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Jacob Krysiak

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## IMPROVING MICROFINANCE THROUGH INTERNATIONAL AGREEMENTS AND TAILORING THE SYSTEM TO ASSIST INDIGENOUS POPULATIONS

*Jacob Krysiak\**

### *Abstract*

The rise of the microfinance system and microfinance institutions (“MFIs”) has gained great notoriety throughout the world as a means to provide a more tailored solution to assisting the world’s poor, many of which belong to indigenous populations.<sup>1</sup> As these institutions began to create strong foundations and develop a portfolio of financial services, states have found it necessary to regulate this sector and have started passing various legislation in order to create structure and oversight. The differing, and sometimes overbearing, laws governing microfinance can make it difficult for the MFIs to operate efficiently and reach their target populations. More importantly, the MFIs are in desperate need of a cheaper and more accessible source of funding. States need to find a mechanism specifically tailored to target indigenous populations in order to combat the negative effects that are caused by macrofinance and large-scale development projects, one that will allow them to provide this cheaper source of funding so that the MFIs can continue to grow and reach their clients. This paper proposes an international agreement that will create an investment fund to better provide capital to the MFIs, while specifically targeting aid to indigenous populations, and will address key issues in drafting such an agreement. Additionally, this paper will analyze Australia and New Zealand as candidates for a bilateral treaty of this type and tailor solutions to the specific needs of these states.<sup>2</sup>

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\* Third-year student, University of Oklahoma College of Law.

1. For the purposes of this Comment, “indigenous population” refers to the international communities who have historical continuity, pre-colonization or pre-invasion with the territories or land in which they occupy and claim as their own. Also, the terms “groups,” “populations,” and “communities” will be used interchangeably.

2. For the purposes of this Comment, “states” refers to recognized sovereign powers with the capability to enter international agreements.

### I. Introduction

With the inception of the World Bank in 1944, the global community began truly combating poverty.<sup>3</sup> As a result of international and domestic efforts, the world has managed to see great improvements in the lives of the world's poor.<sup>4</sup> Much of this economic growth came as the result of large-scale development projects that were funded largely by governments or international institutions like the World Bank.<sup>5</sup> While many people in society likely perceive financing large-scale development projects as a beneficial action to the global population, the truth is, despite these improvements, growth and development has been disproportionate among the different demographics across states.<sup>6</sup> Moreover, many of these projects are implemented in ways that are detrimental to certain populations, and no segment of the population is more left out of the benefits or hurt by these processes than the world's indigenous populations.<sup>7</sup> As a result, "[i]ndigenous peoples suffer higher rates of poverty, landlessness, malnutrition and internal displacement than other members of society, and they have lower levels of literacy and less access to health services."<sup>8</sup> However, institutions have recognized this issue, and many have tried to correct the disproportionately negative impact that large-scale financed development projects sometimes have on indigenous populations, but to no avail.<sup>9</sup>

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3. See *History*, WORLD BANK, <http://www.worldbank.org/en/about/archives/history> (last visited Mar. 19, 2017).

4. According to 2013 estimates, 10.7% of the world's population lived on less than US \$1.90 a day, compared to 12.4% in 2012. That is down from 35% in 1990. *Poverty: Overview*, WORLD BANK, <http://www.worldbank.org/en/topic/poverty/overview> (last updated Oct. 2, 2016).

5. *Pakistan: Achieving Results in a Challenging Environment* (Apr. 11, 2014), WORLD BANK, <http://www.worldbank.org/en/results/2014/04/11/pakistan-achieving-results-in-a-challenging-environment>; see also *Tocantins, Brazil: Raising Living Standards and Reducing Inequalities and Regional Disparities*, WORLD BANK (Sept. 19, 2013), <http://www.worldbank.org/en/results/2013/09/19/reducing-inequalities-poverty-Tocantins-Brazil>; *Philippines: Social Welfare and Development Reform Project*, WORLD BANK, <http://go.worldbank.org/BTGO1SAL30> (last visited July 8, 2017).

6. *Poverty: Overview*, *supra* note 4.

7. See *Statistics and Key Facts About Indigenous Peoples*, RURAL POVERTY PORTAL, [http://www.ruralpovertyportal.org/web/rural-poverty-portal/topic/statistics/tags/indigenous\\_peoples](http://www.ruralpovertyportal.org/web/rural-poverty-portal/topic/statistics/tags/indigenous_peoples) (last visited Mar. 19, 2017).

8. *Id.*

9. See *id.*

*II. The Recent Recession and Macrofinance Failures  
to the Indigenous Population*

In the 2000s, the world experienced the most severe global recession since the 1930s.<sup>10</sup> Sadly, as a result of this recession, there seemed to be great discrepancies between the cultural, social, and economic impacts on indigenous populations compared to their non-indigenous counterparts.<sup>11</sup> The world's indigenous population, who in 2012 only made up 5% of the world's population, accounted for 15% of the world's poor.<sup>12</sup>

Indigenous populations are disappearing, and the cultural components of these groups are vanishing.<sup>13</sup> The lands possessed by the indigenous groups are slowly being carved away.<sup>14</sup> It is clear that the economic well-being of indigenous populations needs to be examined and addressed by world and state leaders. While the global community could once rely on large international organizations to combat these issues, these institutions are now failing to help indigenous people. For example, the World Bank continues to primarily concentrate on large-scale development projects to combat poverty,<sup>15</sup> and these types of projects tend to have a disproportionately negative effect on indigenous people. The United Nations put it best:

Economic policies, promoted by international agencies and triggered by free-trade agreements and globalization, have resulted in a proliferation of large-scale development projects on

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10. Press Release, Econ. & Soc. Council, U.N., Impact of Economic Crisis on Indigenous Peoples, Incarceration of Indigenous Youth, Corporations, Among Issues Addressed in Reports to Permanent Forum (No. HR/5018, Apr. 26, 2010), <https://www.un.org/press/en/2010/hr5018.doc.htm>.

11. *See id.*

12. Ethan Freedman, *Poverty Rates Strikingly High Among Indigenous Populations*, INTER PRESS SERV. (June 20, 2012), <http://www.ipsnews.net/2012/06/poverty-rates-strikingly-high-among-indigenous-populations/>.

13. *See generally* Ben Campbell, Book Review, 29 MOUNTAIN RES. & DEV. 289 (2009) (reviewing *DISAPPEARING PEOPLE? INDIGENOUS GROUPS AND ETHNIC MINORITIES IN SOUTH AND CENTRAL ASIA* (Barbara Brower & Barbara Rose eds., 2007)); *see also* Caitlin Trent, *42 Indigenous Populations in Danger of Disappearing*, COLOMBIA REP. (Oct. 16, 2012), <http://colombiareports.com/42-indigenous-populations-in-danger-of-disappearing/>.

14. *See* Martin Mowforth, *Indigenous People and the Crisis over Land and Resources*, THE GUARDIAN (Sept. 23, 2014), <https://www.theguardian.com/global-development/2014/sep/23/indigenous-people-crisis-land-resources>.

15. Gretchen Gordon & Prabindra Shakya, *The World Bank's Retreat on Indigenous Rights*, INTERCONTINENTAL CRY (Aug. 27, 2016), <https://intercontinentalcry.org/world-banks-retreat-indigenous-rights/>.

indigenous lands and territories . . . . Evidence shows that indigenous people bear the costs of the resource-intensive projects disproportionately, and the human rights effects include a loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.<sup>16</sup>

The World Bank has a policy on indigenous people designed to incorporate them and their interests into the decision-making process. This policy provides a framework for social assessment and consultation for large-scale development projects.<sup>17</sup> However, in the past, both states and the World Bank elected not to implement this policy, and indigenous people were left out of the process.<sup>18</sup> To make matters worse, the World Bank recently amended the policy to make it a less useful shield for indigenous rights.<sup>19</sup> For example, for approval of the projects, the old policy required “broad community support,” but this language has been changed to “free, prior, and informed consent.”<sup>20</sup> While the original language encouraged policy makers to look at the population, including indigenous people, as a whole, the new language seems to always allow states to approve projects outside of three situations: (1) projects which have an “adverse” impact on indigenous peoples’ land and territory, (2) projects which include involuntary resettlement of indigenous people, and (3) projects which have significant impacts on cultural heritage “material to the identity and/or cultural, ceremonial, or spiritual aspects of the affected [peoples’/communities’] lives.”<sup>21</sup> To add further injury, the government typically implements the development project and determines whether impacts are “adverse” or “material.”<sup>22</sup> This raises concerns that not only will large-scale financing projects continue to exclude the already

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16. DEP’T OF ECON. & SOC. AFFAIRS, U.N., STATE OF THE WORLD’S INDIGENOUS PEOPLES 88 (No. ST/ESA/328, 2009).

17. WORLD BANK, OPERATIONS MANUAL: OP 4.10 – INDIGENOUS PEOPLES (rev. Apr. 2013), <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf> [hereinafter WORLD BANK OPERATIONS MANUAL: OP 4.10].

18. Gordon & Shakya, *supra* note 15.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

disadvantaged indigenous populations from the benefits of financing economic development, but that these projects may financially or culturally harm indigenous people as well. Ideally, states should try to search for an alternative financial system that would not only prevent further harm to indigenous populations, but could also be used to specifically target these populations to correct the many years of cultural, social, and economic harm that has been caused by macrofinance.

### *III. Microfinance as an Alternative*

#### *A. What Is Microfinance?*

Access to financial resources has long been understood as a vital component to economic development as well as individual and familial wellbeing.<sup>23</sup> Microfinance, to put it simply, is “the provision of financial services to low-income people.”<sup>24</sup> Even poor individuals, although it may not seem like it, make use of saving and investing mechanisms. “They invest in assets such as gold, jewelry, domestic animals, building materials, and things that can be easily exchanged for cash. They may set aside corn from their harvest to sell at a later date. They bury cash in the garden or stash it under the mattress.”<sup>25</sup> However, there are limitations to these practices. If one’s savings are invested in materials like livestock, an owner may need a little bit of money to pay off a debt, but they cannot just sell a portion of the animal, and selling the whole animal may result in the loss of a critical asset.<sup>26</sup> Storing certain commodities makes them susceptible to price fluctuations and money is easily stolen or lost if it is not in a formal security system.<sup>27</sup> However, money loans provide a liquid asset that is more stable and can be obtained in needed amounts without a long process of saving.<sup>28</sup> That is why microfinance is so essential. Sadly, most large banks primarily provide financial assistance to wealthier individuals, and this

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23. See James J. Biles, *Globalization of Banking and Access to Financial Resources: A Case Study from Southeastern Mexico*, 2 *INDUS. GEOGRAPHER* 159, 160 (2005).

24. *What Is Microfinance? How Does It Relate to Financial Inclusion?*, CGAP, <http://www.cgap.org/about/faq/what-microfinance-how-does-it-relate-financial-inclusion-0> (last visited Mar. 15, 2017) [hereinafter *What Is Microfinance?*].

25. *About Microfinance*, KIVA, <https://pages.kiva.org/about/microfinance> (last visited Mar. 19, 2017).

26. *Id.*

27. *Id.*

28. *Id.*

seems to leave the world's poor in a vicious cycle where they are stuck in poverty and unable to obtain needed capital.<sup>29</sup>

The rise of Microfinance Institutions (“MFIs”) came after the 1950s when governments would provide subsidized credit to rural farmers to increase productivity. These small forms of credit were handed out in the form of loans.<sup>30</sup> By the 1980s, the MFIs soon developed to keep up with the growing demand from the success of these endeavors.<sup>31</sup> There are some commercial banks that provide auxiliary microfinance services, although most refrain from doing so since it is an expensive operation and more money can be made through larger loans.<sup>32</sup>

Because microfinancing needs to be tailored to the demographic it tries to assist, institutions had to make particular changes from traditional practices in finance, although the basic method is the same. Microfinance started out as only microlending, a form of credit where small loan amounts are given with typically high interest rates.<sup>33</sup> These interest rates are high because they are meant to cover a variety of costs perceived or incurred by the MFI, including the cost of funding the MFI, exchange rate risk, risk of default, and administrative costs.<sup>34</sup> The MFIs then need to focus on mitigating their internal costs so that they do not have to charge as high of an interest rate and can be marketable for more potential clients.<sup>35</sup> Microcredit gained huge success, and by the 2000s, the system began evolving into today's microfinance in which the MFIs not only provide loans, but also offer a variety of other financial services as well, such as savings and insurance.<sup>36</sup>

Since its inception, microfinance has proven to be an effective tool in many cases to combat poverty and catalyze development. For example, for one project in India, it was reported that “three-quarters of their clients saw

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29. See Lisa J. Servon, *The High Cost, for the Poor, of Using a Bank*, NEW YORKER (Oct. 9, 2013), <http://www.newyorker.com/business/currency/the-high-cost-for-the-poor-of-using-a-bank>.

30. *Micro-Finance Literature Review*, DOCHAS, [http://www.dochas.ie/Shared/Files/2/MicroFinance\\_literature\\_review.pdf](http://www.dochas.ie/Shared/Files/2/MicroFinance_literature_review.pdf) (last visited July 8, 2017).

31. See *id.* at 1-2.

32. *About Microfinance*, *supra* note 25.

33. *About Microcredit*, MICROWORLD.ORG, <http://www.microworld.org/en/about-microworld/about-microcredit> (last visited Mar. 17, 2017).

34. *Id.*

35. See *id.*

36. See generally THE NEW MICROFINANCE HANDBOOK (Joanna Ledgerwood et al. eds. 2013), <https://openknowledge.worldbank.org/bitstream/handle/10986/12272/9780821389270.pdf>.

‘significant improvements in their economic well-being and that half of their clients graduated out of poverty.’<sup>37</sup> Additionally, similar successful programs can be found throughout the world in areas like Mali, Burkina Faso, Guinea, and Nigeria.<sup>38</sup> Microfinance is credited with helping the poorest households meet basic needs and is associated with household development.<sup>39</sup>

Despite all these positive outcomes, there are a few perceived disadvantages or risks linked to microfinance. Nick Hamilton, a first-hand worker in the microfinance industry, admitted that even if a person had acquired a loan in order to create a product, like baskets, macroeconomic factors, such as poor infrastructure or a recession, could prevent the individual from being able to sell their product and yield a profit.<sup>40</sup> The individual would then be in debt and without any means to pay it off. An alternative scenario is that individuals in poor economic circumstances do not use the loans to invest in a small business or economic activity, but instead use the loans for survival by purchasing food, shelter, or clothing.<sup>41</sup> While these amenities are essential for survival, this situation similarly leaves the individual without a way to pay off the debt. In both scenarios, poverty due to deprivation is replaced by poverty due to debt, and the individuals that the MFIs are trying to help are cemented into a poverty trap that is hard to escape.

Hamilton also acknowledges that the MFIs lack power to deal with corruption or crime in cases where the lender, the borrower, the community, or even the government are the criminal or corrupted entities.<sup>42</sup> Excessive stealing, lying, taxing, and other similar unlawful or unethical behaviors may drastically nullify the benefits resulting from microfinance or even convert loans into great detriments. Sadly, these detrimental circumstances are more likely to exist in underdeveloped areas where there is limited law enforcement, and where the MFIs are most needed.

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37. *Micro-Finance Literature Review*, *supra* note 30, at 5.

38. Glynnis McIntyre, *Microfinance: An Analysis of Challenges and Success in West Africa*, in PROCEEDINGS OF THE NATIONAL CONFERENCE ON UNDERGRADUATE RESEARCH (NCUR) 2012, at 715 (Weber State Univ., Ogden, Utah, Mar. 29-31, 2012), <http://www.ncurproceedings.org/ojs/index.php/NCUR2012/article/download/210/156>.

39. Alissa Alvarez, *10 Global Microfinance Success Stories*, NEXTBIGWHAT (Jan. 2, 2012), <https://mag.nextbigwhat.com/microfinance-success-stories-worldwide-297/>.

40. Nick Hamilton, *The Pros and Cons of Microfinance – A View from the Field (Part 2)*, KIVA: FELLOWS BLOG (May 24, 2011), <http://pages.kiva.org/fellowsblog/2011/05/24/the-pros-and-cons-of-microfinance-a-view-from-the-field-part-2>.

41. *Id.*

42. *Id.*



Harvard Professor of Public Policy Rohini Pande also shared stories of failure, along with great triumphs of microfinance. In particular, Pande explained how one woman in southern India received a \$200 loan, but had no experience handling finances and struggled to repay the loan.<sup>43</sup> Pande still believes that microfinance can be a powerful tool, but, in most cases, a “lack of credit rating systems for individuals and the lack of regulation to address market failure with subsidies are the biggest hurdles to successful microfinance in developing countries.”<sup>44</sup> The questions then become, how can policy makers better contribute to the microfinance market to optimize its benefits, and is there an opportunity to tailor this financial system towards indigenous populations in particular?

### *B. Regulating Microfinance Institutions*

Due to microfinance’s recent popularity in the public eye, many governmental bodies have already started to regulate the sector.<sup>45</sup> A Bank of Zambia official observed that the success of microfinance caused a surge of donations into this historically unregulated sector and consequently caused “a risky, rapidly growing, ungoverned sector with significant gaps in accountability, transparency, stability and efficiency.”<sup>46</sup> Many ensuing problems included a lack of focus on sustainable and transparent service, poor or non-existent external reporting, imposters posing as MFI agents, giving out credit with insufficient risk analysis, time periods, or amounts, and many more.<sup>47</sup> The regulation of microfinance, however, can safeguard sustainability for these institutions. New and improved laws could strengthen transparency and efficiency which would protect borrowers and possibly mitigate cost so that credit would be less expensive.<sup>48</sup> Consequently, many governments have begun the process of regulating this sector.<sup>49</sup> It is important, however, that these regulations do not strangle,

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43. Jane Finn-Foley, *Using Evidence to Analyze the Success of Microfinance Programs*, HARV. KENNEDY SCH. (Feb. 13, 2013), <https://www.hks.harvard.edu/news-events/news/articles/pande-microfinance-programs>.

44. *Id.*

45. See Jonathan Morduch, *So How Exactly Do We Regulate Microfinance?*, CGAP (Jul. 9, 2010), <http://www.cgap.org/blog/so-how-exactly-do-we-regulate-microfinance>.

46. Edna Mudenda, *Microfinance Regulation and Supervision in Zambia*, DEV. BULL., Feb. 2002, at 53, 53 (issue no. 57), <https://www.microfinancegateway.org/sites/default/files/mfg-en-paper-microfinance-regulation-and-supervision-in-zambia-2002.pdf>.

47. *Id.*

48. See *id.* at 54.

49. See *id.*; see also Esther Tagoe, *Ghana: BOG to Weed Out Unscrupulous Microfinance Institutions*, ALLAFRICA (Aug. 19, 2016), <http://allafrica.com/stories/201608>

either by poor regulation or over-regulation, institutions that offer microfinance service.<sup>50</sup>

Regulation has caused an increase in cost for the MFIs.<sup>51</sup> Ideally, the microfinance system would want to operate in the circumstances that provide the lowest cost possible, not only so they are not crowded out by larger, profit seeking financial institutions, but so they can continue to expand and reach the segments of the population that are without financial resources altogether.<sup>52</sup> States could assist the MFIs and help overcome these growing costs by establishing a mechanism to provide a large and cheap source of funds to the MFIs. One effective way to do this would be through drafting international agreements.

#### *IV. Proposed Solution to Help Microfinance and to Target Indigenous Populations*

##### *A. Forming a Treaty to Improve Funding*

Under the Vienna Commission on the Law of Treaties, states may form legal obligations with one another through the formation of a treaty, which is a binding agreement between two states in written form, governed by international law.<sup>53</sup> Once a treaty is negotiated and the provisions are agreed upon, the treaty is submitted to each party nation for signature.<sup>54</sup> The signature does not make the state a party to the nation, but does create the obligation to not take steps to defeat the object and purpose of the treaty.<sup>55</sup> Once the treaty is signed, a state will take the treaty back for approval by the domestic body of government.<sup>56</sup>

At this point, individual state governments may decide to make reservations to the provisions of the treaty and submit them with the

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190970.html; Allan Olingo & Bernard Busuulwa, *East Africa: Kenya's Cap on Interest Rates Could Impact EAC Monetary Union*, ALLAFRICA (Aug. 27, 2016), <http://allafrica.com/stories/201608290321.html>.

50. See Olingo & Busuulwa, *supra* note 49.

51. Vincent Yu, Rahim Damji, Vrushank Vora & Lokesh Anand, *Regulation on Microfinance: Effect upon Profitability and Loan Diversity*, UCHICAGO UNDERGRADUATE BUS. J., Spring 2014, [https://careeradvancement-newdev.uchicago.edu/sites/default/files/ucib-journal/regulation\\_on\\_microfinance.pdf](https://careeradvancement-newdev.uchicago.edu/sites/default/files/ucib-journal/regulation_on_microfinance.pdf).

52. See generally *id.*

53. Vienna Convention on the Law of Treaties art. 2, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

54. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 81 (2d ed. 2012).

55. Vienna Convention, *supra* note 53, art. 18.

56. MURPHY, *supra* note 54, at 81.

document of ratification to the United Nations (“UN”).<sup>57</sup> Any reservations made may not conflict with the overall object or purpose of the treaty itself;<sup>58</sup> those reservations that do not cause a conflict can then either be accepted or rejected by the other states parties to the treaty.<sup>59</sup> States that accept another’s reservations will enter into a legal obligation with the reserving state to the extent of the reservations.<sup>60</sup> For any reservations that are rejected, the provisions that the rejections are referring to are removed, and no legal obligation will exist between the reserving state and the rejecting state on that specific provision. The states, however, will still enter into the treaty with one another on all other provisions, unless a rejecting state explicitly states that they do not wish to be parties to a treaty with the reserving state at all.<sup>61</sup> Holistically, this means that several states can all be parties to a treaty and have primary legal obligations to one another, which would be considered essential to the object and purpose of the treaty. The states may, however, have varying legal obligations otherwise, due to possible reservations of other provisions and whether states accept or reject them.

### *1. Why Is a Treaty Helpful?*

A treaty on microfinance is needed because it would create legal obligations among the many interacting states that participate in microfinance. A treaty is essential since microfinance seems to primarily be an international effort.<sup>62</sup> The intricacies of treaty formation and enforcement compliment the needs of microfinance. Microfinance is in desperate need of a uniform, systematic way to increase sources of cheap funding.<sup>63</sup> This component of potential treaties would likely be treated as the object and purpose. However, if states have varying interests and concerns, they may not have the same willingness to enter into some obligations. A treaty on microfinance can attempt to mitigate barriers to the MFIs and promote their ability to help indigenous populations in numerous

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57. *Id.* at 82.

58. Vienna Convention, *supra* note 53, art. 19.

59. *Id.* art. 20.

60. *Id.* art. 21.

61. *Id.*

62. See *Microfinance: Learning from Developing Countries — and Past Experiences*, KNOWLEDGE@WHARTON (Apr. 23, 2014), <http://knowledge.wharton.upenn.edu/article/microfinance-lessons-learned-developing-countries-past-experience/>.

63. See Yu, Damji, Vora & Anand, *supra* note 51.

ways. States will still be able to restrain from entry if the obligations seem too burdensome.

## 2. Funding

Funding is probably the most essential component of microfinance since these institutions operate almost solely on the exchange of financial capital. The MFIs should try to keep the operating costs as low as possible so that they do not have to charge high interest rates. The goal of any MFI should be to obtain the lowest cost funding.<sup>64</sup> Ultimately, like any other financial institution, there are three ways to fund a MFI: (1) debt, (2) equity, and (3) deposits.<sup>65</sup>

Debt is by far the largest source of assets for most MFIs, and accounted for over one-third of the total funds to the MFIs between 2008 and 2011, and increased by \$7 billion during the same time period.<sup>66</sup> In determining where to seek debt funding, the Consultative Group to Assist the Poor (“CGAP”) made an interesting discovery in the affordability between cross-border and domestic sources:

Clearly cross-border, hard currency debt often appears cheaper than [sic] local debt because of lower nominal interest rates. But even when cross-border debt was denominated in local currency, managers saw the foreign debt as less expensive than domestic debt. Cross-border debt may have longer tenors, be cheaper, and often require less collateral as compared with local debt because foreign funders are more familiar with MFI risk and/or because their social motivation leads them to accept terms that are below levels that would maximize profits. (Foreign lenders also have started competing against each other more, which may be leading to lower cross-border interest rates.)<sup>67</sup>

It may be imperative then that policy makers ensure that cross-border lending is as unhindered as possible.

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64. See RANI DESHPANDE ET AL., CGAP BRIEF, MFI CAPITAL STRUCTURE DECISION MAKING: A CALL FOR GREATER AWARENESS 4 (Aug. 2007), <https://www.cgap.org/sites/default/files/CGAP-Brief-MFI-Capital-Structure-Decision-Making-A-Call-for-Greater-Awareness-Aug-2007.pdf>.

65. Ralitsa Sapundzhieva, *Funding Microfinance – A Focus on Debt Financing*, MIX MARKET (Nov. 1, 2011), <https://www.themix.org/publications/microbanking-bulletin/2011/11/microfinance-funding-microfinance-debt-financing>.

66. *Id.*

67. DESHPANDE ET AL., *supra* note 64, at 1.

Funding through equity is another option, but tends to be the smallest form of funding for the MFIs.<sup>68</sup> This is likely due to the fact that investments made into microfinance institutions are not seen as the most profitable, and therefore, mainly quasi-commercial investors who are more socially motivated, rather than profit maximizing, tend to be the investors for this sector.<sup>69</sup> Since the mid-2000s, organizations have started to pool their money to create microfinance investment funds, and some commercial investors have started to become interested in these types of funds.<sup>70</sup>

Deposits are the last type of funding typically available to the MFIs. These are the cheapest source of funds and appear to be fairly stable.<sup>71</sup> Additionally, some states are having debates about whether the MFIs should allow for consumers to make deposits in their institutions. For example, the Reserve Bank of India ("RBI") contends that the MFIs should not be allowed to accept deposits because they want to ensure that deposits are made in safe and regulated institutions, such as banks.<sup>72</sup> While the RBI's conservatism is aimed at making sure the deposits are kept in safe institutions, many of the poor do not have access to larger banks, so this action may completely remove the opportunity to save in a bank altogether.<sup>73</sup> Some states, like Egypt and Morocco, have not allowed any institution other than a formalized bank to take deposits at all.<sup>74</sup>

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68. *Id.*

69. See GAUTAM IVATURY & XAVIER REILLE, CGAP FOCUSNOTE NO. 25, FOREIGN INVESTMENT IN MICROFINANCE: DEBT AND EQUITY FROM QUASI-COMMERCIAL INVESTORS (Jan. 2004), <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Foreign-Investment-in-Microfinance-Debt-and-Equity-from-Quasi-Commercial-Investors-Jan-2004.pdf>.

70. Patrick Goodman, *Raising MFI Equity Through Microfinance Investment Funds*, in NEW PARTNERSHIPS FOR INNOVATION IN MICROFINANCE 19, 20 (Ingrid Matthäus-Maier & J.D. von Pischke eds., 2009), [http://content.schweitzer-online.de/static/catalog\\_manager/live/media\\_files/representation/zd\\_std\\_orig\\_zd\\_schw\\_orig/017/913/524/9783540766407\\_content\\_pdf\\_1.pdf](http://content.schweitzer-online.de/static/catalog_manager/live/media_files/representation/zd_std_orig_zd_schw_orig/017/913/524/9783540766407_content_pdf_1.pdf).

71. DESHPANDE ET AL., *supra* note 64, at 3.

72. Paul Fletcher-Hill, Answer to *Microfinance: Why Are MFIs Not Allowed to Accept Deposits in India?*, QUORA (Aug. 17, 2013), <https://www.quora.com/Microfinance-Why-are-MFIs-not-allowed-to-accept-deposits-in-India>.

73. Vijay Mahajan, *Rebuilding a Stronger Microfinance Sector in India*, KNOWLEDGE@WHARTON (Jul. 26, 2012), <http://knowledge.wharton.upenn.edu/article/vijay-mahajan-rebuilding-a-stronger-microfinance-sector-in-india/>.

74. David Roodman, *Where Microfinance Institutions Get Their Finance*, CTR. FOR GLOBAL DEV. (June 23, 2010), <http://www.cgdev.org/blog/where-microfinance-institutions-get-their-finance>; see also USAID, THE LEGAL AND REGULATORY ENVIRONMENT FOR MICROFINANCE IN EGYPT 20 (June 19, 2009), <https://www.microfinancegateway.org/sites/>

*B. Treaty on Funding Microfinance and Indigenous Economic Growth*

Given that deposit funding is more of a domestic source that would likely conflict with the broader security interests that many states have, a treaty on microfinance and indigenous development should focus primarily on debt or equity financing. There have been other treaties in the past whose focuses were structured pooling and use of capital for a specific purpose,<sup>75</sup> but this treaty would be the first to address funding microfinance institutions and lending to indigenous populations. Furthermore, the focus should be to establish a communal fund that will help solve issues with equity funding. While the primary cause for the lack of equity financing is the undesirability of investment opportunities in the MFIs,<sup>76</sup> governments have a great financial capability and, unlike their private counterparts, they are more driven by social issues, rather than profit.<sup>77</sup> States will be able to properly invest substantial quantities in the MFIs while spreading the risk among the different states partied to the treaty.<sup>78</sup> There are several issues that would need to be negotiated to set up this particular fund.

In order for the fund to function properly, given the varying interests of the potential parties, the treaty will need to include a complex structure for each fund in order for it to operate and be managed properly. Thankfully, the investment fund can likely be created and operated in a similar fashion to existing international financial bodies created by treaties.

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default/files/mfg-en-paper-the-legal-and-regulatory-environment-for-microfinance-in-egypt-diagnostic-study-with-focus-on-ngo-mfi-transformation-issues-jun-2009.pdf.

75. See Agreement Establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, *opened for signature* Aug. 4, 1993, 1728 U.N.T.S. 380; see also Agreement Establishing the African Development Bank, *opened for signature* May 7, 1982, 569 U.N.T.S. 353; Agreement Establishing the Asian Development Bank, *opened for signature* Dec. 4, 1965, 608 U.N.T.S. 380; Agreement Establishing the Caribbean Development Bank, *opened for signature* Jan. 26, 1970, 1401 U.N.T.S. 265.

76. See IVATURY & REILLE, *supra* note 68.

77. See *American Government: 1a. The Purposes of Government*, USHISTORY.ORG, <http://www.ushistory.org/gov/1a.asp> (last visited July 8, 2017) (explaining how national governments today significantly focus on the economic well-being of the state and public service).

78. See PABLO GOTTRET & GEORGE SCHIEBER, WORLD BANK, HEALTH FINANCING REVISITED: A PRACTITIONER'S GUIDE 45-72 (2006), <https://siteresources.worldbank.org/INTHSD/Resources/topics/Health-Financing/HFRFull.pdf>.

*1. Qualifications for Individual Treaties on Microfinance Investment Funds*

To make a treaty of this type manageable, and to maximize its benefits to the constituent parties, the treaty should spell out specific qualifications to be met prior to becoming a member. These qualifications may be as restrictive as to limit the constituent parties to the original drafters of the treaty, or they may be more broad and allow for other parties to join after they meet certain requirements.<sup>79</sup> Accordingly, drafting parties need to analyze several factors in determining membership requirements.

First, drafters should consider a specified and limited geographical area of its membership. There would be no point in pooling money from different states only to reinvest that money in the respective states again, unless there is a particular benefit in states collectively investing in each other. We tend to see these benefits when we confine membership to a geographical area because parties would be more likely to witness more residual or indirect benefits of their investments.<sup>80</sup> Second, drafters should be very particular in addressing the economic structures of each country. States with similar economies, or at least with poor and indigenous populations that occupy similar economic activities, may find that their investment funds can be more concentrated and specialized in investing in the MFIs which lend money to a consistent business activity.<sup>81</sup> Additionally, this similarity presents the opportunity to condition lending to sector targets based on a business activity. Lastly, parties need to consider the interconnectivity or similarities among the indigenous groups within their respective borders. Ideally, if similar indigenous groups can exist within multiple states, then states can join to benefit the communities that

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79. See Agreement Establishing the African Development Bank, *supra* note 75, art. 3 (allowing for new members to join the African Development Bank, so long as the party is recognized as an independent state within the African continent); see also Agreement Establishing the Asian Development Bank, *supra* note 75, art. 5 (confining membership to members of the United Nations Economic Commission for Asia and the Far East).

80. Joshua D. Coval & Tobias J. Moskowitz, *The Geography of Investment: Informed Trading and Asset Prices*, 109 J. POL. ECON. 811, 812 (2001) (showing that managers appear to earn substantial abnormal returns in their geographically proximate investments).

81. See Press Release, Cambridge Assocs., Sector-Focused Private Equity Funds Often Outperform Generalists and Should Be Considered When Building Portfolios, Says Cambridge Associates Report (Nov. 12, 2014), <https://www.cambridgeassociates.com/press-release/sector-focused-private-equity-funds-often-outperform-generalists-and-should-be-considered-when-building-portfolios-says-cambridge-associates-report/> (attributing the significantly higher returns in sector-focused equity firms over their generalist counterparts to a manager's intimate knowledge of the industry).

they collectively host within their borders.<sup>82</sup> Even if the indigenous groups are different among the constituent states, there may be additional benefits in investing in those various groups if they are so similar or interconnected that the decision to invest in these groups may create or reinforce positive regional policies.<sup>83</sup>

## 2. Organization and Decision Making

The next issue to be negotiated during the creation of this treaty would be how to make investment choices and who would have the power to make these decisions. The Agreement Establishing the African Development Bank provides a model framework for how to create an assembly of decision makers.<sup>84</sup> These agreements create an equally representative body of nationals from every state party to the treaty.<sup>85</sup> A board of directors is then elected by the representative group.<sup>86</sup> The board of directors then appoints individuals to fill executive positions which ensure that the decisions of the board are carried out as mandated.<sup>87</sup>

The treaty itself may limit or direct the ways in which directors may make their decisions. Drafting parties must construct the treaty in a manner that creates a balance between direction and freedom, enabling directors to use their best business judgment to invest in responsible but beneficial ways. However, investment choices for these funds should be governed to optimize the benefits for indigenous populations. There are two ways to accomplish this goal: (1) incorporate a protocol or guideline that requires indigenous populations' input in the decision-making process, or (2) mandate that the MFIs will not be eligible for investment opportunities unless they meet target goals in doing business with indigenous populations.

Protocols and guidelines are common when trying to structure a decision-making process that will have a substantial effect across similar

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82. See *The Sami of Northern Europe – One People, Four States*, UNITED NATIONS REGIONAL INFO. CTR. FOR WESTERN EUR., <http://www.unric.org/en/indigenous-people/273-07-the-sami-of-northern-europe--one-people-four-states> (last visited July 8, 2017).

83. Nick Williams, *Learnings from the Māori Economy and the Benefits for Australia and New Zealand*, AUSTL. IN N.Z.: THE OFFICIAL BLOG OF THE AUSTL. HIGH COMM'N IN N.Z. (Aug. 12, 2016), <https://australiainnz.com/2016/08/12/learnings-from-the-maori-economy-and-benefits-for-australia-and-new-zealand/>.

84. See Agreement Establishing the African Development Bank, *supra* note 75, art. 30.

85. *Id.*

86. *Id.* art. 32-33.

87. *Id.*



groups.<sup>88</sup> Standard guidelines and protocols are used to address the possible destruction of cultural heritage, communal land, or any other tangible item and property that has a significant meaning to an indigenous population.<sup>89</sup> However, these types of guidelines can be manipulated or interpreted to mitigate protection for indigenous populations.<sup>90</sup> Moreover, microfinance does not operate through large-scale development or projects which would typically pose a threat to cultural property.<sup>91</sup> Therefore, states would need to just ensure that indigenous populations are receiving the benefit of these funds.

While guidelines or protocols allow for more flexibility in the decision-making process, it may be better to make the commitment to guarantee that the beneficiaries of this fund are indigenous people by using quantitative targets that the MFIs must meet to make use of the investment fund. For example, states could require that a certain percentage of a MFI's business be conducted with indigenous people. States could also set a monetary target for the overall financial assistance provided to indigenous people. There may be several ways to structure a quantitative target requirement.

### 3. *Capital and Voting Power*

First, states would need to determine how much capital is going to be required by each state party to the treaty and how states could potentially continue to invest in each fund. The treaty should list a total number of authorized shares that the fund may issue. A number of these shares shall be purchased as part of an original subscription as agreed upon by the drafting parties.<sup>92</sup> This amount would need to be determined during negotiations,

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88. See COUNCIL FOR INT'L ORG. OF MED. SCI. & WORLD HEALTH ORG., INTERNATIONAL ETHICAL GUIDELINES FOR EPIDEMIOLOGICAL STUDIES 3 (Feb. 2008), <https://www.ufrgs.br/bioetica/cioms2008.pdf>; see also WORLD BANK OPERATIONS MANUAL: OP 4.10, *supra* note 17.

89. See INTER-AGENCY SUPPORT GROUP ON INDIGENOUS PEOPLES' ISSUES THE KNOWLEDGE OF INDIGENOUS PEOPLES AND POLICIES FOR SUSTAINABLE DEVELOPMENT: UPDATES AND TRENDS IN THE SECOND DECADE OF THE WORLD'S INDIGENOUS PEOPLE 10 (June 2014), [http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper\\_%20Traditional%20Knowledge%20-%20rev1.pdf](http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper_%20Traditional%20Knowledge%20-%20rev1.pdf) (listing numerous guidelines and protocols and describing how and why indigenous populations' input is included to address key social issues).

90. Gordon & Shakya, *supra* note 15.

91. See *What Is Microfinance?*, *supra* note 24. But see *What We Do*, WORLD BANK, <http://www.worldbank.org/en/about/what-we-do> (last visited July 8, 2017).

92. See Agreement Establishing the African Development Bank, *supra* note 75, at annex A.

and depends on the number of interested states and the minimum amount needed for the funds to function properly. It will be necessary to determine the currency under which the funds will operate and which exchange rate will be used for contributions or distributions.

Next, the amount invested will need to be translated into a form of voting power and control so that equitable management rights are given to states who have contributed more to each fund. Instead of accounting for a state's contributions purely through the monetary amounts they supply, the funds should issue shares and sell those shares to states that are parties to the treaty.<sup>93</sup> For example, the Agreement Establishing the African Development Bank provides:

Each member shall have 625 votes and, in addition, one vote for each share of the capital stock of the Bank held by that member, provided, however, that in connection with any increase in the authorized capital stock, the Board of Governors may determine that the capital stock authorized by such increase shall not have voting rights . . . .<sup>94</sup>

This organizational structure allows for fairness and proportionality between contributions and managerial rights, but it also could provide a mechanism for the easy reallocation of power if contributions change over time.

#### *4. Withdrawal and Termination of the Treaty*

Another important consideration is the process of withdrawal. While withdrawal is not optimal for the effectiveness of the treaty, it is important to realize that states will be reluctant to become a party to the treaty if there are not possible means for withdrawal. It is best to include a clear means for withdrawal, but there is difficulty in determining how to withdraw and pay out states who have invested in the fund. Most international agreements that require a pooling of state money tend to allow for withdrawal from the treaty at will, so long as proper notice and procedures are followed.<sup>95</sup> For example, the Agreement Establishing the Asian Development Bank states:

Any member may withdraw from the Bank at any time by delivering a notice in writing to the Bank at its principal office.

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93. *See id.* art. 5-6.

94. *Id.* art. 35.

95. *See id.* art. 6; Agreement Establishing the Asian Development Bank, *supra* note 75, art. 5.

Withdrawal by a member shall become effective, and its membership shall cease, on the date specified in its notice but in no event less than six (6) months after the date that notice has been received by the Bank. However, at any time before the withdrawal becomes finally effective, the member may notify the Bank in writing of the cancellation of its notice of intention to withdraw. A withdrawing member shall remain liable for all direct and contingent obligations to the Bank to which it was subject at the date of delivery of the withdrawal notice. If the withdrawal becomes finally effective, the member shall not incur any liability for obligations resulting from operations of the Bank effected after the date on which the withdrawal notice was received by the Bank.<sup>96</sup>

Presumably, states are reluctant to enter into binding agreements which require them to appropriate national funds to an international body if they do not have the option to withdraw at will. This is due to the fact that economic conditions of a particular country, and therefore the need for monies to implement policies, vary and are cyclical.<sup>97</sup> States may try to argue for allowed withdrawal due to a fundamental change in circumstances. These fundamental changes, however, only apply to changes that would not be foreseeable<sup>98</sup> and cyclical trends in the economy. Even the underperformance of these funds would likely not constitute an unforeseeable change since cyclical trends have been observed historically, and since a risk is always assumed as part of the very nature of an investment opportunity.<sup>99</sup>

Expressly stating that withdrawal may be at will probably will encourage more states to participate in the funds, but this leaves the requirement of notice as the only protection to possible changes in the funds membership. Another option to try to provide more stability in fund membership would be to allow for withdrawal at will only in the cases where the funds do not yield a profitable return. So long as states are yielding a profit from the funds, they will be required to stay. This may mean that their money will be

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96. Agreement Establishing the Asian Development Bank, *supra* note 75, art. 41.

97. See generally Alberto Alesina, *Fiscal Policy After the Great Recession*, 40 ATLANTIC ECON. J. 429 (2012), [http://scholar.harvard.edu/files/alesina/files/fiscal\\_policy\\_after\\_the\\_great\\_recession\\_atl\\_econ\\_j\\_2012.pdf?m=1364586265](http://scholar.harvard.edu/files/alesina/files/fiscal_policy_after_the_great_recession_atl_econ_j_2012.pdf?m=1364586265).

98. Vienna Convention, *supra* note 53, art. 26.

99. See generally John Lintner, *Corporation Finance: Risk and Investment in DETERMINANTS OF INVESTMENT BEHAVIOR* 215 (Robert Ferber ed., 1967), <http://www.nber.org/chapters/c1237.pdf>.

tied up in the investment regardless of if the states believe a more profitable or better use of their money is available.

If a state can withdraw, the treaty will need to address the settlement of the withdrawing party's accounts. This process can become difficult since a party's money may not be available if capital is tied up in investments. Parties can draft a schedule to repurchase shares, or in the case where there may be few or only two parties, parties may cease operation and issue capital back out proportionately as loans are repaid and profits are issued.<sup>100</sup>

### 5. *Dispute Resolution*

A method for dispute resolution should be spelled out in the treaty. Many treaties attempt to resolve disputes by providing an arbitration clause.<sup>101</sup> In particular, many states who deal with foreign direct investment choose to arbitrate through the Center for the Settlement of Investment Disputes.<sup>102</sup> If the parties to the treaty do not wish to arbitrate, they can choose to submit their case to an agreed upon court set out in the treaty.<sup>103</sup> The most common international court to submit disputes to is the International Court of Justice ("ICJ"). There are three ways for this court to gain jurisdiction in a contentious case: (1) the parties can sign or enter into a *compromise*,<sup>104</sup> (2) the parties can pre-authorize the ICJ to have jurisdiction via a compromissory clause in the treaty,<sup>105</sup> and (3) the states may opt into the ICJ jurisdiction on any issues through unilateral declaration and the ICJ will be able to hear the case if both parties have consented to jurisdiction.<sup>106</sup> These options should be considered when states are drafting the treaty if they intend to litigate resulting disputes before the ICJ.

### 6. *Immunity*

The treaty should also address immunity for the investment funds from the domestic jurisdictions of states partied to the treaty. As an international

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100. See Agreement Establishing the African Development Bank, *supra* note 75, art. 6, Agreement Establishing the Asian Development Bank, *supra* note 75, art. 5.

101. See generally Energy Charter Treaty, *opened for signature* Sept. 30, 1999, 2080 U.N.T.S. 95.

102. Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT'L STUD. Q. 1, 4 (2010).

103. See BARRY CARTER & ALLEN WEINER, INTERNATIONAL LAW 301 (6th ed. 2011).

104. *Id.* at 299.

105. *Id.* at 301.

106. *Id.* at 306.

organization,<sup>107</sup> an investment fund created by multiple constituent states tends to enjoy numerous types of immunity.<sup>108</sup> However, states have begun to domestically implement restrictive immunity for international organizations on the same level of immunity given to sovereign states.<sup>109</sup> Additionally, restrictive immunity is beginning to be expressly incorporated into drafting international agreements.<sup>110</sup> While the concept of restrictive immunity itself is a widely used form of immunity, there can be complications in drafting it into international agreements depending on how a state has integrated international law into its domestic legal system.<sup>111</sup> If a treaty is self-executing in a domestic jurisdiction, then the drafters need not look further than the provisions of the treaty itself for the law that will prevail domestically in the state.<sup>112</sup> However, if the treaty requires executing legislation within the state, then drafters should make sure that the constituent states have all adopted the same form of immunity that the treaty attempts to impose.<sup>113</sup>

#### *V. Microfinance Investment Treaty Between Australia and New Zealand*

Many states are in a unique position to enter into a treaty on investing in microfinance with one another. This type of treaty could be of particular benefit to Australia and New Zealand, allowing them to better provide for their indigenous populations through microfinance.

#### *A. Australia and the Aborigines*

Australia is an ideal starting location for a treaty to invest in microfinance. The country itself is already very developed, with the economic capabilities to contribute to an investment fund for the MFIs.<sup>114</sup>

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107. See Fatemeh Mihandoost, *Immunity of International Organizations from the Perspective of International Law*, 9 J. POL. & L. 41, 41 (2016) (defining international organizations as “second subjects of international law . . . that have a legal personality distinct from their constituent states, have the same property, funds, and employees regarding the performance of their duties as while they are on a mission in the member states or third states and have the same immunities as diplomats”).

108. *Id.* at 43-44 (stating that international organizations typically enjoy three types of immunity: judicial immunity, occupational immunity, and immunity from prosecution).

109. See 22 U.S.C. § 288a (2012).

110. Agreement Establishing the Asian Development Bank, *supra* note 75, art. 49-57.

111. MURPHY, *supra* note 54, at 89.

112. See CARTER & WEINER, *supra* note 103, at 164.

113. See *id.*

114. See *Australia*, WORLD BANK, <http://data.worldbank.org/country/australia> (last visited July 8, 2017).

Moreover, the MFIs already exist in Australia and have been performing well in the areas in which they operate.<sup>115</sup> A major concern for the MFIs in Australia is geographical access to financial tools for those communities which exist in the more remote areas of the country.<sup>116</sup> However, there are some small financing projects which have managed to reach these areas.<sup>117</sup>

Australia is a prime candidate for this type of treaty because it has a disadvantaged indigenous population that is impacted by poverty. Aboriginal people make up about 2.5% of the Australian population.<sup>118</sup> Of this entire Aboriginal population, about 40% of them live under the national poverty line for the country, although this number has been declining slowly in recent years.<sup>119</sup> 25% of this indigenous population lives in remote areas of Australia, typically far from urban centers where the MFIs are found and accessed for financial help.<sup>120</sup> The Secretary at the Australian High Commission in Wellington, Nick Williams, explains this struggle:

The idea of indigenous economic wealth which contributes to self-determining and self-sustaining social and economic outcomes is arguably a concept that is still developing in Australia. There are some indigenous communities, organisations and individuals that have been successful in commercial endeavours and have been able to channel economic wealth into community development activities and programs. In my view, however, most public and private efforts to support the development of indigenous Australians has largely been

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115. *Micro Finance Proving a Success in Australia – Report*, PRO BONO AUSTRALIA (Mar. 13, 2012), <https://probonoaustralia.com.au/news/2012/03/micro-finance-proving-a-success-in-australia-report/> (showing the National Australia Bank's (NAB) support of micro enterprise has generated more than \$44 million in turnover and has created approximately 300 jobs over the past five years).

116. INST. FOR REG'L DEV., *THE FUTURE OF MICRO CREDIT IN AUSTRALIA: OPPORTUNITIES FOR ECONOMIC EMPOWERMENT 7* (Aug. 2009), [http://www.utas.edu.au/\\_\\_data/assets/pdf\\_file/0009/61938/The-future-of-Micro-Credit-in-Australia-Opportunities-for-Economic-Empowerment-Report,-August-2009.pdf](http://www.utas.edu.au/__data/assets/pdf_file/0009/61938/The-future-of-Micro-Credit-in-Australia-Opportunities-for-Economic-Empowerment-Report,-August-2009.pdf).

117. *See id.* at 35.

118. FIGHTING INDIGENOUS IMPRISONMENT (Journeyman Pictures 2015).

119. Gillette Hall & Gary Patrinos, *Indigenous Peoples, Poverty and Development 6* (Apr. 2010) (draft manuscript), [http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/full\\_report.pdf](http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/full_report.pdf).

120. SBS Viceland, *Food Availability in Remote Indigenous Communities | The Feed*, YOUTUBE (Oct. 20, 2015), <https://www.youtube.com/watch?v=deaO2n6pjEk>.

designed and delivered under a framework of economic and social welfare dependence.<sup>121</sup>

Today, economic well-being for these communities in these more remote areas is being threatened for several reasons. As nonindigenous populations moved into the areas, many Aborigines lost their jobs.<sup>122</sup> Moreover, the Australian government has been wrestling with balancing the economic interest of commercial industries with the interest of Aboriginal groups who still, in many ways, live off the land.<sup>123</sup> For example, commercial farmers have petitioned and requested that rivers and other bodies of water be altered to better provide for the agricultural industry, especially during dry season.<sup>124</sup> However, this has a negative impact on Aboriginal communities who use these water sources as an important source of hunting and foraging. Therefore, the Australian government launched the 2004 National Water Initiative in order to urge state governments to consider and include Aborigines in water planning.<sup>125</sup> The initiative discovered that many Aboriginal communities operate in cycles of hunting and foraging within the current ecosystems and they use the items they forage and catch to supplement any food they have to buy from local stores.<sup>126</sup> If ecosystems are changed in a way that depletes a water source, and consequently the food sources, then these communities have to buy more food from stores, increasing expenses, and thus families are not able to consume as much food as they do now.<sup>127</sup> Additionally, food sharing is common and relied upon not only within specific communities, but among various communities as well, so the impact of a depleting ecosystem in one area could have a larger effect on a greater area.<sup>128</sup> State governments are stuck deciding between commercial farmers need for water and ecosystem sustainability. If they choose to redirect water in any way, it seems clear that Aborigines in these more remote communities will need financial assistance.

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121. Williams, *supra* note 83.

122. *Id.* (indicating that in 1968, about 85% of the indigenous population in these remote areas were employed, but today that has nearly reversed with about 85% of the indigenous population in these areas being unemployed).

123. See *Aboriginal Water Values and Management in Northern Australia*, CSIRO (Feb. 10, 2013), [http://www.csiro.au/news/transcripts/YouTubeTranscripts/2013/Feb/Aboriginal\\_water\\_values.html](http://www.csiro.au/news/transcripts/YouTubeTranscripts/2013/Feb/Aboriginal_water_values.html) (transcript of YouTube video).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

Another reason Australia is a great candidate for the implementation of this treaty is its desire to help its indigenous population. Aboriginal rights are a highly discussed topic in Australian politics and the country has tried to take steps to provide protection to the Aborigines. Apart from the National Water Initiative, the country also officially recognizes the Mabo, or Aboriginal customary law, in its legal system.<sup>129</sup> High crime and incarceration rates are observed in Aboriginal communities. Finally, the remoteness and low population density of these areas may make it difficult to create a successful business, whether Aborigines in these areas would be able to convert micro loans into successful entrepreneurial ventures that would yield profit and prevent a poverty trap is a major concern.<sup>130</sup> Many microfinance loans can be acquired in order to obtain equipment necessary to bring goods to market,<sup>131</sup> but, given the large breadth of land in remote Australia, if people still find themselves too far removed from their target markets, there are still other ways to use loans to generate economic activity. For example, the Bawinanga Aboriginal Corporation is an Aboriginal-controlled, white-managed organization in central Arnhem Land that has successfully facilitated the diverse economic aspirations of its Aboriginal members.<sup>132</sup> Corporations like these can allow Aborigines to pool their funds to overcome any obstacles associated with their remoteness, and any dividends paid out can be used to satisfy their micro loans. Other economists believe that untapped mines in these remote areas may be possible business ventures that could be the solution to closing the

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129. See *supra* note 123; see also *Mabo Case*, AUSTRALIAN INST. OF ABORIGINAL & TORRES STRAIT ISLANDER STUD., <http://aiatsis.gov.au/explore/articles/mabo-case> (last visited July 9, 2017).

130. See *The Most Detailed Map of Australian Population Density Ever*, THEGUARDIAN: AUSTL. NEWS DATABLOG (Dec. 21, 2014, 23:48 EST), <https://www.theguardian.com/news/datablog/ng-interactive/2014/dec/22/the-most-detailed-map-of-australian-population-density-ever> (showing that less than 2% of Australians live in remote areas of the Australian continent).

131. See *Microfinance Products*, MICROFINANCE & MICROCREDIT, <http://www.microfinanceinfo.com/microfinance-products/> (last visited July 9, 2017).

132. Jon Altman, *Economic Futures on Aboriginal Land in Remote and Very Remote Australia: Hybrid Economies and Joint Ventures*, in CULTURE, ECONOMY AND GOVERNANCE IN ABORIGINAL AUSTRALIA 121, 122 (Diane Austin-Broos & Graynor Macdonald eds., 2005), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.459.7150&rep=rep1&type=pdf>.



economic gap between the Aborigines and the rest of the Australians in the country.<sup>133</sup>

### *B. New Zealand and the Maori*

New Zealand would be an excellent partner for Australia in drafting a treaty on investment in microfinance. Like Australia, New Zealand is a developed nation with a good economic capability.<sup>134</sup> Additionally, the MFIs are present and successful in New Zealand as well.<sup>135</sup>

The Maori are the prevalent indigenous group in New Zealand. In fact, a 2001 census showed that one in seven people in New Zealand belong to the Maori ethnic group.<sup>136</sup> Despite the large population of Maori within the country, the group is still disadvantaged compared to the average population. In 2001, the median income for Maori adults was less than \$15,000 per year and the Maori population suffered from about a 50% unemployment rate.<sup>137</sup> Despite these inequities, New Zealand has made great strides in helping the Maori. In recent years, average wages for Maori citizens have been steadily approaching the wages of average New Zealand citizens.<sup>138</sup> The Maori economy is estimated to be about \$36 billion,<sup>139</sup> and the Maori occupy significant portions of key sectors in New Zealand.<sup>140</sup> Despite this communal success, many of the Maori suffer from third world

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133. See Jens Korff, *Aboriginal Economy: Can It Catch Up Through Mining?*, CREATIVE SPIRITS (Jan. 12, 2014), <https://www.creativespirits.info/aboriginalculture/economy/aboriginal-economy-can-it-catch-up-through-mining>.

134. See *New Zealand*, WORLD BANK, <http://data.worldbank.org/country/new-zealand> (last visited July 9, 2017).

135. See *Kiwibank & Nga Tangata: Tackling Poverty in NZ Through Microfinance*, SUSTAINABLE BUS. NETWORK, <http://sustainable.org.nz/sustainability-stories/kiwibank-nga-tangata-tackling-poverty-in-nz-through-microfinance#.WFyuF6lrKTC> (last visited July 9, 2017).

136. *Census Snapshot: Māori*, STATS NZ, [http://www.stats.govt.nz/browse\\_for\\_stats/people\\_and\\_communities/maori/census-snapshot-maori.aspx](http://www.stats.govt.nz/browse_for_stats/people_and_communities/maori/census-snapshot-maori.aspx) (last visited July 9, 2017).

137. *Id.*

138. See Brian Easton, *Income and Wealth Distribution – Income Distribution by Gender, Age, and Ethnicity*, TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND (Mar. 11, 2010), <http://www.teara.govt.nz/en/graph/23809/incomes-of-maori> (containing information pulled from the New Zealand Census).

139. maraetv, *Can the Government's Budget 2012 Deliver for the Maori Economy and the NZ Economy*, YOUTUBE (May 7, 2012), <https://www.youtube.com/watch?v=sOTQm9Hc-HI>.

140. See NZTEvideo, *Engaging with Maori Businesses in New Zealand*, YOUTUBE (Aug. 31, 2015), <https://www.youtube.com/watch?v=cP3D9DivqM0> (describing the scale of Maori involvement in the New Zealand economy and how they occupy significant portions of the beef, sheep, dairy, fishing, and forestry markets).

housing and disease, particularly on the northern island of the country,<sup>141</sup> which is where a majority of the Maori population live.<sup>142</sup>

New Zealand and the Maori also have close economic ties to Australia which raises a particular benefit in creation of a treaty on microfinance. Secretary Williams elaborates:

For New Zealand, the Australian market is an important source and destination of investment and trade. It also serves as a market for many New Zealand businesses seeking to build scale and increase global connectivity. Exploring opportunities for Māori and indigenous partnerships and commercial ventures could help build the capacity and scale of businesses operating in sectors such as mining and natural resource development; primary industries; infrastructure development; and tourism. In addition, growing closer cultural connections could facilitate greater sharing of ancient practices related to traditional governance and lore; land and sea management; and domestic and international trading.<sup>143</sup>

Given the Secretary's view, by investing in the indigenous communities of the other country, Australia and New Zealand may witness domestic economic benefits that other states may not see with similar agreements.

### *C. Tailoring the Treaty to These Two States*

Knowing this basic background about Australia and New Zealand, it seems that both states would be excellent candidates for a bilateral treaty establishing an investment fund for the MFIs within the two states. The next question is how these states should address the particular issues discussed earlier in drafting the treaty.

#### *1. Qualifications for Membership*

While a treaty for investing in microfinance could be formed to be very inclusive and flexible in allowing other members to join, the specific treaty between Australia and New Zealand should be absolutely exclusive in its membership. It would behoove the members of the treaty to keep membership within close geographical proximity, which only leaves a limited number of states to consider as additional members. Of these states,

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141. maraetv, *supra* note 139.

142. *Census Snapshot: Māori*, *supra* note 136.

143. Williams, *supra* note 83.

very few of them are as developed as Australia and New Zealand and would be able to contribute substantially to the investment fund.<sup>144</sup>

However, there is an argument to allow other states in the Pacific to join the treaty as well. The Pacific Region is very connected and Secretary Williams states:

There could also be regional benefits of increasing Māori and indigenous economic engagement. Australia and New Zealand play a major role in the prosperity and stability of the Pacific region. Increasing the capability of Māori and indigenous businesses to create closer partnerships with Pacific states could have both tangible and intangible cultural and commercial benefits for our region.<sup>145</sup>

If the entire region could be affected, should the treaty not allow for the inclusion of other Pacific states in the area, like Papua New Guinea, Indonesia, or Malaysia? Moreover, many of the other states in the Pacific have indigenous populations that are very similar to the Maori and Aborigines,<sup>146</sup> and the MFIs are present in these states within Oceania and are in need of additional funding.<sup>147</sup> While a treaty on microfinance investing in the other Oceanic states would be very beneficial for those smaller states and their indigenous populations, it is still probably best to exclude them from the treaty and rather to form a separate treaty with more limited contributions.

## 2. Organization and Decision Making

The organization of the investment fund should be structured the same way as other treaties of its type.<sup>148</sup> The difficulty is in deciding the best way to guide or direct the decision making of the managers so that the states can

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144. See *List of Oceanian Countries by GDP*, STATISTICS TIMES (Feb. 22, 2017), <http://statisticstimes.com/economy/oceanian-countries-by-gdp.php> (Compiling data from the International Monetary Fund World Economic Outlook for October 2016).

145. Williams, *supra* note 83.

146. See generally *Australia and Oceania: Human Geography*, NAT'L GEOGRAPHIC, <http://nationalgeographic.org/encyclopedia/oceania-human-geography/> (last visited July 9, 2017).

147. See Rohan Poojara & Rubaab Bhangu, *Microfinance and Young Indonesia*, DIPLOMAT (May 23, 2011), <http://thediplomat.com/2011/05/microfinance-and-young-indonesians/>; see also *Fiji*, SPBD: SOUTH PAC. BUS. DEV., <http://www.spbdmicrofinance.com/spbd-network/fiji> (last visited July 9, 2017).

148. See Agreement Establishing the African Development Bank, *supra* note 75, art. 32-33.

ensure that money is appropriately invested to benefit indigenous populations.

Another issue that Australia and New Zealand will have to address is the stark differences between the standing of the Aborigines in Australia and the Maori in New Zealand; more Aborigines are in poverty in Australia than the Maori in New Zealand.<sup>149</sup> The Maori are more economically powerful in their own country, and for Australia, could potentially be a more profitable group in whom to invest.<sup>150</sup> As a result, there may be more of an incentive to invest in the New Zealand Maori, or the managerial body of the investment fund may skew their investments to the MFIs who work with the Maori, since the Maori present safer and smarter business decisions.

### 3. *Capital and Voting Power*

The initial capital required by each country, and consequently, the voting power each country will have when electing directors to manage the fund will be a highly negotiated topic, but one that will primarily concern the financial analysts of the states. However, the legal implications of one country contributing more than the other, can result in the inability of a minority shareholder to elect a director.<sup>151</sup> While Australia would likely want to have the greatest voting power if they contribute more (and New Zealand will likely expect them to as a more economically powerful country), there are still certain alternatives to standard voting of directors that New Zealand can negotiate in drafting the treaty that would protect the power of their votes.

First, New Zealand can demand that the voting process be done in the form of cumulative voting.<sup>152</sup> The second option would be to require a specific number of the total directors to be elected by each member and then the remaining members can be elected by the voting process.<sup>153</sup> The

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149. *Indigenous Australians in Poverty More than Double the Rate of NZ Māori People: Study*, NITV (Apr. 21, 2016), <http://www.sbs.com.au/nitv/article/2016/04/21/indigenous-australians-poverty-more-double-rate-nz-maori-people-study>.

150. *See supra* notes 138-40. *But see* Jens Korff, *Successful Aboriginal Economic Developments*, CREATIVE SPIRITS (Apr. 5, 2017), <https://www.creativespirits.info/aboriginal-culture/economy/successful-aboriginal-economic-developments> (indicating \$1.18 billion in income generated by Australian indigenous populations as opposed to the \$36 billion generated by the Maori in New Zealand).

151. *See* CHARLES O'KELLEY & ROBERT THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 164 (7th ed. 2014).

152. *See id.* (discussing the process and structure of cumulative voting).

153. U.N. Charter art. 23, ¶ 1.

decision between these alternatives, or whether they will be used at all, greatly depends on the amount that is contributed. If the contributions of each party are close, they may not elect to use any alternative. If New Zealand is a clear minority holder, then the parties may use cumulative voting.

Given that voting mechanisms are greatly determined by contributions and voting power, the parties should consider ensuring the stability of voting power with one another. Since the treaty is bilateral, the parties should express that capital contributions made after the initial contribution can only occur with the consent of all the parties. This will still allow for the possibility of increasing capital in the investment fund, but only in a way which the parties consent (likely so that each party contributes enough capital to maintain the same voting power).

#### 4. *Withdrawal and Termination*

As aforementioned, these parties can draft either an at-will or conditional withdrawal provision.<sup>154</sup> Excluding withdrawal will likely appear as an unreasonable option since it would, essentially, permanently commit the parties to investing in a specific industry even if it proves to be unsuccessful.<sup>155</sup> Preferably, Australia and New Zealand will choose a conditional withdrawal since it will provide more certainty in the funds contributions and since they can use the condition to declare a wrongful withdrawal<sup>156</sup> and invoke a penalty spelled out in the treaty (like the forfeiture of contributions or some fee), which would help prevent the loss of contributions in the case of withdrawal.

Whether the parties choose to allow for an at-will withdrawal or a conditional withdrawal, a primary concern will be paying out a withdrawing party or terminating the treaty because of the withdrawal. If Australia and New Zealand elect to draft an exclusive bilateral treaty, the effects are one purely of legal procedure, since the withdrawal of one party

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154. *See* Agreement Establishing the Asian Development Bank, *supra* note 75, art. 41.

155. Vienna Convention, *supra* note 53, art. 54-56. Withdrawal can only be made in conformity with a treaty or by unanimous consent. If the treaty is silent on withdrawal then withdrawal can only be made if parties intended to admit the possibility of withdrawal or if the right to withdrawal is implied by treaty. Otherwise withdrawal is prohibited. *Id.*

156. *See id.* art. 60. Wrongful withdrawal and demanding of contributions would likely constitute a material breach, especially if condition to withdrawal is expressly stated as a provision essential to the object and purpose of the treaty. A material breach also gives other parties to suspend or terminate treaty by unanimous consent. *Id.*

of a bilateral treaty immediately terminates the treaty.<sup>157</sup> Therefore, the investment fund and all of its operations will cease upon the withdrawal of a party and investments would be pulled out and distributed back to the parties in proportion to contributions (measured in shared value), unless the treaty provides for other ways to wind up the affairs of the investment fund. Should Australia and New Zealand allow for others to possibly join the treaty, then a withdrawal of one party will not terminate treaty obligations among the other parties.<sup>158</sup> Therefore, another reason to draft an exclusive treaty would be the added simplicity in drafting and efficient operation of the investment fund.

#### 5. *Dispute Resolution*

Regarding a potential treaty on funding microfinance, Australia and New Zealand would likely opt to resolve any disputes between the countries through arbitration since both states seem to prefer arbitration. In fact, “[a]rbitration is widely used and understood in New Zealand, which was an early adopter of the UNCITRAL Model Law on International Commercial Arbitration 1985.” New Zealand also passed the Arbitration Act of 1996, which governs all arbitration for the country, including international disputes. Since New Zealand has become a leader in international arbitration,<sup>159</sup> it will likely incorporate much of the Arbitration Act of 1996 into the treaty, and both parties will simply choose a neutral forum at which the arbitration will take place.

#### 6. *Immunity*

The last issue that needs to be addressed is immunity from the domestic jurisdictions of Australia and New Zealand while the investment fund is operating and investing in organizations within the two states. The simplest way to do this is to start with domestic statute and build up into the treaty. Australia adopted the International Organisations (Privileges and Immunities) Act of 1963, which allows for regulators to grant immunities up to a certain extent under various schedules.<sup>160</sup> However, Australia has

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157. Laurence R. Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634, 635-36 (Duncan Hollis ed., 2012), [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5338&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5338&context=faculty_scholarship).

158. *Id.*

159. *Id.*

160. See generally *International Organisations (Privileges and Immunities) Act 1963* (Cth) (Austl.).

adopted restrictive immunity for foreign states,<sup>161</sup> and will likely exercise that same immunity for international organizations via regulations under the International Organisations (Privileges and Immunities) Act of 1963. As of now, the Australian executive can enter into treaties, but they will not be self-executing.<sup>162</sup> However, there has been debate about the power of the executive to make international legal obligations without approval of the Australian Parliament, and a couple of bills have been pushed to try to require this approval.<sup>163</sup> While these bills would make it more difficult to enter into an agreement, they may also solve domestic execution problems if the approval comes with implementing legislation.<sup>164</sup>

New Zealand also has adopted the theory of restrictive immunity.<sup>165</sup> However, unlike Australia, treaties can be entirely self-executing and thus no implementing legislation is required.<sup>166</sup> Both states would likely draft for restrictive immunity for the investment fund. However, New Zealand, as of now, would need to make sure that Australia either has pre-authorized legislation for restrictive immunity for the investment fund, or condition the entry into force on acceptance since Australia has no statute on the books that grants restrictive immunity to all international organizations and cannot pass treaties as self-executing legislation.

### VI. Conclusion

In a time where the world constantly struggles to implement policies that protect indigenous populations or fails to correct decades of economic inequities, microfinance has gained momentum as a mechanism to help close the gap between the world's poorest populations and the wealthy. If

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161. See Gavan Griffith, *Foreign State Immunity in Australia*, in 2 ESTUDIOS EN HOMENAJE A JORGE BARRERA GRAF 837 (Instituto de investigaciones jurídicas, Mexico City 1989), <https://archivos.juridicas.unam.mx/www/bjv/libros/2/645/5.pdf>.

162. *International Law in Australia*, AUSTRALASIAN LEGAL INFO. INST., [http://www3.austlii.edu.au/au/other/liac/hot\\_topic/hottopic/2009/2/7.html](http://www3.austlii.edu.au/au/other/liac/hot_topic/hottopic/2009/2/7.html) (last visited July 9, 2017).

163. Glen Cranwell, *The Case for Parliamentary Approval for Treaties in Australia*, 8 MURDOCH UNIV. ELECTRONIC J. L. (Dec. 2001), [http://www.austlii.edu.au/au/journals/MurUEJL/2001/25.html#The Parliamentary Approval of Treaties Bill T](http://www.austlii.edu.au/au/journals/MurUEJL/2001/25.html#The%20Parliamentary%20Approval%20of%20Treaties%20Bill%20T).

164. CARTER & WEINER, *supra* note 103, at 204 (explaining congressional executive agreements within the United States legal system to be used as an example).

165. DANIEL KALDERIMIS, INT'L BAR ASS'N, ARBITRATION GUIDE: NEW ZEALAND 24 (Sept. 2013), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=278729D0-AAA9-4D8B-A7D8-A27F2E3F711D>.

166. *Part I: International Law and the Law of New Zealand*, AUSTRALIAN LEGAL INFO. INST., <http://www.austlii.edu.au/nz/other/nzlc/report/R34/R34-Part.html> (last visited July 9, 2017).

individual states find that they have a strong common interest in specific indigenous groups, then they can use treaties as a tool to not only increase funding for the MFIs. But they can also condition investments on sector lending targets or client lending targets, thereby incentivizing the MFIs to conduct more business with indigenous populations around the world. Australia and New Zealand would be ideal candidates for this type of treaty. This Comment has presented the issues that drafters of such a treaty need to consider, and has tailored solutions to those very issues for an exclusive bilateral treaty, modeled after the organizational structure of the African and Asian Development Banks, between Australia and New Zealand. Hopefully, future leaders in government will see the benefits in mutual investment in the world's poor indigenous groups, not only to fulfill a responsibility to aid their fellow man, but to do so in an economically and socially responsible way that creates business for all interested parties.