Cabinet National Security Committee *New Zealand in the Pacific* (2018) at 2 (obtained under Official Information Act 1982 request to the Office of the Minister of Foreign Affairs).

137 Geoff Bertram "South Pacific economic relations" (11 March 2010) Te Ara <www.teara.govt.nz>; and TrendEconomy "New Zealand: Imports and Exports" (November 2020) <www.trendeconomy.com>.

138 For example, the recently signed Regional Comprehensive Economic Agreement which includes signatories such as China, Indonesia and Japan: Ministry of Foreign Affairs and Trade "Regional Comprehensive Economic Partnership (RCEP)" <www.mfat.govt.nz>.

tourism).¹³⁹ Aotearoa New Zealand will be one of the key sources of tourism customers (particularly due to lower costs for consumers flowing from the liberalisation of the PACER Plus). This increases the reliance of PICs on Aotearoa New Zealand as a source of tourists.

There is no analogous empirical evidence from similar free trade agreements to draw on. Therefore, based purely on the economic analysis above, the criterion is met—subject to empirical proof.

(6) Exploitation through surplus flows

Exploitation of PICs through surplus flows occurs in two key ways: unequal exchange and repatriation of profits. I will use balance-of-payments accounts and productivity (GDP per person employed) to predict whether exploitation is happening.

Unequal exchange occurred before the PACER Plus because of the disparity in productivity between Aotearoa New Zealand and PICs. Productivity is often measured as GDP per person employed. Using this metric, in 2019, the average productivity of PICs was \$20,517.80, whereas Aotearoa New Zealand's was \$78,800.64.¹⁴⁰ This is a significant disparity, with Aotearoa New Zealand's productivity being nearly four times as high as the PICs' productivity. Therefore, the differences would produce significant unequal exchange (as explained when introducing this criterion in Part IV). Unequal exchange would also occur because of monopolistic pricing if there is monopolistic control under the third criterion.

Additionally, before the PACER Plus, foreign-owned companies located in PICs were only obliged to share their profits with their host state according to the proportion of the corporate tax rate. The corporate tax rate has been lowered across most PICs in the past few decades, reducing their slice of profits from foreign-owned companies.¹⁴¹ After taxation, foreign-owned companies could reinvest the profits in the local business, or repatriate them offshore. There is strong indication that a significant repatriation of profits was occurring based on the balance-of-payments deficits discussed below. Specifically, in the tourism sector, many multinational companies exploit the environment only to send profits back to their headquarters offshore.¹⁴²

Before the PACER Plus, the pervasiveness of unequal exchange and repatriation of profits in PICs were indicated in balance-of-payments account amounts. In 2017, Palau's account balance as a percentage of GDP was -18.2 per cent, and in 2019, Fiji's was -12.5 per cent, the Solomon Islands' was -9.8 per cent and Tonga's was -0.8 per cent.¹⁴³ Many other PICs have account balances that are nearly negative: Samoa was at 4.0 per cent in 2019 and Nauru was at 6.8 per cent in 2018.¹⁴⁴

Moving to the effects of the PACER Plus, it is unclear what the impact on productivity disparity, and therefore unequal exchange, will be. The World Bank claims that free trade agreements improve productivity by removing constraints and improving access to

139 Kautoke-Holani, above n 71, at 91.

140 The World Bank "GDP per person employed (constant 2017 PPP \$)" (1 March 2020) <<https://data.worldbank.org>>.

141 In some cases to as low as 10 per cent: Kieran Murray, Sally Wyatt and Robin Oliver *Topography of tax reform in the Pacific Islands in the period 2002 - 2012* (Sapere Research Group, 8 October 2013) at 13.

142 Harrison, above n 46, at 10.

143 The World Bank "Current account balance (% of GDP)" (1 March 2020) <<https://data.worldbank.org>>.

144 The World Bank, above n 143.

technology.¹⁴⁵ However, it is unclear if productivity gains will be equally distributed or if they will reduce disparities between PICs and Aotearoa New Zealand. It is likely to do so because PICs will benefit more from increased access to Aotearoa New Zealand's advanced technology than Aotearoa New Zealand will benefit from increased access to PICs' technology.

The PACER Plus has not embraced the demands of the New International Economic Order: a set of proposals made by developing countries to combat neocolonialism, demanding that profits made by foreign-owned businesses in "poorer countries ... are shared equally between the host State and the investors".¹⁴⁶ Therefore, it does not make any significant inroads into ensuring profits are not repatriated. The PACER Plus also does not have any explicit impact on taxation in PICs (nor, therefore, on the proportion of profits that PICs retain), though PICs may increase tax rates to recover revenue lost through the reduction or removal of tariffs. Even if there is no change in taxation, it is likely that the PACER Plus will increase repatriation of profits merely because it will probably increase the number of Aotearoa New Zealand companies operating in PICs. Therefore, there is likely to be a greater exploitation of surplus through this avenue.

The evidence regarding the fulfilment of this criterion is mixed. It appears that exploitation of surplus through repatriation of profits will increase while unequal exchange will decrease. Therefore, the criterion is weakly met. The eventual result will be reflected in balance-of-payments accounts in PICs.

(7) Indirect control

The PACER Plus is a form of indirect control because it is a treaty. It does not involve military or physical coercion, but economic coercion. This criterion is met.

(8) Previous colonial relationship

There have been numerous types of relationships between Aotearoa New Zealand and various PICs throughout history. Some have been colonial, some have teetered on the edge, and some were not colonial. However, taking a broader view, Britain (and later, Aotearoa New Zealand) had a significant colonial presence throughout the Pacific for centuries, in the form of explorers, traders, missionaries, military personnel and settlers. That impact cannot be understated and clearly laid the foundation for future neocolonial power structures. This criterion is met.

B *Conclusion*

Seven of the criteria are strongly met, with four of them subject to further empirical evidence. The sixth criterion is met, albeit weakly. Overall, these results send a strong signal that the PACER Plus is a neocolonial legal instrument. However, this strong indication could be weakened if empirical evidence emerges that undermines the conclusions under the four criteria that are subject to empirical proof.

145 The World Bank "Trade Agreements Boost Productivity and Growth, Contributing to Malaysia's Successful Development, World Bank Says" (30 June 2016) <www.worldbank.org>.

146 Herdegen, above n 8, at 17.

VI Conclusion

This article has identified eight criteria indicating economic neocolonialism and applied them to the PACER Plus. I have found that the PACER Plus fulfils seven of the criteria strongly, and one of the criteria weakly, indicating that the PACER Plus is a neocolonial legal instrument.

This conclusion is concerning. While Aotearoa New Zealand is lauded internationally for its acknowledgement of its colonial nature at home, and for its ongoing attempts to address and redress that colonial nature, Aotearoa New Zealand stretches a neocolonial hand into the Pacific. While other free trade agreements, such as the Comprehensive and Progressive Trans-Pacific Partnership Agreement, receive significant public attention and protest, the PACER Plus has slid under the radar, with little attention paid to it by the Aotearoa New Zealand public.¹⁴⁷ If Aotearoa New Zealand is truly committed to reckoning with its colonial nature, then it must interrogate the character of its influence in the Pacific today.

This article indicates that the core-periphery system is maintained by the ability of core states to manipulate the workings of the international legal system as a whole to suit their needs.¹⁴⁸ The PACER Plus is one of those “manipulations”. However, it is not a mere blip within a sea of enlightened international law. It represents the core principles and values of an entire swath of the international legal system: international economic law. Aotearoa New Zealand celebrates progress in international law in the area of human rights, with instruments such as the United Nations Declaration on the Rights of Indigenous Peoples. Simultaneously, the PACER Plus indicates that the international economic system may be working to undermine the economic livelihoods, and perhaps economic rights, of Indigenous peoples. If we want international economic law to serve the interests of all countries, not just the interests of neocolonial powers, then we must challenge its core assumptions and infrastructure to push for a truly decolonised world.

147 Josh Fagan and Brooke Bath “TPPA protests shut down Auckland intersections to ‘send a message’” (4 February 2016) Stuff <www.stuff.co.nz>.

148 Immanuel Wallerstein *The Capitalist World-Economy: Essays* (Cambridge University Press, Cambridge, 1979) at 292–293.