

TRIPLE WINS OR TROJAN HORSE? EXAMINING THE RECOGNISED SEASONAL EMPLOYER SCHEME UNDER A TWAIL LENS

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I. INTRODUCTION

Pacific Islanders have been migrating across the Pacific Ocean in search of labour opportunities since the early 19th century.¹ The latest variation on this theme has been Pacific participation in temporary labour migration schemes in New Zealand and Australia. This sees the recruitment of thousands of low-skilled Pacific Islanders for employment in the horticulture and viticulture industries in New Zealand and Australia for several months in a year, after which the Pacific Islanders return to their home country. New Zealand's programme, the Recognised Seasonal Employer (RSE) scheme, has been roundly hailed as a success, most notably for its capacity as a development initiative. The access to income for under-employed Pacific Islanders rounds off the much-vaunted "triple win" scenario in the RSE scheme that sees benefits for New Zealand, through filling labour shortages; Pacific states, through the provision of employment for a larger proportion of their populations; and of course, the Pacific RSE workers themselves.

In contrast to the prevailing view, it will be submitted that the triple win assessment requires re-evaluation. This stance will be taken by reference to the work of TWAIL (Third World Approaches to International Law) scholars, whose incendiary critique of the relationship between development and international law demonstrates that any apparent economic benefits of development do not tell the whole story. It will be argued that the underlying economic logic of the RSE scheme exerts an influence that undermines its potential as a development initiative. However, it is hoped that consciousness of the unstable foundations of the RSE scheme can lead to its rehabilitation.

Part II of this paper will trace the beginnings of the RSE scheme, from its heritage as the most recent initiative in New Zealand's long line of immigration policies providing entry to Pacific Islanders, through to the scheme's origins as an answer to labour-demand, then the workings of the scheme, and finally, a review of the scheme's reception thus far. Part III will

* BA, LLB(Hons). The author gratefully acknowledges Associate Professor Treasa Dunworth of the University of Auckland Faculty of Law for invaluable assistance with this paper, and her father, Sefita Hao'uli, for sharing his practical knowledge of the RSE scheme.

1 Charlotte Bedford "Picking Winners? New Zealand's Recognised Seasonal Employer (RSE) Policy and its Impacts on Employers, Pacific Workers and their Island-Based Communities" (PhD thesis, University of Waikato, 2013) at 48.

introduce the critical lens of TWAIL, before chronicling the tumultuous relationship between development and international law, as understood by TWAIL scholars. Although the depth and scale of the problems presented by the relationship between international law and development are daunting, it will be argued that a TWAIL understanding of development can be adapted to analyse contemporary development initiatives. This opportunity will be seized in Part IV, where it is argued that the application of a TWAIL understanding of development reveals the development capacity of the RSE scheme to be constrained by its underlying economic logic. Part V explores the social costs of the scheme, and the ramifications of its vulnerability. It argues for a rehabilitated RSE scheme. Finally, for the sake of consistency, focus throughout this paper will be put on the experience of Tonga in the RSE scheme. However, it is submitted that the analysis presented is salient for all Pacific states involved in the RSE scheme.

II. INTRODUCING THE RECOGNISED SEASONAL EMPLOYER (RSE) SCHEME

The RSE scheme is a New Zealand policy initiative that allows for the temporary entry of overseas workers for employment in New Zealand's horticulture and viticulture industries. Employers in these industries may apply for RSE status to supplement their labour supply with migrant workers. The scheme was established primarily to address seasonal labour shortages in the horticulture and viticulture industries.² However, its secondary function is to contribute to New Zealand's broad development objectives in the Pacific Islands.³ Workers from Pacific Islands Forum nations are given preference,⁴ and New Zealand has concluded bilateral inter-agency agreements with Vanuatu, Tonga, Samoa, Kiribati, Tuvalu and Solomon Islands to facilitate Pacific recruitment. Since its introduction in 2007, the RSE policy has received considerable acclaim for achieving the "elusive triple wins" that have notoriously evaded temporary migration schemes across the world: benefits for sending states, receiving states and the workers themselves.⁵ This section will trace the origins of the RSE policy, before looking at the workings of the scheme in depth and concluding with a review of its reception thus far.

2 Evaluate Research *Final Evaluation Report of the Recognised Seasonal Employer Policy (2007-2009)* (Department of Labour, 2010) at 74.

3 At 72.

4 Fiji was, and remains, excluded from the scheme after its December 2006 military coup.

5 Sankar Ramasamy and others "The Recognised Seasonal Employer policy: seeking the elusive triple wins for development through international migration" (2008) 23(3) *Pacific Economic Bulletin* 171 at 171.

A. Growing the RSE Policy

1. Historical Precedents

The New Zealand Government has a long-standing tradition of implementing migration policies allowing the temporary entry of workers from Pacific Island countries to meet labour demands. In this respect, the RSE scheme is nothing new. Since the 1960s, there have been at least nine schemes for temporary workers negotiated between New Zealand and its Pacific neighbour states.⁶ The first of these schemes was the Fiji Rural Work Permit Scheme, which was launched in 1969 and allowed entry for up to 300 Fijian workers annually for up to four months of employment in agricultural work and halal slaughtering.⁷ Similar schemes were introduced in the early 1970s for Samoans and Tongans. However, in the midst of an economic recession and increasing unemployment, the Government abandoned country-specific policies in the mid-1970s.⁸ Instead, a single Pacific-wide scheme was instituted, allowing more effective control – and curtailment – of temporary migration from the Pacific.⁹ From 1977, Fijians, Samoans and Tongans (and later, i-Kiribati and Tuvaluans) could come to New Zealand under the South Pacific Work Permit Scheme (SPWPS) for up to 11 months, subject to specific offers of employment.¹⁰ The SPWPS was little used by Pacific Island workers and was gradually phased out from the late-1980s; first for Fijians, who were disallowed entry under the scheme after Fiji's 1987 coup, then for Samoans and Tongans in 1991 following a review of immigration policy.¹¹ The scheme continued to operate exclusively for i-Kiribati and Tuvaluans until its termination in 2001, partly in response to high rates of overstaying.¹²

While it seemed New Zealand had had enough of temporary labour migration policies for Pacific nationals, five years later, the Cabinet of the Labour-led Government agreed to implement what would be known as the RSE policy.¹³ This new temporary migration scheme was the product of the convergence of two complementary policy directions: an urgent need in the horticulture and viticulture industries for a reliable workforce on one hand, and a growing recognition of the development benefits of international labour mobility for “developing” countries on the other.

6 Nicola van der Beek *Legal Instruments and Documents Relevant to the Relationship Between New Zealand and Six Pacific Nations: Annotated Bibliography* (Ministry of Justice, September 2000) at 28.

7 Bedford, above n 1, at 58.

8 Kirsten Lovelock and Teresa Leopold “Labour Force Shortages in Rural New Zealand: Temporary Migration and the Recognised Seasonal Employer (RSE) Work Policy” (2008) 33/34 *New Zealand Population Review* 212 at 219.

9 At 218.

10 Bedford, above n 1, at 58.

11 At 59.

12 At 59.

13 Ramasamy and others, above n 5, at 171.

2. Business Meets Development

New Zealand's horticulture and viticulture industries have experienced major growth over the past thirty years. In 2004, the industries' combined exports reached \$2.2 billion – almost 20 times the export value in 1980.¹⁴ Between 2000 and 2004 alone, horticulture and viticulture exports increased more than 30 per cent.¹⁵ In the mid-2000s, it became clear that these industries' capacity to sustain such growth was threatened by a lack of supply for the considerable seasonal labour demand of approximately 50,000 workers annually.¹⁶ Unemployment rates were at record lows, affecting the availability of local labour,¹⁷ and traditional sources, such as students, backpackers and casual workers, were no longer sufficient or appropriate. To continue to be competitive in the international market, both industries recognised the need for “higher levels of productivity, efficiency, quality of produce and innovation” – all of which required significant investment in business development.¹⁸ Such investment was perceived to be too risky with a labour force notorious for high turnover and mixed quality of work.¹⁹ As it was, industry estimates placed the cost of workforce undersupply and quality at \$140-230 million in lost value added and \$180-300 million in lost output.²⁰ These concerns culminated in the formation of the Horticulture and Viticulture Seasonal Working Group in 2004, comprised of government agencies and industry and union organisations, to develop a long-term, sustainable Labour Strategy to be implemented through government policy and industry practice.²¹ Inherent in the Strategy was the awareness that New Zealand-sourced labour alone would not satisfy seasonal demands. This was expressed in the Working Group's endorsement of a return-worker temporary labour migration scheme to fill horticulture and viticulture labour demands.²²

Just months prior to the release of the Strategy, Pacific leaders at the 2005 Pacific Islands Forum (PIF) had appealed for better access to New Zealand and Australian labour markets for Pacific workers.²³ This initiated a regional

14 *New Zealand Horticulture Facts & Figures* (Horticulture & Food Research Institute of New Zealand, 2004).

15 Evaluate Research, above n 2, at 3.

16 Ramasamy and others, above n 5, at 173.

17 Jim Anderton “Support for seasonal labour shortage strategy” (press release, 23 March 2005).

18 Ramasamy and others, above n 5, at 174.

19 John Gibson and David McKenzie “Development through Seasonal Worker Programs: The Case of New Zealand's RSE Program” (January 2014) World Bank Policy Research Working Paper Series <www.econ.worldbank.com> at 4.

20 Ramasamy and others, above n 5, at 174.

21 Richard Whatman and Jerf van Beek “The Seasonal Labour Strategy and the Role of Recognised Seasonal Employer (RSE) in Helping Make Transformative Changes for Employers and Industry” (2008) *Labour, Employment and Work in New Zealand* 278 at 281.

22 At 281.

23 Geoffrey Hayes “Maximizing Development Benefits in the Pacific Islands Sub-Region” (paper presented at the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) Workshop on Strengthening National Capacities to Deal with International Migration, 22-23 April 2010, Bangkok) at 18.

dialogue around labour mobility in the Pacific region. In 2006, the World Bank released a report analysing the potential benefits of increased labour mobility in the Pacific, with its youthful populations and scarce job opportunities, and proposing a temporary worker scheme for the horticulture industry in Australia.²⁴ Soon after, the Pacific Cooperation Foundation held a conference on the future of Pacific labour markets in Wellington.²⁵ The momentum for labour mobility was fuelled by a growing interest internationally in the relationship between migration and development. In September 2006, the United Nations (UN) convened its first High-level Dialogue on International Migration and Development, which achieved broad international consensus in recognising not only the developmental potential of migration, but also the need for concerted international attention and coordination to this end.²⁶ This would add potency to the case for a new temporary labour migration policy in New Zealand.

By the time the proposal for the RSE scheme was complete, the policy environment was ripe for its consideration. Serendipitously, the RSE policy paper went to Cabinet at the same time as a Cabinet Policy Committee paper entitled “Pacific Labour Mobility”, which examined the social and economic benefits of temporary labour mobility in the Pacific context.²⁷ This helped to ensure the progression of the RSE policy from possibility to reality, as well as its distinctly Pacific character.²⁸ With Cabinet’s approval, Prime Minister Helen Clark announced the RSE policy in October 2006 at the PIF in Fiji.

B. Workings of the RSE Scheme

The RSE policy was launched in April 2007. It initially allowed for the entry of up to 5000 workers annually for a maximum of seven months per 11-month period, for work exclusively in the horticulture and viticulture industries. The policy was expanded in 2009 to allow the current maximum of 8000 workers. It now also allows an extended maximum period of nine months employment for workers from the more distant Pacific states with higher transport costs, Kiribati and Tuvalu.

Five PIF member states were selected from the outset of the RSE policy to “kick-start” the programme: Kiribati, Samoa, Tonga, Tuvalu and Vanuatu. Facilitative arrangements for the operation of the scheme in these countries are outlined in bilateral inter-agency understandings (IAUs). The Pacific states are responsible for developing and maintaining a work-ready pool of workers, overseeing and licensing private recruitment agents and providing

24 World Bank *At Home and Away: Enhancing Employment Opportunities for Pacific Islanders* (World Bank Publications, Washington, DC, 2006) at vii.

25 Ramasamy and others, above n 5, at 176.

26 Philip Martin and others “High-level Dialogue on Migration and Development” (2007) 45(1) *International Migration* 7 at 24.

27 Cabinet Policy Committee Paper “Pacific Labour Mobility” (2006) POL (06) 293.

28 Rupert Tipples and Richard Whatman “Employment standards in world food production – GLOBALGAP supply contracts and indirect legislation” (2010) 35(3) *NZJER* 40 at 51.

pre-departure orientation for workers to aid adjustment to work and life in New Zealand.²⁹ They receive assistance from the Government to fulfill these requirements, discussed further below.

Employers in New Zealand wishing to participate in the scheme must apply and be approved for RSE status. Criteria include: high standards of human resource policies and practices, good work practices, commitment to recruiting and training New Zealanders, a sound financial position, and willingness to pay market rates and “take care” of RSE workers.³⁰ To become accredited, all RSEs must undertake to pay half of workers’ airfare costs; provide (evidence of) pastoral care of workers; pay workers at full market rates; and pay a financial penalty of \$3000 in the event that a worker overstays. RSEs also undertake to pay workers a minimum level of remuneration. For employment agreements for a period of less than six weeks, employers must pay workers for 40 hours per week at the “per hour” market rate, over the period of work offered in the agreement – regardless of the availability of work.³¹ For employment periods of six weeks or longer, the minimum remuneration is either payment at no less than 240 hours at the “per hour” rate, or payment for an average of 30 hours per week at the “per hour” rate for the period worked – whichever is greater, and again, regardless of work availability.³²

Once approved for RSE status, employers can apply on a seasonal basis to the Ministry of Business, Innovation and Employment (MBIE) for an Agreement to Recruit (ATR), specifying the numbers of workers required, the source country, and conditions – such as period of employment, location and work tasks.³³ The number of RSE workers approved by MBIE is subject to availability of suitable local labour, in accordance with the scheme’s “New Zealanders first” principle. Employers must demonstrate that they are unable to meet their labour needs with New Zealanders and lodge their vacancies with the government social welfare body, Work and Income New Zealand, before looking offshore.³⁴

If an ATR is approved, employers must recruit from PIF countries, with limited exceptions.³⁵ The PIF countries take distinct and different approaches to recruitment, which is recognised in their IAUs.³⁶ Tonga’s approach

29 Evaluate Research, above n 2, at 28.

30 Tipples and Whatman, above n 28, at 51.

31 *Immigration New Zealand Operational Manual* (Immigration New Zealand, online ed, April 2014) at WH1.20.5.

32 At WH1.20.5.

33 Ramasamy and others, above n 5, at 179.

34 Gibson and McKenzie, above n 19, at 5.

35 Gibson and McKenzie, above n 19, at 6. Employers are able to recruit from outside the PIF countries only if they have pre-established relationships with workers of other countries, reasonable attempts to recruit from PIF states have been unsuccessful or they can provide reasonable grounds as to why PIF recruitment is not feasible. Approximately 75 per cent of RSE workers are recruited from PIF countries.

36 Manjula Luthria and Mai Malaulau “Bilateral Labor Agreements in the Pacific: A Development-Friendly Case Study” in Sebastian Saez (ed) *Let Workers Move: Using Bilateral Labor Agreements to Increase Trade in Services* (World Bank Publications, Washington, DC, 2013) at 133.

is described as “pro-poor”, while Kiribati and Samoa have focused on equitable geographical distribution of opportunities.³⁷ In contrast, Vanuatu and Solomon Islands allow licensed private recruitment agents to facilitate recruitment – although recruitment must be conducted in consultation with community and church leaders.³⁸ Facilitation arrangements in the kick-start states helped significantly in the recruitment process initially, with employers heavily utilising countries’ work-ready pools in the initial 2007/2008 season. However, after several seasons, some employers have established links with certain communities and villages through re-hiring, making direct recruitment feasible.

Workers selected under ATRs must apply for an RSE limited visa. To be eligible, they must be aged 18 or older; have an employment agreement with an RSE that meets the minimum RSE employment requirements outlined above; meet health and character requirements; be a bona fide applicant; and hold or be approved for “acceptable medical insurance”.³⁹ RSE limited visas are granted under the “limited visa” category in the Immigration Act 2009.⁴⁰ Limited visas generally are endorsed with entry and stay conditions for an express purpose until a specified date, provided any conditions stipulated in the visa are met.⁴¹ Strict conditions attach to RSE limited visas. They allow a single journey to New Zealand only,⁴² and require that the applicant will be in New Zealand for the express purpose of “undertaking seasonal employment in the horticulture and viticulture industries for a specified RSE”. As such, visas are granted to allow arrival in New Zealand no earlier than 14 days before, and no later than 14 days after, the expected commencement of work as stated in an applicant’s employment agreement, and do not allow applicants to stay beyond the term of the relevant ATR.

When their visas have been granted and they are ready to leave, RSE workers must complete pre-departure orientation as provided by their government. This covers topics such as climate, clothing, insurance, taxation, health and well-being, aspects of their employment, and travel arrangements. Over time, these briefings have been adapted to meet workers’ needs; they now also cover budgeting and sound financial decision-making.⁴³

Once workers have arrived in New Zealand, their work is organised in accordance with the RSE accreditation conditions and their employment contracts. Although all employment agreements must specify a “per hour” rate for work to be performed, this often represents a minimum level of remuneration, with many workers being paid according to piece rates (ie per

37 At 133.

38 Nic Maclellan “Workers for All Seasons? Issues from New Zealand’s Recognised Seasonal Employer (RSE) program” (May 2008) Swinburne Institute for Social Research <www.sisr.net> at 12.

39 *Immigration New Zealand Operational Manual*, above n 31, at WH1.15.1.

40 At WH1.15.20. See also Immigration Act 2009, s 81.

41 *Immigration New Zealand Operational Manual*, above n 31, at L2.10.

42 Return workers are required to reapply annually for an RSE limited visa.

43 Evaluate Research, above n 2, at xi.

bin or per tree).⁴⁴ The first Tongan RSE workers recruited into the scheme working over seven months in 2008 provide an idea of average wage rates.⁴⁵ Based on a 30 hour week, the average wage rate was approximately \$16-\$17 an hour. The highest earning worker was paid \$20.15 per hour.⁴⁶

RSEs are responsible for looking after and organising workers as per their pastoral care obligations. In addition to ordinary employer responsibilities, RSE pastoral care includes arranging arrival, departure and worksite transportation, organising access to appropriate accommodation, ensuring access to banking facilities, and providing opportunities for recreation and religious observance.⁴⁷ Outside of work hours, workers often engage with the local community, especially Pacific communities, through church and sports activities. There are also informal and formal training opportunities on offer, some of which are discussed below.

Workers' visas expire at the conclusion of their employment and they cannot transfer their visa-type or permit, so must leave immediately.⁴⁸ Rates of overstaying – an important concern for the Government – have averaged less than 1 per cent over six seasons.⁴⁹ The median after-tax income earned in New Zealand by Pacific RSE workers is approximately \$12,000.⁵⁰ However, on average RSE migrants will repatriate and/or remit \$5,500. The significant difference is due to the cost of participating in the scheme, and includes airfares, compulsory health insurance and the cost of living in New Zealand.

C. Facilitating Development Impacts in the Pacific

New Zealand has undertaken several initiatives to enhance the development impacts of the RSE scheme for the Pacific states. These are primarily administered through the Strengthening Pacific Partnerships (RSE: SPP) programme,⁵¹ which was established in October 2011. Managed by MBIE in partnership with several NGOs,⁵² with funding secured from MFAT for five years, the RSE: SPP programme has three key intended outcomes:⁵³

1. Sustained participation by Pacific States in the RSE scheme.
2. Pacific States will successfully manage domestic labour requirements and social cohesion.

44 Evaluate Research, above n 2, at 10.

45 Maclellan, above n 38, at 4.

46 At 4.

47 Gibson and McKenzie, above n 19, at 7.

48 Maclellan, above n 38, at 18.

49 Gibson and McKenzie, above n 19, at 10.

50 Gibson and McKenzie, above n 19, at 22.

51 Initially the Strengthening Partnerships project.

52 Partners of the RSE: SPP programme are: the World Bank, the New Zealand horticulture and viticulture industry bodies, the New Zealand Horticulture ITO, and the New Zealand Council of Trade Unions.

53 Heather Nunns and others *Mid-term Evaluation of the Strengthening Pacific Partnerships Project* (Analytic Matters, 2013) at 9.

3. Ongoing RSE income and horticulture skills will contribute to Pacific States' economic development.

In pursuit of these outcomes, the RSE: SPP programme thus far has included the following activities: training workshops for RSE operational staff and staff from RSE-related agencies, secondments to New Zealand for Pacific state officials, technical assistance visits, supply of equipment to Pacific states, funding of information management work in Tuvalu and Solomon Islands, collaboration in an initiative with the New Zealand Primary Industries Training Organisation (PITO), health-related initiatives and domestic awareness workshops for workers, and the provision of resources for workers' pre-departure training.

The majority of the RSE: SPP programme's activities have been directed at Outcome 1 and capacity building in the Pacific states in particular. The most prominent RSE: SPP activity not associated with Outcome 1 has been the Living in the Land or Ola i Fonua/Ola 'oe Fonua pilot – an in-country horticulture skills development programme for Pacific citizens who may intend to become RSE workers, run by the PITO. The 12-week course focused on practical training in real horticulture contexts, while also incorporating areas such as literacy, numeracy, language, and health and well-being.⁵⁴ Skill areas were linked to New Zealand Qualifications Authority (NZQA) unit standards, giving trainees the opportunity to become formally qualified. The PITO project was piloted in Samoa in 2012, and saw 25 trainees obtain a New Zealand National Certificate in Horticulture Level 1.⁵⁵ In 2013, the project moved to Tonga.⁵⁶ Although successful in both countries, the project was not intended to be implemented on a full-scale, long-term basis.⁵⁷ It has been discontinued indefinitely.

Outside of the RSE: SPP programme, the Government funds one other development initiative: a New Zealand-based worker training initiative called "Vakameasina: Learning for Pacific growth". Vakameasina was introduced in 2009 and is funded by the New Zealand Aid Programme until 2015.⁵⁸ It was implemented to align with New Zealand's Pacific Strategy 2007-2015, and targets workers with limited formal education and from rural communities. The broad intention for the scheme is to "increase opportunities and choices for Pacific RSE workers through skills development, by providing them with access to English literacy, numeracy and financial literacy training during their time in New Zealand."⁵⁹

54 "RSE: New Zealand Horticultural Industry Training Organisation Programme Launch in Samoa" *Strengthening Pacific Partnerships Update* (online ed, July 2012).

55 "ITO Foundation Horticulture Commences in Tonga" *Strengthening Pacific Partnerships Update* (online ed, July 2013).

56 Above n 54.

57 Nunns and others, above n 53, at 34.

58 "Vakameasina training extended for RSE employees" *NewZAID* (online ed, February 2012).

59 Mathea Roorde *Review of the Recognised Seasonal Employer (RSE) worker pilot training programme* (Evaluate Research, February 2011) at 8.

D. Positive Reception of the RSE Scheme

Though only a young policy, the RSE scheme has already received significant attention from international organisations, media and academics alike as a development success story. The positive reception has been directed at both the implementation of the scheme and its outcomes.

1. Development Outcomes

One of the main themes of the literature on the RSE policy is the concept of the “triple win”. As Ramasamy and others have observed, although the RSE policy is certainly not the first temporary migration scheme in New Zealand, it is the first that is explicitly intended to benefit all of the scheme’s main stakeholders.⁶⁰ The bulk of the literature affirms that the triple win is being achieved.⁶¹

World Bank economist, David McKenzie, has characterised the RSE scheme as “the most effective development intervention we have evidence for” in light of its effectiveness in “raising incomes of people in poor countries” in comparison to other initiatives, such as microfinance or conditional cash transfer.⁶² The impacts of increased incomes of Pacific RSE workers tend to be the main measure of development in much of the academic literature. For example, in John Gibson and McKenzie’s most recent World Bank-sponsored study of the RSE’s effects, the development impacts for RSE workers that are measured are: increase in per-capita income, increase in per-capita expenditure, increase in savings, increase in subjective economic welfare, and percentage point increases in dwelling improvements and bank account use. Data from their research demonstrates the economic significance of the RSE scheme to Pacific states, including Tonga, which is spotlighted in this article. The increase in per-capita income in Tongan households over the first two years of the RSE scheme was 34-38 per cent, while savings increased by 122 per cent.⁶³ Gibson and McKenzie also assessed the total value of the scheme to the Tongan economy:⁶⁴

We estimate [the total development impact of the RSE over the first two years of the scheme to be] \$NZ5.3 million in Tonga ... This amount is equivalent to 42-47% of total annual bilateral aid from New Zealand to [Tonga], and is equivalent to almost 50% of its annual export earnings ...

Another aspect of the scheme’s reception is the proliferation of stories detailing what workers have been able to achieve with their earnings. In Vanuatu, for example, many RSE workers have used their repatriated incomes to start their own businesses.⁶⁵

60 Ramasamy and others, above n 5, at 171.

61 Bedford, above n 1, at 273; Ramasamy and others, above n 5, at 184.

62 David McKenzie “The Most Effective Development Intervention We Have Evidence For” (December 2010) *All About Finance* <<http://blogs.worldbank.org/allaboutfinance/>>.

63 Gibson and McKenzie, above n 19, at 22.

64 At 23.

65 Bob Makin “Many RSE workers start businesses” *Vanuatu Daily Post* (online ed, Port Vila, 14 February 2013).

2. Implementation

As Charlotte Bedford has observed, there was an expectation from the outset of the RSE policy that the scheme “would operate as an employer driven recruitment market” in which relationships would be established without government facilitation.⁶⁶ The change of heart can be seen to have been an important decision, with the Government’s interventionist approach to temporary labour mobility often characterised as a “best practice” model.⁶⁷ For example, the International Labour Organisation (ILO) features the scheme in its Good Practice database:

The comprehensive approach of the RSE scheme towards filling labour shortages in the horticulture and viticulture industries in New Zealand and the system of checks to ensure that the migration process is orderly, fair and circular could serve as a model for other destination countries.

The Government’s approach is comprehensive both in terms of its multi-ministry approach to the RSE scheme and its consequent involvement in every aspect of the policy. As Ramasamy observes,⁶⁸ the RSE policy is unique in its involvement of three core government agencies sharing responsibility for delivering the scheme: the Ministry of Social Development (which includes Work and Income New Zealand), MBIE⁶⁹ and MFAT. This approach has been seen as successful. In 2011, the former Department of Labour was jointly awarded the Institute of Public Administration New Zealand Award for Working Together for Better Services. The award characterised the RSE policy as “an innovative example of cross-agency collaboration around challenging and sometimes conflicting objectives” and recognised that its implementation “took considerable patience and brokerage skills and required effective interaction with industry partners”.⁷⁰

One facet of the policy’s comprehensive approach that has garnered praise is attention to the welfare of RSE workers. Fiona Barker credits active government involvement by both New Zealand and the sending Pacific states, as well as the significant pastoral care role of employees, with mitigating “at least some of the types of exploitation often considered to plague guest worker programs”.⁷¹ According to Manjula Luthria and Mai Malaulau, the scheme’s provision for workers’ rights is such that Pacific RSE workers are thought to be entitled to “greater benefits than receiving country nationals by virtue of close government involvement with and facilitation of their employment”.⁷²

66 Bedford, above n 1, at 193.

67 International Labour Organisation “The Recognised Seasonal Employers Scheme (RSE), New Zealand” *Good Practices Database – Labour Migration Policies and Programmes* (online ed, 31 October 2010) <<http://www.ilo.org/>>.

68 Ramasamy and others, above n 5, at 177.

69 Formerly the Department of Labour, which has since been amalgamated into the Ministry of Business, Innovation and Employment.

70 OECD *Better Policies for Development: In Focus: Policy Coherence for Development and Global Food Security* (OECD Publishing, online ed, 2013) at 56.

71 Fiona Barker “Maximizing the migration policy buck: uniting temporary labor, development and foreign policy goals in New Zealand” (2010) 29 *Policy and Society* 321 at 329.

72 Luthria and Malaulau, above n 36, at 133.

Overall, positive reception of the RSE scheme can largely be credited to the constant investment, oversight and collaboration not just from the Government, but also the Pacific states. It is evident that the perception of “triple wins” would be unlikely were it not for government involvement at every stage of the RSE policy’s life.

Having canvassed both the workings and perceptions of the RSE scheme, TWAIL – the critical lens that will be applied to the scheme – will now be introduced.

III. TWAIL: THIRD WORLD APPROACHES TO INTERNATIONAL LAW

A. Introducing TWAIL

TWAIL – Third World Approaches to International Law – is an intellectual movement founded on challenging the contemporary international law regime and its role in legitimising the unequal organising structures and processes of the modern global order. The animating concern of TWAIL scholarship is the recognition of the structural imbalance that permeates relations within and between the Third World and “developed” countries.⁷³ TWAIL scholars perceive international law as perpetuating this imbalance because it is borne of a legacy of imperialism and colonial conquest.⁷⁴ This critical perspective immediately sets TWAIL apart from mainstream scholarship; few conventional accounts of international law present colonialism as anything more than a regrettable and embarrassing phase, thankfully overcome through the decolonisation movement in the mid-20th century.⁷⁵

The TWAIL position on the relationship between international law and colonialism has been most eloquently put by the Sri Lankan scholar, Antony Anghie, in his work, *Imperialism, Sovereignty and the Making of International Law*. Anghie posits that colonialism was the impetus for many of the doctrines of international law that are foundational to the discipline – most significantly, sovereignty.⁷⁶ Anghie argues that the desire to exclude the non-European world from achieving sovereignty status pervaded 19th century positivism “at virtually every level of its jurisprudence”.⁷⁷ Demonstrating this, Anghie points out the distinction between civilised and uncivilised states, the doctrine of *terra nullius*, the suppression of treaty practice between European and non-European peoples and the process of acquisition of sovereignty

73 James Thuo Gathii “TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography” (2011) 3(1) Trade L & Dev 26 at 27.

74 Makau Mutua “What is TWAIL?” (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31 at 32.

75 Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2004) at 6.

76 At 4.

77 At 103.

itself.⁷⁸ For non-European peoples, the denial of sovereignty signified “the negation of power, authority and authenticity”.⁷⁹ In Anghie’s view, this demonstrates that the development of the principle of sovereignty should not be seen as “logical elaborations of a stable, philosophically conceived sovereignty doctrine”, but rather, in terms of “its complex relationship with the colonial encounter and the constellation of racial and cultural distinctions it generated and elaborated”.⁸⁰

Although colonisation is long over and all peoples are said to enjoy formal equality through state sovereignty, international law has yet to transcend its 19th century origins. Anghie, along with other TWAIL scholars, argues that its legacy of colonial disempowerment and subordination remains pervasive. Sometimes this is abundantly obvious. An example of this is the doctrine of *terra nullius*, whose operation in international law has yet to be confronted and finally ejected from the law as a colonial fiction.⁸¹ More often than not, however, the continuing imperialistic nature of international law remains invisible. This invisibility is consistent with the idea that dominant social forces in society maintain their power by having their worldview accepted as “natural” by those subordinated to their dominance. Anthropologist Arturo Escobar traces this trajectory in application to the example of development, noting that development has gained ascendancy “not so much by repression but by normalisation; not by ignorance but by controlled knowledge, not by humanitarian concern but by the [bureaucratisation] of social action”.⁸² As BS Chimni observes, the language of law has always contributed significantly to normalisation and controlled knowledge, in many contexts:⁸³

[Law’s] discourse tends to be associated with rationality, neutrality, objectivity and justice. International law is no exception. It [legitimises] and translates a certain set of dominant ideas into rules and this places meaning in the service of power. International law, in other words, represents a *culture* that constitutes the matrix in which global problems are approached, [analysed] and resolved. This culture is shaped and framed by the dominant ideas of the time.

This understanding of international law is a key point of departure for TWAIL scholars, and has seen a plethora of critiques deconstructing many of the organising concepts of the contemporary international law regime that tend

78 At 103.

79 At 104.

80 At 5.

81 As Anghie shows, this task has simply been evaded by re-answering the question of whether political organisation existed, as if to suggest that the colonisation of, for example, the Western Sahara might have been prevented had this principle been applied “properly”. See *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12.

82 Arturo Escobar *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press, Princeton, New Jersey, 1995) at 53.

83 BS Chimni “Third World Approaches to International Law: A Manifesto” in Antony Anghie and others (eds) *The Third World and International Order: Law, Politics and Globalization* (Leiden, Martinus Nijhoff, 2004) 47 at 60.

to be taken as given by mainstream scholars. Humanitarian intervention,⁸⁴ the human rights movement⁸⁵ and the international intellectual property regime⁸⁶ are just some of the areas of international law that have been exposed, in the words of Anghie and Chimni, as “neo-colonial” – forming part of “the identifiable and systematic pattern whereby the North seeks to assert and maintain its economic, military and political superiority.”⁸⁷ “Development” – which may be viewed essentially as a set of processes and actions connecting “developed” states with the Third World – may be added to the list. Several TWAIL scholars have sought to understand and uncover the role of development – through its relationship with international law – in the contemporary international order.

B. Development and International Law Under the TWAIL Lens

As noted by many critical international law scholars who have trained their sights on development in the latter part of the 20th century, development has historically received little attention in the work of mainstream international lawyers. In an article published in 1987 – the year after the United Nations General Assembly passed its Declaration on the Right of Development⁸⁸ – Canadian academic, Ivan Head, noted that in an examination of the titles of 744 articles from six major American and European international law journals of the previous decade, only 17 were principally concerned with development themes.⁸⁹ Head criticised this neglect as “wholly inadequate.”⁹⁰ Head’s comments are echoed more than two decades later by the TWAIL scholar, Balakrishnan Rajagopal. According to Rajagopal, development has continued to be disfavoured in preference for classical areas of international law, such as statehood or the use of force.⁹¹ International legal scholarship, he claims, has failed to notice both the significance and evolution of development in the international legal field, treating “‘development’ as though it has a self-evident, obvious core of meaning, overlooking the fierce debates

84 See Sue Robertson “‘Beseeking Dominance’: Critical Thoughts on the ‘Responsibility to Protect’ Doctrine” (2005) 12 *Austl Int’l LJ* 33.

85 See Makau Mutua “Savages, Victims and Saviors: The Metaphor of Human Rights” (2001) 42 *Harv Int’l LJ* 201.

86 See James Thuo Gathii “Construing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable Aids Drugs to Low-End Income Consumers” (2001) 53(4) *Fla L Rev* 727.

87 Antony Anghie and BS Chimni “Third World Approaches to International Law and Individual Responsibility in Internal Conflict” in Steven R Ratner and Anne-Marie Slaughter (eds) *The Methods of International Law* (American Society of International Law, Washington DC, 2004) 186 at 203.

88 *Declaration on the Right to Development* GA Res 41/128, A/RES/41/128 (1986).

89 Ivan L Head “The Contribution of International Law to Development” (1987) 25 *Can YB Int’l L* 29 at 36.

90 At 36.

91 Balakrishnan Rajagopal “Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy” in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds) *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish, London, 2008) at 73.

within the development profession and its changing complexity”.⁹² As the following discussion will illustrate, this academic blindness to development is symptomatic of both the nature of the concept, and its mutually affirming and perpetuating connection to international law.

1. Critically Approaching Development

Consistent with the contextual approach of TWAIL scholarship, TWAIL analyses adopt a sociological understanding of development that has emerged from critical development scholarship. For many thinkers working in this area, the emergence of development as a concept of international relevance is marked by Harry Truman’s 1949 inaugural address as President of the United States. It is worth quoting his revelatory words at length:⁹³

[We] must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. More than half the people of the world are living in conditions approaching misery. Their food is inadequate, they are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas. For the first time in history humanity possesses the knowledge and the skill to relieve the suffering of these people ... I believe that we should make available for peace-loving peoples the benefits of our store of technical knowledge in order to help them realise their aspirations for a better life ... What we envisage is a program of development based on the concepts of democratic fair dealing ... Greater production is the key to prosperity and peace. And the key to greater production is a wider and more vigorous application of modern scientific and technical knowledge.

Truman’s speech encapsulates the way in which development – or underdevelopment – was intended to structure relations between the “developed” countries of Europe and the United States, and their “underdeveloped” counterparts in Africa, Latin America, Asia and the Pacific in the new, post-war, decolonised international system. This was quite a departure from the previously colonial nature of this relationship before 1940. As Escobar has established, the concepts of underdevelopment and Third World did not exist before 1945.⁹⁴ Any concern with poverty in the colonial era was accompanied by a belief that “even if the ‘natives’ could be somewhat enlightened by the presence of the [coloniser]... their economic development was pointless”.⁹⁵ Colonised peoples were seen simply to have no capacity for science and technology – the basis for economic progress.⁹⁶ However, as Truman’s address demonstrates, this perspective was forced to evolve as colonised countries achieved political independence after World War II. That evolution culminated in a new discourse of development.

92 At 74.

93 Harry Truman *Public Papers of the Presidents of the United States: Harry S Truman* (US Government Printing Office, Washington DC, 1964) as cited in Gilbert Rist *Le développement. Histoire d’une croyance occidentale* (Presses de Sciences Po, Paris, 1996) (translated ed: Patrick Camiller (translator) Gilbert Rist *The History of Development: From Western Origins to Global Faith* (3rd ed, Zed Books, New York, 2008) at 71.

94 Escobar, above n 82, at 31.

95 At 22.

96 At 22.

The introduction of the concepts of development and underdevelopment fundamentally transformed the international sphere. Unlike “colonised” and “coloniser”, underdeveloped and developed were not each other’s opposite. Instead, as Gilbert Rist has imaginatively put it, the way in which so-called underdeveloped peoples were to understand the state of being developed (and developed states) was “rather as a ‘deputy manager’ can always dream of becoming a manager himself ... so long as he continues to play the same game and his conception of managing is not too different.”⁹⁷ Thus, as Rajagopal notes, the objective of developing the underdeveloped was situated on a progressive continuum: a continuum of modernisation.⁹⁸ This sense of development as a singular path to modernity is just what Truman describes: the idea that becoming developed is complex, but “humanity” has acquired the knowledge and skills to create science and technology that can now be attained and applied by less-developed nations so that they might overcome poverty. In other words, rich countries had the unprecedented financial and technological capacity to secure “progress” across the world. Their past was the Third World’s present, and they would ensure that their present would be the Third World’s future. Consequently, the First World states endowed the concept of development with a clear set of prescriptions for how to become “modernised” and “developed”. Industrialisation and urbanisation – essentially, material advancement – was the only way that social, cultural and political advancement could be achieved.⁹⁹ Development was made almost synonymous with economic growth and the effective operation of a capitalist system. This is made clear in Truman’s address, in which he claimed that greater production begets prosperity and peace.

The issue with all of this, as Gustavo Esteva remarked more than 20 years ago, is that these ideas are a matter of perception:¹⁰⁰

No one seems to doubt that the concept [of underdevelopment] does not allude to real phenomena. They do not [realise] that it is a comparative adjective whose base of support is the assumption, very Western but unacceptable and undemonstrable, of the oneness, homogeneity and linear evolution of the world.

Essentially, Western society has conceptualised its relationship to the past and future as being that of the history of humankind. Rist, borrowing from Bruno Latour, describes this singular vision as “particular universalism”.¹⁰¹ A hallmark of both critical development and TWAIL scholarship is the commitment to moral cultural equivalency.¹⁰² In reality, there is nothing

97 Rist, above n 94, at 74.

98 Balakrishnan Rajagopal *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, Cambridge, 2003) at 29.

99 Escobar, above n 82, at 4.

100 Gustavo Esteva “Development” in Wolfgang Sachs (ed) *The Development Dictionary: A Guide to Knowledge as Power* (Witwatersand University Press, Johannesburg, 1993) at 11-12.

101 Bruno Latour *We Have Never Been Modern* (Harvester Wheatsheaf, New York, 1993) at 105 cited in Rist, above n 94, at 44.

102 Mutua, above n 74, at 37.

to indicate that every society has the same idea of “the good life” or that development – as it was proposed by Truman, and has been implemented since – is the only way of achieving it. As Rist argues, Western imaginings about its central role in human history might not have been all that problematic. But the integration of development discourse into relationships of power, as between the First and Third World states, was such that it would come to be seen as universal and impossible to question.

2. International Law and Development: Complementing Universalities

Recounting the birth of the development age suggests parallels between notions of development and the TMAIL conception of international law – the claims to universality and the mediation of uneven international relations, for example. And yet critical development scholars have generally not considered this important connection between development and international law in their work. As Rajagopal has observed, the academic neglect of development on the part of legal scholars is mirrored by a lack of discussion in development literature of the relevance of international law. Here, the prevailing view is that international law is “epiphenomenal”,¹⁰³ or as Sundhya Pahuja puts it, “power drove it, international law reflected it.”¹⁰⁴ A TMAIL approach to development allows this gap to be bridged, demonstrating the significance of the relationship between international law and development, which has largely been ignored by scholars from both disciplines.

For TMAIL scholars, the history of development as told by critical development scholars must be situated in its international legal context. Rajagopal argues that at the time of Truman’s 1949 announcement of the age of development, international law was in crisis. In its leanings towards a world government, it was seen as “too utopian”; in its excessive realism, it was seen as “too subservient to power”.¹⁰⁵ Hope, however, arrived in the form of the burgeoning decolonisation movement, which was seen as providing an unprecedented opportunity for the renewal of the discipline. In recognition of the newfound legal, cultural and ideological pluralism in the society of states, Western international law scholars predicted an increased universality of international law, which would be facilitated by the establishment of international institutions.¹⁰⁶ International law would assume a new social character that would revivify the discipline – no longer restricted to the affairs of states, but inclusive of the individual and international organisations.¹⁰⁷

According to Rajagopal, the perceived “lack” in the Third World – its poverty, illiteracy and backwardness – was seen by Western international lawyers as providing much of the “raw material” for what was intended to be

103 Rajagopal *International Law from Below*, above n 98, at 27.

104 Sundhya Pahuja *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, Cambridge, 2011) at 5.

105 Rajagopal *International Law from Below*, above n 98, at 29.

106 At 30.

107 At 30.

a new and genuinely universal international law, through the phenomenon of development.¹⁰⁸ Third World international lawyers were encouraged by this prospect too, and the opportunity to “[deploy] the newly found weapon of international law”.¹⁰⁹ But when the time came, and the young Third World states attempted to harness the promised universality of international law to improve the circumstances of their peoples, their efforts were consistently “deradicalised”. Demands in the 1950s and 1960s for permanent sovereignty over natural resources (PSNR) were transformed into the regulation and protection of foreign direct investment.¹¹⁰ Calls in the 1970s for a New International Economic Order (NIEO) that would recognise the separate economic needs of the historically mistreated Third World eventually came to nought.¹¹¹ In contrast to their expectations, attempts by Third World states to invoke their newfound sovereignty to effect change through international law were constantly rebuffed.

Sundhya Pahuja elucidates this pattern in the relationship of the Third World to international law in her book, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*. She argues that the phenomenon of development did indeed provide the means for international law to take on a new sense of universality.¹¹² But that universality served as a constraint on the radical potential of the Third World’s demands, rather than an opportunity.¹¹³ This was because of the way in which the Western conception of development – and what Pahuja refers to as its “secret twin”, economic growth – were *positioned* in relation to international law:¹¹⁴

These two concepts took up (and continue to take up) an ostensibly exterior position in relation to international law, occupying a position of rational truth and offering it values without seeming to do so. This combination of exteriority, superiority and ostensibly, objectivity means that development and growth operate in something like a “transcendent” position in relation to international law.

Understanding development as it has been propounded by critical development scholars, one can see how the universality of international law became a mode of power, working either to shape the desires of Third World states into something more palatable to the development project (as in the case of PSNR) or deny them altogether (as in the case of NIEO). This was done by First World states successfully establishing Western values – such as private property rights, for example – as being universal, even though they are patently particular to Western society.¹¹⁵ The discourse of development and economic growth, positioned transcendent to international law, allowed

108 At 31.

109 At 31.

110 Pahuja, above n 104, at 6.

111 Margot E Salomon “From NIEO to Now and the Unfinishable Story of Economic Justice” (2013) 62(1) ICLQ 31 at 33.

112 Pahuja, above n 104, at 2.

113 At 2.

114 At 7.

115 At 6.

and continues to allow those values to become “juridified” in positive law.¹¹⁶ Evidently, this has been to the detriment of Third World claims. In opposition to what was now, in law, “universal”, their claims become “particular” or “relative” and consequently, inimical to the common good.¹¹⁷ This, in Pahuja’s words, is the subordination of the “universal *promise* of international law to its universal *claim*.”¹¹⁸ Just as the colonial nature of law is invisible, so too is the law’s inherent developmentalist nature in the 20th century. The ruling understanding of law as secular – and not operating in service of higher, god-like ideals – has effectively masked the role of development and growth in the formation of international law.¹¹⁹

How did development come to relate to international law in this way in the post-war era? For Pahuja, the rule of development and economic growth in international law begins with the birth of the international institutions – the United Nations and the Bretton Woods Institutions (BWIs) – and the ensuing separation of the “economic” and the “political” in international relations.¹²⁰ This separation could first be ascertained in the geographical separation of the meetings and conferences to set up what were intended to be the “twin pillars” of the post-war international order; the UN institutions were set up in Washington and San Francisco, while the conference to establish the BWIs was held in New Hampshire.¹²¹ The delineation was made even clearer in the constitutional documents of the International Bank for Reconstruction and Development (the World Bank) and the International Monetary Fund (IMF) in which it was stated that social and political considerations were not to come into their decisions.¹²² Finally, acceptance of the separation could be ascertained when the voting systems of the World Bank and the IMF were devised. The systems are weighted according to the principle that voting rights should be attached to the supply of capital in the form of quota, resulting in systems “massively biased” against “developing” and poor countries.¹²³ So uncontroversial was the split between economic and political issues at the time that the voting systems did not cause much of an uproar. In comparison to the institution of the inequality in the powers and privileges afforded to the Security Council’s permanent members at the UN, which was strongly contested by other states, Susan Strange reveals that “the unprotesting populist majority stayed on the whole silent and apparently compliant” in response to similar formal inequality at the IMF in particular.¹²⁴

116 At 7.

117 At 7.

118 At 257. Emphasis in original.

119 At 7.

120 At 22.

121 At 19.

122 At 19.

123 Dennis Leech and Robert Leech “Voting Power in the Bretton Woods Institutions” (2005) 22(4) *Homo Oeconomicus* 605 at 606.

124 Susan Strange “International Monetary Relations” in Andrew Shonfield (ed) *International Economic Relations in the Western World 1959-1971: Volume 2* (Oxford University Press, London, 1976) at 33 cited in Pahuja, above n 104, at 23.

The split between the “economic” and the “political” is essential to the place of development in relation to international law. As Pahuja demonstrates, the split is constructed.¹²⁵ True separation of issues in this way is impossible: “what is defined as economic or political itself is a political question”.¹²⁶ But attempts to do so take on a “real appearance” – with real effects.¹²⁷ Borrowing from Karl Marx and Karl Polanyi, Pahuja argues that the conceptual economic/political split is a function of capitalism and the free-market model, which views the sphere of economics as a discipline separate from social relations, and able to be reduced to technical matters in need of purportedly scientific solutions.¹²⁸ Development, inseparable from economic growth, might be seen as capitalism internationalised. Thus, the undemocratic BWIs were seen to be the proper decision-making forum for issues of international development, where they would be subject to economic science, away from the purview of the United Nations.

The constructed difference between “economic” and “political” in combination with the institutionalisation of international law explains much about the Third World’s failure to have its initiatives internationalised. From a practical perspective, the United Nations General Assembly was never going to be the right platform to initiate the NIEO, for example. The way that development programmes – as supported by First World states – have been implemented by the BWIs in Third World countries is also made clearer. Crucially, the constructed separation between what is political and what is economic had led to a formal conception of sovereignty that designated the UN as the appropriate institution for sovereignty discussions and saw the ascendancy of the idea of “sovereign equality”, despite the fact of deep material inequality among states.¹²⁹ Sovereignty was firmly delineated as a political, not economic, concept. This allowed interventions of an ostensibly economic nature into Third World states’ domestic affairs – in the name of development – to be promoted as inoffensive to sovereignty. In truth, the economic sovereignty of the Third World could be found in Washington DC – in the hands of the BWIs.

Structural adjustment programmes (SAPs) are the best-known example of the BWIs’ interventions in the name of development. They exemplify, in a concrete way, how the nature of the relationship between international law and development has failed Third World peoples. SAPs were a series of strict conditions applied to loans financed by the World Bank and the IMF and obtained by poor countries from 1981 onwards.¹³⁰ The late 1970s had heralded a series of global economic catastrophes and had left Third

125 Pahuja, above n 104, at 19.

126 At 20.

127 At 20.

128 At 20-21.

129 At 23.

130 M Rodwan Abouharb and David Cingranelli *Human Rights and Structural Adjustment* (Cambridge University Press, Cambridge, 2007) at 62-63.

World countries desperately in need of finance by the 1980s. At the same time, both the Reagan and Thatcher administrations and their allies were urging the BWIs to insist on the imposition of more conditions in the disbursement of loans and grants, with the recent crises and their dire consequences apparently demonstrating the need for greater intervention in the poorer states.¹³¹ These urgings were heeded. In line with the one-size-fits-all approach to development recognised by Escobar, the BWIs advocated the same structural adjustments for all the states that accepted them.¹³² The adjustments were directed above all at the achievement of rapid and sustained economic growth as the means for development.¹³³ These policy packages – eventually referred to as the “Washington Consensus” – included fiscal austerity, capital account liberation, unified and competitive exchange rates, consumption-based taxation, trade and investment liberation, labour market deregulation, privatisation, macro-economic stability and property right protection.¹³⁴ Altogether, these policy instruments, which were promoted as being based in “classical mainstream economic theory”, incorporated a pro-market, anti-state emphasis.¹³⁵ Under the BWIs’ watch, Third World states were to be done with protectionism, implement privatisation and encourage foreign direct investment. But the promised economic growth did not materialise for any of the states that instituted structural adjustments. What did eventuate is articulated best by The Structural Adjustment Participatory Review International Network:¹³⁶

[The] overall impact of adjustment policies has included the generation of increased current-account and trade deficits and debt; disappointing levels of economic growth, efficiency and competitiveness; the misallocation of financial and other productive resources; the “disarticulation” of national economies; the destruction of national productive capacity; and extensive environmental damage. Poverty and inequality are now far more intense and pervasive than they were 20 years ago, wealth is more highly concentrated, and opportunities are far fewer for the many who have been left behind by adjustment.

By 1995, the BWIs’ 50th anniversary, it had become clear that the free market policies of the Washington Consensus had completely failed Third World countries.¹³⁷

Despite the monumental failure of the BWIs – and their scientific, top-down approach of operating exclusive of political and social considerations – they have not been deterred. Having become the focus of international criticism in

131 At 63.

132 At 3.

133 At 15.

134 Abouharb and Cingranelli, above n 130, at 63; Jane Kelsey *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Routledge-Cavendish, Abingdon, 2008) at 97.

135 John Pender “From ‘Structural Adjustment’ to ‘Comprehensive Development Framework’: Conditionality transformed?” (2001) 22(3) *TWQ* 397 at 399.

136 The Structural Adjustment Participatory Review International Network *Structural Adjustment: The SAPRI Report* (Zed Books, London, 2004) at 218.

137 Pender, above n 135, at 402.

the 1990s, the BWIs were forced to redefine themselves and their missions, in order to regain their legitimacy as one of the “twin pillars” of the international order. The result was an explicit focus on poverty reduction, most notably under the World Bank’s Comprehensive Development Framework (CDF).¹³⁸ Underlining the CDF approach is “an attempt to operationalise a holistic approach to development” that encompasses – in the words of former Bank President, James Wolfensohn – “the financial, the institutional and the social, together”.¹³⁹ This meant that development policy endorsed through the CDF would no longer be restricted to macroeconomic policy, but could also relate to areas such as open and honest government, property and personal law rights, welfare measures, financial regulatory systems, rural development and urban management policy, and more.¹⁴⁰ The former purely economic nature of the donor-recipient relationship was being revised. As Rajagopal has shown, new terms were generated in the development discourse, seemingly signifying the changing nature of the BWIs’ relationship with the Third World.¹⁴¹ The concept of “ownership” was introduced, representing the idea that development could not succeed unless it was “owned” by those being developed. Consequently, it was said that national development strategies would now be designed and “owned” by the debtor nations themselves, set out in Poverty Reduction Strategy Papers.¹⁴² “Selectivity” required that recipient governments demonstrate a “good policy environment and a ‘clean’ government that has not engaged in massive repression” – apparently addressing previous concerns that the World Bank and the IMF had been funding the lifestyles of oppressive, Third World political elites.¹⁴³

On the face of it, it seemed that, quite independently, the BWIs were finally taking a step in the right direction and revising the extent to which “economics” alone should inform global development policy. Economics, independently of the “political”, had failed to bring forth “development” and the end of poverty in the Third World. Now, in recognition of that failure, it seemed that the two realms were converging. Human rights, for example, entered the conversation, with Wolfensohn stating that “without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible”.¹⁴⁴ This saw the World Bank’s approach to human rights evolve from “outright rejection of the rights agenda as political and therefore anathema under the bank’s Articles of Agreement”¹⁴⁵ to the belief that “human rights may constitute legitimate considerations for

138 At 407.

139 At 407.

140 At 408.

141 Rajagopal *International Law from Below*, above n 98, 132.

142 Kelsey, above n 134, at 97.

143 Rajagopal, above n 98, at 133.

144 James D Wolfensohn “A Proposal for a Comprehensive Development Framework: A Discussion Draft” (January 21 1999) at 10.

145 Andrea Cornwall & Celestine Nyamu-Musembi “Putting the ‘rights-based approach’ to development into perspective” (2004) 25(8) TWQ 1415 at 1426.

the Bank where they have economic ramifications or impacts”,¹⁴⁶ allowing a facilitative role in supporting states to fulfil human rights obligations. Although, as noted above, the BWIs are not permitted under their Articles of Association to consider, or interfere with, states’ social or political policies in their decision-making processes, the integration of social and political issues within the BWIs’ purview has been welcomed by development and legal commentators alike. Scholarly responses include the emergence of the idea of “rights-based approaches to development”, which has been welcomed by some for its “promise of re-politicising areas of development work – particularly, perhaps, efforts to enhance participation in development”.¹⁴⁷

What should the Third World make of all this? In contrast to many of her colleagues in the law, Pahuja argues that the Third World should be concerned – not elated – about the expanded realm of “development” and the resultant integration and coordination of the work of the UN-affiliated organisations and BWI institutions.¹⁴⁸ There is little or no reason to believe that human rights – or any other politically oriented elements of international law – will “somehow temper the violence of the development project.”¹⁴⁹ Instead, she argues, “when merged with development ... human rights become a means by which society is subordinated to the imperative of economic growth through markets”.¹⁵⁰ The key concern is that when the domain of development is widened, whatever comes under its purview is instrumentalised to it – to the exclusion of all else. Whatever is considered to be development-related takes on a stabilised, uncontestable meaning. This ultimately has a limiting effect on how development in international law can be challenged.

Pahuja’s argument is abstract, and is perhaps better explained in application – for example, to the Millennium Development Goals (MDGs). The MDGs are the most prominent development initiative in the contemporary global development agenda and an example of human rights-development (as well as political-economic institutional) convergence. The MDGs are said to represent the international community’s commitment to development and poverty eradication, reduced to just eight goals. The first seven are designed to be measured through progressive time-bound targets and essentially aim for the provision of basic services like education, healthcare and sanitation for the world’s poorest people. Arguably, they can be approximated to social and economic rights.¹⁵¹ The first seven goals are to:

146 World Bank “Human Rights” (June 2012) <www.worldbank.org>.

147 Cornwall and Nyamu-Musembi, above n 145, at 1427.

148 Pahuja, above n 104, at 232.

149 At 235.

150 Sundhya Pahuja “Rights as Regulation: The Integration of Development and Human Rights” in Bronwen Morgan (ed) *Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Ashgate, Aldershot, 2007) at 171.

151 Philip Alston “Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millenium Development Goals” (2005) 27(3) HRQ 755 at 773.

1. Eradicate extreme poverty and hunger;
2. Achieve universal primary education;
3. Promote gender equality and empower women;
4. Reduce child mortality;
5. Improve maternal health;
6. Combat HIV/AIDS, malaria and other diseases; and
7. Ensure environmental sustainability.

Goal 8 is different – it establishes how the first seven MDGs will be achieved and calls for the creation of a “global partnership for development”. This includes: the development of an “open, rule-based, predictable, non-discriminatory trading and financial system”; addressing the “special needs” of the Least Developed Countries (which includes “tariff and quota free access for the least developed countries’ exports”); addressing the needs of landlocked developing countries and small island developing states; and expanding access to new technologies with an information and communications and pharmaceutical focus, through cooperation with the private sector.¹⁵²

As Jane Kelsey has recognised, Goal 8 abstracts the MDGs from their social, political and economic context in establishing an exclusively free market solution for them.¹⁵³ In doing so, the major powers driving the MDGs – the European, US and Japanese governments, co-sponsored by the IMF, World Bank and the Organisation for Economic Co-operation and Development (OECD) – effectively sidestep the evidence showing that the application of neoliberal and trade liberalisation policies has contributed significantly to the inability of the Third World to create the circumstances in which its peoples’ social and economic rights can be realised.¹⁵⁴ Unsurprisingly, even the World Bank has conceded that the majority of the MDGs will not be met by the 2015 deadline.¹⁵⁵ Much of this surely has to do with the fact that there is no room within the MDGs to explore options for poverty reduction and the attainment of rights outside of the neoliberal orthodoxy.

For the Third World, accepting the MDG framework is comparable to synonymising the fulfillment of social and economic rights for all with a free market economic order. From a critical perspective, this view is untenable not only because of the practical evidence that neoliberal policies do not work, but also its theoretical acceptance that rights-fulfillment can be consistent with a Western conception of development. In framing rights as compatible with market logic and economic growth, the human rights regime loses its capacity as a potential weapon that the Third World can

152 UN Millennium Project *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (Earthscan, London, 2005) at xix.

153 Kelsey, above n 134, at 112.

154 At 112.

155 World Bank “Twenty Fragile States Make Progress on Millennium Development Goals” (press release, 1 May 2013).

use to contest the neoliberal, free market paradigm.¹⁵⁶ Put differently, the *incompatibility* of rights with development – as that universal, transcendent value that is inseparable from economic growth – imbues them with a potentially anti-imperial quality. If that incompatibility is lost, and rights and development are seen to be mutually affirming, rights become sites in which international law can be seen to be “imperiallly operative” – and the Third World loses an important avenue through which it is able to argue for economic equity.¹⁵⁷ Ultimately, the increased convergence between the long-separate political and economic realms of international law spells disaster for the Third World.

The extension of the BWIs’ realm demonstrates the dynamic yet stable nature of the relationship between development and international law. It is dynamic in the way it evolves and reacts to different global contexts, as in the initial separation of international issues along the economic/political divide in the name of development and more recently, the integration of the economic and political realms – again, for the sake of development. But it is stable in the way the two concepts are positioned as mutually affirming and constitutive of each other, with international law furthering the universality of development and development furthering the universality of international law. It is as a result of this relationship that international law continues to be imperialistic – and that development has failed to produce the results it promises.

This conclusion paints a depressing picture of both development and international law. It is difficult, after coming to terms with the TWAIL account of the relationship between the two, not to become disillusioned. The challenge of disentangling one from the other seems too daunting to bear thinking about. And yet it must be attempted. Throwing in the proverbial towel does not erase the reality that more than 800 million people go to bed hungry every day, more than 2.6 billion do not have access to basic sanitation, and every year six million children will die from malnutrition before their fifth birthday.¹⁵⁸

Despite its dark past and present, the development project – not in the Western conception, but in the simple commitment to “provide a path away from impoverishment, malnutrition, mortality and morbidity” – simply cannot be abandoned. As Chimni has argued, although development is justly perceived as a Trojan horse for the Third World, it is a “particular kind of development policies that are responsible for these violations and not development per se.” While TWAIL is certainly better known for being reactive, rather than proactive, it is submitted that the TWAIL movement’s critical insights into development can – and should – be utilised to improve upon contemporary development initiatives. Additionally, TWAIL is not

156 Pahuja “Rights as Regulation”, above n 150, at 190.

157 At 190.

158 The UN Millennium Project *Fast Facts: The Faces of Poverty* (2006) <<http://www.unmillenniumproject.org>>.

often applied in a Pacific context.¹⁵⁹ The RSE scheme thus provides an opportunity to test the applicability of the TWAIL critique as wholly “Third World.”

IV. APPLYING TWAIL TO THE RSE SCHEME

An unavoidable conclusion of the TWAIL approach is that the way in which development is being evaluated has been highly problematic. Unsurprisingly, methods of evaluation have reflected the ideology of development as it has evolved in its relationship with international law. In the RSE example, the markers of success have been increases in economic measures in the Pacific states, such as income per capita, and the extent to which RSE workers’ human rights are fulfilled. However, the TWAIL critique demonstrates that neither an economic nor a human rights-based assessment is particularly trustworthy as a means of gauging the capacity of a development initiative to bring about genuinely positive development outcomes. What is meant by positive development outcomes is the idea that development – unencumbered by ideology – is ultimately about expanding people’s ability to lead their lives in a way that is meaningful to them.¹⁶⁰ Development, in its Western conception, has generally failed to procure such outcomes. Thus, given the history of development and international law, the extent to which a development initiative is established on an economic logic in particular warrants the adoption of TWAIL’s philosophy of suspicion.¹⁶¹ Accordingly, in the following discussion, the RSE scheme as a development initiative will be deconstructed to reveal and problematise its intimacy with economics.

A. Demand-driven Development?

Although much of the literature written about the RSE scheme has focused on the policy qua international development initiative, the scheme’s intended primary purpose was, and continues to be, to address a national economic issue: critical labour shortages. Though the pro-migration policy environment facilitated Cabinet’s approval of the RSE scheme in 2006, it is unlikely to have happened without the Horticulture and Viticulture Seasonal Working Group Labour Strategy.¹⁶² Industry is the key driver of the RSE scheme; as Luthria and Malaulau have observed, the scheme’s name itself underscores the focus on New Zealand employers.¹⁶³ As noted above, employers’ interests, and those of the horticulture and viticulture industries,

159 While it is not doubted that they exist, no applications of the TWAIL critique to a specifically Pacific example could be found in the research for this article.

160 Paul Streeten “Human Development: Means and Ends” (1994) 84(2) American Economic Review 232 at 232.

161 Anghie and Chimni, above n 87, at 203.

162 Whatman and van Beek, above n 21, at 281.

163 Luthria and Malaulau, above n 36, at 132.

take priority for the Government. As baldly stated in the scheme's *Final Evaluation Report* published by the former Department of Labour, the so-called Pacific economic development goal is a "secondary aim for the New Zealand Government".¹⁶⁴ Prioritising in this way is not necessarily inimical to creating positive development outcomes. However, the way the scheme has evolved suggests that not only is development in the Pacific a secondary aim, but that any development initiatives will be instrumentalised to industry and RSE needs. Not only do the interests of the horticulture and viticulture industries take priority, they also seem to take precedence in initiatives that are ostensibly meant to benefit Pacific states and RSE workers.

This balancing of priorities is arguably ascertainable from the operation of the RSE: SPP programme to date. As noted in Part II, the RSE: SPP programme facilitates the development focus of the RSE policy and is directed at assisting Pacific states to gain most value from their participation in the scheme.¹⁶⁵ The majority of its work thus far has been aimed at capacity building in Pacific state ministries and departments in charge of RSE scheme operations.¹⁶⁶ In the RSE: SPP's recent *Mid-term Evaluation* report, the justification given for the emphasis on capacity building was that sustained involvement by the Pacific states – one of three intended outcomes of the programme – was an area of "immediate concern".¹⁶⁷ But of concern to whom? Capacity building, though helpful for Pacific states, benefits employers in a way that the two other RSE: SPP outcomes – Pacific state management of domestic labour requirements and social cohesion, and facilitating the contribution of RSE income to economic development – do not. As has been noted in the RSE: SPP's *Mid-term Evaluation* report, it has not escaped the attention of some RSE scheme stakeholders that the balance of the purportedly development-focused RSE: SPP programme seems weighted to benefit the RSEs:¹⁶⁸

They question whether its objective is to make RSE more efficient for employers through building capacity in Pacific States? Or does SPP aim to deliver additional value to island communities, over and above the direct contribution being made by remittances? These stakeholders are of the view that SPP (as it is currently operating) appears to be predominantly focused on the former.

It is recommended in the report that stakeholder concerns about the SPP: RSE programme objectives may be addressed "if the SPP project incorporates more activities that support outcomes two and three".¹⁶⁹ However, this advice glosses over the well-founded nature of the concerns expressed. The RSE: SPP does frame its seemingly development-focused activities in terms of industry or employer interests. An example can be found in the quarterly RSE: SPP

164 Evaluate Research, above n 2, at 72.

165 Nunns and others, above n 53, at 28.

166 At 27.

167 At 27.

168 At 6.

169 At 7.

newsletter. The January 2013 issue focused on issues relating to worker health, which had become a concern after a health incident.¹⁷⁰ It was described twice, as follows:¹⁷¹

In May 2011, an RSE worker in the Kiwifruit sector in the Bay of Plenty was diagnosed with typhoid. Up to 100,000 trays (or approximately NZ\$800,000 worth) of kiwifruit that may have been associated with the worker and his picking gang, were voluntarily withdrawn from sale.

2011's "typhoid incident" showed that swift and decisive action ensured the tracing and destruction of \$800,000 worth of fruit and the reputation of the sector was preserved.

Tellingly, the "typhoid incident" was described only in terms of its impact on the worker's employer and its potential effects on industry. No mention was made of the welfare of the worker and his picking gang. The newsletter did focus on initiatives that were intended to help increase levels of worker health that would be beneficial for the workers themselves – for example, through Samoa's educational RSE Health Programme for workers, or the facilitation of compulsory (worker-paid) health insurance. But the fact that worker health was framed in terms of economic and reputational costs for employers and the industry is worrying.

The apparent priority given to RSE and industry interests in the supposedly development-focused aspects of the RSE scheme is not limited to the RSE: SPP programme. Arguably, employer bias is perceptible in the Government's second major development initiative, Vakameasina, the worker training programme. The manner in which this programme was designed in the pilot stage speaks volumes. The contracted training provider did not consult with either Pacific RSE workers or Pacific officials about curriculum design at any stage prior to courses starting. Instead, feedback sought from "employers and staff responsible for RSE workers, industry representatives and New Zealand government officials" provided the basis for what was taught.¹⁷² Notably, employers perceived the course as being an "investment" in workers.¹⁷³ They anticipated that the training would have benefits for themselves and expected that it would result in improved English language skills among workers, to allow the "concerns of the employer [to] be understood and taken on board".¹⁷⁴

The independent review of the pilot found that some of the training did indeed align with what workers were interested in learning – for example, English language and computer skills.¹⁷⁵ But other content was irrelevant and, frankly, patronising. The introduction of a goal-setting workshop, for example, demonstrated ignorance of the fact that participation in the RSE

170 Strengthening Pacific Partnerships Update (online ed, January 2013).

171 "Samoa implements health programme in partnership with Samoa's Ministry of Health" Strengthening Pacific Partnerships Update (online ed, January 2013); "NZ Ministry of Primary Industries: Recognised Seasonal Employment – Pacific Strategy: Partnering and Enabling" Strengthening Pacific Partnerships Update (online ed, January 2013).

172 Roorda, above n 59, at 10.

173 At 20.

174 At 10.

175 At 9.

scheme is, for the majority of workers, the means of achieving their goals – and that many return workers had already successfully achieved several.¹⁷⁶ The training was also ill-designed to take account of workers' varying levels of educational needs and literacy skills.¹⁷⁷ In all, the Vakameasina pilot was structured according to how and what some stakeholders thought the Pacific RSE workers should learn, not what the Pacific RSE workers themselves wanted to learn. Again, it reflected the paramountcy of employer interests, even in explicitly development-focused initiatives.

The Government's management of its RSE-related development initiatives raises questions about the developmental limits of the scheme. Will further initiatives only be introduced if they have the potential to help RSEs? Certainly, the attitudes and thought-processes that inform the implementation of the RSE scheme's development add-ons are concerning. The *quid pro quo* perspective expressed by employers in relation to Vakameasina, reflected by the Government's stance towards workers as signaled in the worker health initiatives example, seems at odds with creating positive development outcomes. Development – in the human sense of the word – should not seek a return. On the other hand, how else could the RSE policy be seen as a “triple win”? The views of employers and Government that services for improving workers' health or their education must also benefit them have obvious potential to limit the development capacity of the RSE scheme.

B. The Business of the RSE Scheme

The priority given to industry, introduced in the previous discussion, not only affects the kind of development initiatives undertaken by the Government in connection to the RSE scheme, but also how the Government supports the operation of the scheme in the Pacific states. Though unsurprising in light of the Government's admission that Pacific economic development is secondary to the needs of industry, the extent to which employers' interests are being served is worrisome. The provision of capacity building has arguably taken on an ideological quality, going far beyond the provision of skills and resources to the endorsement of a “business-like approach” to be taken by the Pacific states in operating the RSE scheme.¹⁷⁸ The nature of this economic emphasis in development is strongly reminiscent of the kind of development flagged by TWAIL scholars. Consistent with their critiques, there is good reason to be concerned with the promotion of the view that the RSE scheme is to be run like a business.

As mentioned above, New Zealand's capacity building activities with Pacific ministries and departments occur under the RSE: SPP programme. A major part of that work is being done through training workshops, which are contracted out by MBIE and administered by a private training firm,

176 At 11.

177 At 13-14.

178 Nunns and others, above n 53, at 13.

Brandheart.¹⁷⁹ The overarching purpose of the workshops is to build capacity among RSE scheme operations staff, managers and personnel from RSE-related departments and ministries – essentially, those in government who have a role to play in the facilitation of overseas labour mobility. Workshop topics include: “Conversations for Results”, aimed at improving staff confidence and assertiveness in initiating and sustaining “effective conversations with RSE employers and key stakeholders by addressing cultural issues and barriers”; “Planning for Outcomes and Customer Relationship Management” – developing skills to plan for and manage the recruitment and deployment of workers to New Zealand; and “RSE Branding and Marketing”, which assists states to develop branding and marketing plans to market themselves to existing and potential employers.¹⁸⁰ According to the RSE: SPP *Mid-term Evaluation* report, while the focus is on skill enhancement, the trainer who runs the workshops perceives the objective of the training as going beyond that:¹⁸¹

The training is used as a “vehicle” for influence by delivering key messages that are embedded in the workshop content. For example ... the need for Pacific States to have a business-like approach to operating RSE (rather than regarding RSE as an administrative activity).”

Specifically what is meant by a “business-like” or “administrative” approach is unclear. It is also stated in the evaluation that progress had been made in some Pacific states “approaching RSE as a business opportunity rather than an administrative task” but similarly, this is not elaborated on.¹⁸² Nor are these concepts mentioned in publicly released RSE: SPP documents. However, publications by the NGO, Pacific Cooperation Foundation (PCF), may provide some clues. In 2009, the PCF received a USD 500,000 Institutional Development Fund (IDF) grant from the World Bank toward the cost of an 18-month programme for “Institutional Capacity Building for Labour Export in the Pacific”.¹⁸³ As mentioned above, the World Bank is a partner in the RSE: SPP programme and has worked directly with Pacific states and MBIE in facilitating labour mobility;¹⁸⁴ accordingly, RSE-related projects it is involved with can be reasonably assumed to be consistent with the approach encouraged by the Government. The PCF’s 2010/2011 Annual Report contains an evaluation of its World Bank programme.¹⁸⁵ One of the key outputs under the IDF grant was the implementation of “recommendations

179 “Strengthening Pacific Partnerships Training with Brandheart” *Strengthening Pacific Partnerships Update* (online ed, July 2012).

180 Nunns and others, above n 53, at 12.

181 At 12.

182 At 17.

183 “Sustainable labour supply: triple win initiative” *Pacific Connection* (Auckland, December 2010) at 4.

184 Nunns and others, above n 53, at 22.

185 Pacific Cooperation Foundation “Objective: Supporting Labour Mobility: Institutional Development Fund Grant” *Annual Report of the Pacific Cooperation Foundation for the year ended 30 June 2011* (Auckland, October 2011) at 19.

to strengthen management and [human resources]" in Tonga and Vanuatu.¹⁸⁶ Those recommendations, and their purpose, are replete with commercial jargon:¹⁸⁷

The assignment delivers a clear purpose and vision for service delivery, explicit service performance standards, comprehensive business planning, transparent budgeting, resource planning, staff training, performance development plans, processes for regular communication with staff and reporting to executive managers.

This will ensure that efficient and effective processes and tools are in place to provide high quality service delivery.

Another key output was marketing. This included targeted market research of employers' needs in both New Zealand and Australia and the development and implementation of marketing strategies and tools for Kiribati, Samoa, Tonga and Vanuatu to market their seasonal workers to Australian and New Zealand employers.¹⁸⁸ The intended outcomes of these actions were similarly couched in commercial terms: "these actions and tools will promote each country's strengths and competitive advantage in order to gain market share and entry into new markets".¹⁸⁹

Together, the RSE: SPP training workshops and PCF activities suggest that a "business-like approach" to RSE operations is essentially the equivalent of running the RSE scheme as if it was a commercial enterprise. Consequently, capacity building in the Pacific states through the RSE scheme may be seen as imbued with neoliberal economic ideology. Presumably, this is what is meant when it is said in the RSE: SPP *Mid-term Evaluation* report that the training workshops are viewed as a "'vehicle' for influence".¹⁹⁰ This kind of ideologically driven development is descended from the structural adjustment programmes of the late-20th century in its encouragement of governments to use a private sector model (if not the private sector itself) to achieve development goals, and apparently remains prevalent.¹⁹¹ The RSE scheme arguably provides an opportunity to test the validity of critiques surrounding ideologically driven development in a current context by analysing how capacity building affects RSEs and Pacific RSE workers.

The horticulture and viticulture industries and the RSEs themselves are the most obvious beneficiaries of this approach. The RSE: SPP training modules for Pacific officials overall are directed at facilitating relationships with the RSEs in particular, as is evidenced by training aimed at giving officials an understanding of communication expectations in the New Zealand business environment, or marketing countries' respective labour mobility operations to different employers.¹⁹² Interestingly, however, employers have remarked that "they are not interested in, or impressed by, Pacific States' marketing

186 At 19.

187 At 19.

188 At 20.

189 At 20.

190 Nunns and others, above n 53, at 12.

191 Kelsey, above n 134, at 105.

192 Nunns and others, above n 53, at 12.

efforts”, negating the usefulness of efforts funded by the World Bank and the Government.¹⁹³ Employers do, however, value the communication skills workshops, as the ease and timeliness of their dealings with Pacific state officials is a major factor in deciding where to recruit.¹⁹⁴

How the private sector model in Pacific RSE operations impacts on Pacific RSE workers is less clear. Arguably, one of the positive business-related ideas conveyed in the Brandheart training is the importance of “good customer service”.¹⁹⁵ In the RSE: SPP Final Evaluation Report, it was noted that one Tongan official reported that the training helped them to recognise the value of treating RSE workers as customers – enquiring into their needs and addressing any concerns, for example.¹⁹⁶ The official suggested that all Tongan ministries could benefit from customer service training.¹⁹⁷ Heightened awareness and sensitivity to the interests and needs of workers seems like a positive step. But on the other hand, perceiving workers as customers seems to be somewhat at odds with the overall business approach being promoted, which – to put it crudely – implicitly positions workers as units of production, rather than customers. The role being encouraged for Pacific states can be likened to that of merchants in the market of labour mobility schemes, who compete for a greater market share. This is reflected in the RSE Branding and Marketing workshop, which encourages states to develop and market their unique “brand” to current and potential RSEs.¹⁹⁸ It is also reflected in the World Bank’s reference to “labour export” in the tendering process for the IDF grant, as opposed to the more politically correct “labour mobility”.¹⁹⁹ It is the provision of a workforce that is being marketed and that is the export; Tonga’s brand, for example, is “TongaWorks” and carries the tagline “Able, willing and ready to work”. Thus, while state officials are encouraged to see RSE workers as customers, this is certainly not the way that RSEs – who are the true customers – are encouraged to receive them. A power imbalance already exists between Pacific RSE workers who migrate to New Zealand, a foreign country with a foreign language, and their employers, who are authority figures in the workplace and charged with looking out for workers’ welfare. One cannot help but wonder if the “business-like” approach might serve to exacerbate that imbalance, which may also be imbued with notions of racial hierarchy.²⁰⁰

193 One wonders why the market research undertaken by the PCF to develop the Pacific states’ marketing plans failed to bring this to light – at least, in the New Zealand context. It is possible that marketing efforts could be effective in Australia, where a temporary labour mobility scheme has only recently been implemented and is less used.

194 Nunns and others, above n 53, at 25.

195 At 36.

196 At 36.

197 At 36.

198 At 12.

199 *Pacific Connection*, above n 183, at 4.

200 Such a suggestion may be unfair. However, it is an accompanying feature of the TWAIL critique of colonialism in the law to be wary of, and wise to, the prevalence of racial hierarchies.

Altogether, it is evident that those who are supposed to be facilitating development outcomes for RSE workers – government officials both in New Zealand and the Pacific, development experts at the World Bank and RSEs themselves – do not, or are encouraged not to, perceive Pacific RSE workers as *people*, first and foremost. Much worse than instrumentalising development initiatives for New Zealand employers' ends as discussed previously, Pacific RSE workers are essentially being instrumentalised *themselves* to others' economic ends. This is the antithesis of the idea of positive development outcomes. It also brings to life the TWAIL warning about so-called rights-based approaches to development. As observed in the review of literature about the RSE scheme in Part II above, one of the lauded aspects of the RSE scheme is the attention given by the Government to ensuring the fulfillment of Pacific RSE workers' labour rights and other basic human rights, in comparison with previous temporary labour migration programmes. But as we have seen, the provision of human rights alone is not enough. A commitment to upholding rights does not equate to, or guarantee, commitment to the basic underlying principle of the human rights regime that human individuals are ends in themselves, not ever to be used as a means to an end.²⁰¹ In the context of the RSE scheme, rights-compatibility²⁰² has acted as a veneer to the underlying ideological foundations of the RSE scheme, masking the way those foundations undermine the capacity of the RSE scheme to achieve positive development outcomes.

V. REHABILITATING THE RSE SCHEME

Exposing the philosophy behind the RSE scheme does not erase the fact that it has provided significant economic benefits to the individuals who travel from the Pacific to work in New Zealand, and their families and communities. Nor should those benefits be undervalued in the role that they can, and do, play in fostering positive development outcomes. But a critical understanding of development comes with the knowledge that those economic benefits are not presumed to tell the full story. The analysis that follows will continue to explore the RSE scheme from a critical perspective, to raise some issues that appear to have been overlooked or undervalued in the formation of a development programme that has taken for granted the meaning and effect of development. It is suggested that exploration of these aspects of development is a necessary step towards rehabilitating the RSE scheme.

201 Immanuel Kant *Grundlegung zur Metaphysik der Sitten* (1785) (translated ed: James W Ellington (translator) Immanuel Kant *Groundings for the Metaphysics of Morals* (3rd ed, Hackett Publishing, Indianapolis, 1993) at 30: "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end."

202 Whether the operation of the RSE scheme does in fact uphold basic human rights, including labour rights, is a matter of contention in itself. See Nic Maclellan "Workers for All Seasons? Issues from New Zealand's Recognised Seasonal Employer (RSE) program" (May 2008) Swinburne Institute for Social Research <www.sisr.net>.

A. Exploring Social Impacts

As the review of the RSE literature in Part II demonstrates, the “win” that has been claimed for Pacific RSE workers is access to employment that allows them to increase their incomes significantly. It is assumed that the effects of having more money will have a net benefit for the individual, their families and their communities. This assumption is a product of the logic that defines costs and outcomes in purely economic terms, precluding the consideration of non-economic impacts. The social impacts of the RSE scheme have received minimal attention, despite the fact that even the World Bank “knows” that social impacts form a part of the development equation, as important as the economic impacts, if not more so.²⁰³ The Government is already aware of some negative social impacts at the community level in Tonga. For example, in the “Final Evaluation Report of the Recognised Seasonal Employer Policy (2007-2009)”, it was noted that parental absence is a major issue for families:²⁰⁴

Some respondents described children becoming less disciplined and unruly and increasing problems with truancy and petty crime. The RSE Policy is compounding a long-standing trend of migration-induced absentee parents, and the increasing reliance on relatives and others in the community to support the children left behind.

The international research on the effects on children and families as a result of parental and spousal absence due to migration does not provide a clear picture. Robert EB Lucas’s analysis of that research has found that while some studies show considerable disruption in the family’s educational and child-rearing function, others suggest it has minimal impact, particularly if one parent “stays behind”.²⁰⁵ There appears to be minimal research on the impact of factors such as circularity and, in particular, frequency and length of absence. Regardless, it should not be assumed that these international findings can be extrapolated to the Tongan, or Pacific, context.

To date, only one research paper examining Tongan families’ ability to cope with the absence of a family member employed in the RSE scheme is available.²⁰⁶ The paper – authored by Halahingano Rohorua, John Gibson, David McKenzie and Pilar Garcia Martinez – relied on data fielded from two surveys undertaken with 442 geographically spread Tongan households. The surveys were taken from October 2007 until March 2008, just before the first Tongan RSE workers left for their first season, and April 2008 until July 2008, when most Tongan RSE workers were still away.²⁰⁷ The research tracked changes in factors such as diet, school attendance, adult health and

203 Pender, above n 135, at 407.

204 Evaluate Research, above n 2, at 49.

205 Robert EB Lucas *International Migration and Economic Development: Lessons from Low-income Countries* (Edward Elgar Publishing, Cheltenham, 2005) at 258.

206 Halahingano Rohorua and others “How do Pacific Island households and communities cope with seasonally absent members? Evidence from Tonga and Vanuatu on early effects of New Zealand’s Recognized Seasonal Employer (RSE) program” (June 2009) Department of Economic, University of Waikato <researchcommons.waikato.ac.nz>.

207 At 3.

the amount of hard physical labour undertaken by household members in “RSE households” as compared to “non-RSE households”.²⁰⁸ The results showed that Tongan households were able to adjust “rather smoothly” to the absence of a family member working in New Zealand under the RSE scheme, experienced small changes in diet, no changes in child schooling or adult health, and did less hard physical labour.²⁰⁹ The breadth of the research is commendable and its results are undoubtedly sound. However, because its data was taken so early in the RSE scheme, this study, like the international research, fails to adequately account for features of circularity.

The need for clarity on the impacts of repeated long-term absences grows as the RSE scheme goes on. Recent research on Tongan participation in the scheme suggests that after six seasons of the RSE scheme, there are likely to be real impacts on families that are simply not being documented. In the most recent 2012/2013 season, 1573 Tongans came to New Zealand under the RSE scheme – a remarkable 4.7 per cent of Tonga’s working population.²¹⁰ Some 69 per cent of the 2012/2013 cohort had worked at least one season previously, and 32 per cent had worked four or more seasons.²¹¹ While there are no figures available currently as to how many Tongan RSE workers are fathers or mothers supporting families, it can be reasonably deduced from these statistics that a significant proportion of Tongan households are going without at least one parent for an average of three to seven months of a year,²¹² over several years. It must also be borne in mind that Tonga takes an explicitly “pro-poor” approach in its recruitment practices. Anecdotal evidence suggests that the temporary migration of an absentee parent and particularly the head of the family tends to negatively impact on the stability of poor families more significantly than others. With the recent establishment of Australia’s Seasonal Worker Program (which, in its pilot, recruited around 80 per cent of its workers from Tonga),²¹³ and the registration of one in five Tongan men of working age on the Tongan Government’s work-ready pool, more and more Tongan households will be affected by the temporary absence of a family member.²¹⁴

Presumably, the negative impacts would not just be restricted to parental absence – other issues could be the difficulty of reintegration for RSE workers, or the creation of societal inequality between those who take part

208 At 18.

209 At 18.

210 Xinyi Oh “Estimate of Remittances for SWP and RSE adjusted for inflation” (February 2014) (unpublished, copy on file with author) at 1.

211 Gibson and McKenzie, above n 19, at 14.

212 “Research proves positive results for RSE scheme” *Strengthening Pacific Partnerships Update* (online ed, July 2012).

213 Oh, above n 210, at 4.

214 John Gibson, David McKenzie and Halahingano Rohorua “How Pro-Poor is the Selection of Seasonal Migrant Workers from Tonga Under New Zealand’s Recognised Seasonal Employer (RSE) Program?” (2008) Department of Economics, University of Waikato <researchcommons.waikato.ac.nz>.

in the scheme and those who do not. Who should bear the responsibility for addressing the negative spin-offs of “development”? Although it is conceded that the Tongan Government has a responsibility to address any negative effects that arise out of the RSE scheme, it is argued that New Zealand does too. It is not enough for a donor state to commit to international development insofar as it can derive a benefit in return – as has been the status quo. It is incumbent upon the New Zealand Government to work with all Pacific states and RSE workers to undertake research to understand the social impacts of the RSE scheme on families and communities, and to take steps to mitigate negative impacts. This would align with the RSE: SPP intended outcome of “successful management of domestic labour requirements and social cohesion” for the Pacific states, which, as noted above, has not as yet received a great deal of attention in the RSE: SPP programme.²¹⁵ Without a more holistic understanding of the development impacts of the RSE policy for Pacific states, communities, families and individuals, the triple win claim in its application to both Pacific workers and Pacific states is certainly premature.

B. Sustainability in Labour Mobility

Although the RSE scheme has expanded since its beginnings in 2007 and shows no sign of slowing down, with numbers of RSE workers increasing annually, in reality, the scheme is somewhat vulnerable. Its existence hinges on several delicately poised external factors that, if changed, would threaten the continuation of the scheme. Economic factors matter. As a temporary labour mobility programme, the operation of the RSE scheme relies on continuing labour demand. If the horticulture or viticulture industries do not need to supplement their workforce with workers from overseas, the RSE scheme becomes redundant. Similarly, political factors matter. The provision of employment opportunities for Pacific Island citizens through the RSE policy, while New Zealanders remain unemployed, has been contentious. Speaking at the 2013 Horticulture New Zealand RSE Conference, the Minister of Immigration, Michael Woodhouse, made it clear that the “New Zealanders first” policy of the scheme was not to be forgotten:²¹⁶

This Government has always taken the view that we should demonstrate a duty of care for New Zealanders first. Our overarching goal is for New Zealand to prosper. To make that happen, we need productive, internationally-competitive business with access to a growing workforce of employees. Let’s do that by putting kiwis first before we look elsewhere ...

Visas will not be given where New Zealanders are available to work and I will be holding the Ministry to account on this and it is their job, along with Ministry of Social Development, to call you, the employers, to account also.

... Let’s build a strategy together to make sure that your industry labour needs are met primarily by New Zealanders.

²¹⁵ Nunns and others, above n 53, at 27.

²¹⁶ Michael Woodhouse, Minister of Immigration, “Address to the 2013 Horticulture New Zealand Recognised Seasonal Employer Conference” (27 June 2013).

This sentiment was echoed several months later by the Leader of the Opposition (and Immigration Minister when the Labour-led Government introduced the RSE scheme in 2006), David Cunliffe, when responding to concerns of iwi that the “New Zealanders first” policy was not being complied with in Hawke’s Bay:²¹⁷

We will not have thousands of Hawke’s Bay locals sitting on the dole queue while we have thousands of offshore workers coming through and taking the jobs off them. If they pay a decent New Zealand minimum-wage-plus – a decent market rate – that problem will not occur. And we will not have foreign labour being imported in New Zealand to drive down New Zealand wage rates. That is going to stop.

Though New Zealand’s unemployment rate remains low currently, one can see that if it were to rise, the RSE scheme would quickly become a political target.²¹⁸

If circumstances at home cause the Government to reduce or even terminate the RSE scheme, there is virtually nothing the Pacific states can do to stop it. As Luthria and Malaulau note, the IAUs that mediate the relationship between New Zealand and each of the Pacific states are not legally binding, and merely serve to document the states’ negotiated agreements.²¹⁹ Breaching an IAU has no legal consequences. Even in their capacity as a region, the Pacific states would be limited to condemnation of New Zealand, which may be of dubious effect.²²⁰ This demonstrates not only the vulnerability of the scheme itself, but also the vulnerability of the Pacific states in their participation in it. As Luthria and Malaulau observe, and as alluded to in Part IV, there is an “obvious” power imbalance between New Zealand and the Pacific states.²²¹

The vulnerability of the RSE scheme and the power that New Zealand wields over the Pacific states in the operation of the RSE scheme evidently is not problematic to the Government. However, it is problematic from a development perspective. The current arrangements are the antithesis of sustainable development. The end of the RSE scheme would represent a significant loss of foreign exchange earnings for Tonga. In the 2012/2013 season alone, total remittances and repatriated income from Tongan RSE workers amounted to approximately NZD 9,561,000, equivalent to approximately 62.6 per cent of Tonga’s annual export earnings.²²² The economic and social consequences would undoubtedly be significant for Tongan families and communities who

217 Simon Hendery “Cunliffe relaxed about Nash’s stance” *Hawke’s Bay Today* (online ed, 3 December 2013).

218 Even though internationally, ‘evidence on the impacts of immigration upon wages and employment levels of natives is quite uniform in finding only very small effects ... [Impacts] ... both upon overall incomes among prior residents and upon the distribution of those incomes across different classes are quite negligible’. See Lucas *International Migration and Economic Development: Lessons from Low-income Countries*, above n 205, at 295.

219 Luthria and Malaulau, above n 36, at 129.

220 At 130.

221 At 130.

222 Oh, above n 210, at 1.

have come to adapt to the steady income stream from RSE work. This raises the related issue of dependence. The way in which the scheme is currently run perpetuates a dynamic of dependence among Pacific states on the migration-remittances cycle. This dependence postpones the generation of robust development strategies by Pacific governments, as the pressure to create solutions to unemployment and other issues is eased by the influx of remittances.

The Government, in collaboration with the Pacific states, must begin to address the sustainability of the development outcomes of the RSE scheme. The issue is an extremely difficult one and the solution will be multi-faceted – reflecting the significant impacts that remittances and repatriated income have in contributing towards positive development impacts, but recognising their limits and planning beyond them. It may be that the Government needs to co-ordinate another development initiative in partnership with Pacific governments to openly explore more sustainable routes to positive development outcomes. As with social impacts, this is an area that requires further research and dedication to the development cause.

C. Can the RSE Scheme be Rehabilitated?

A deeper, warts-and-all understanding of the RSE scheme comes with the view that a paradigm shift is required if the Government is to both facilitate the scheme's positive development outcomes and prevent the negative outcomes that stem from a close-minded, economically-focused development perspective. This requires a "stripping back" of the RSE policy to understand further how it sustains uneven relationships among different stakeholders. Stakeholders in the RSE scheme should not put a premium on increased economic results, be they profit or income, but the creation of positive, people-led development outcomes. The interests of the Pacific workers *qua* people and their communities – as expressed by them – must be given greater weight in the RSE policy. Exactly how this is to be achieved is unclear, and is beyond the scope of this article.

IV. CONCLUSION

Since its beginnings in 2007, the New Zealand Recognised Seasonal Employer scheme has brought many positive development outcomes for the Pacific Islands, through the economic benefits provided by the increased incomes of Pacific RSE workers. However, these benefits do not present a full picture of the impact of the RSE scheme in the Pacific Islands. Having applied a TWAIL conception of development to the workings of the RSE scheme, it is evident that the potential of the scheme to effect positive development outcomes is constrained by the economic logic that underlies it. But with this realisation comes an opportunity for rehabilitation. The RSE scheme need not be the proverbial Trojan horse. If New Zealand is truly committed to the positive development of the Pacific region, it will re-examine the ideological and self-serving nature of its approach to development.