
# *Defending Pacific Ways of Life: A Peoples Social Impact Assessment of PACER-Plus*

*A report commissioned by the Pacific Network on Globalisation*

*June 2016*

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## *Acronyms*

AoA – Agreement on Agriculture
BIT – Bilateral Investment Treaty
CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women
CTH – Change of Tariff Heading
EPA – Economic Partnership Agreement
EU – European Union
EC – European Commission
FAO – Food and Agriculture Organization
FDI – Foreign Direct Investment
FIC – Forum Island Countries
GATS – General Agreement on Trade in Services
GATT – General Agreement on Tariffs and Trade
iEPA – interim Economic Partnership Agreement
ISDS – Investor-State Dispute Settlement
LDC – Least Developed Country
MFN – Most Favoured Nation
MSG – Melanesian Spearhead Group
NCD – Non-Communicable Disease
NTM – Non-Tariff Measure
NZ – New Zealand
PACER – Pacific Agreement on Closer Economic Relations
PACER-Plus – Pacific Agreement on Closer Economic Relations 'Plus'
PICTA – Pacific Island Countries Trade Agreement
PICTA TiS – Pacific Island Countries Trade Agreement Trade in Services protocol
PIF – Pacific Islands Forum
PIFS – Pacific Islands Forum Secretariat
PNG – Papua New Guinea
PR – Performance Requirement
PSR – Product Specific Rules
PTA – Preferential Trade Agreement
RoO – Rules of Origin
SPARTECA – South Pacific Regional Trade and Economic Co-operation Agreement
SPS – Sanitary and Phytosanitary
SSA – sub-Saharan Africa
SSG – Special Agricultural Safeguard
TBT – Technical Barriers to Trade
TRIMS – Agreement on Trade Related Investment Measures
TRIPS – Agreement on Trade Related Aspects of Intellectual Property Rights
TPPA – Trans-Pacific Partnership Agreement
UNCTAD – United Nations Conference on Trade and Development
US – United States of America
*WTO – World Trade Organization*

# *Foreword*

When we think of what 'development' means for the Pacific it has to start at the community level– healthy, educated, good work, culture, healthy environment and the ability to determine for ourselves our own future.

Despite this, Australia, New Zealand, even the Office of the Chief Trade Advisor are pushing ahead the free trade agreement, known as PACER-Plus, that challenges all those components of development.

Trade is not new to the Pacific, neither is being a pawn in the politics of Australia and New Zealand's aspirations. PACER-Plus is the latest in a long line of attempts by these two developed countries to shape the Pacific Islands in their interests, this time though they will be able to do so with legally binding and enforceable commitments.

Free trade agreements like PACER-Plus are characterised by secrecy and lack of transparency, often including the voices of civil society in token ways or more commonly excluding them all together. It is only after everything has been agreed and signed that people are allowed to comment on what it is that their country has sacrificed at the altar of free trade.

It is this exclusion of people that makes a social impact assessment like this one all the more important. It is the start of a more informed conversation based on evidence about what is at stake in PACER-Plus, stakes that are routinely brushed off by the true believers of free trade. A comprehensive independent SIA is the measure of the value to determine costs vs. benefits of a free trade agreement.

Pacific Leaders are aiming to conclude PACER-Plus in 2016 but there is yet to be an agreement on the table that supports development in the Pacific. It's worth remembering that when negotiations were launched, then Australian Trade Minister Simon Crean made the case that negotiation comes with no commitment to complete.

The Pacific has negotiated in good faith for 7 years and resulted in an outcome that is not in the interests of the people. This course has been run; it's time to move on.

Sold as a 'development agreement', PACER-Plus was meant to support the Pacific to trade and develop. Sadly what has been revealed is an agreement that will see Australia and New Zealand increase their exports to the region, restrict the ability of Pacific governments to make decisions about their economies, and place the importance of foreign investors above the needs of Pacific people.

PACER-Plus now represents not an opportunity for a development outcome but a distraction from the real conversation that is needed about development in the Pacific. We hope that this social impact assessment helps us get to that conversation.

# *Introduction*

Trade agreements are often sold on the promise of overly ambitious economic modelling and the inherent belief that opening up markets ultimately works out for the best. Our lives however are not made up of economic models and blind belief, they exist outside the promises of riches and are more likely comprised in the real world where inequality is increasing.

This Social Impact Assessment (SIA) aims to shed some light on the human impacts of PACER-Plus and the importance of sovereign states to exercise their right to regulate their economies.

Beginning by examining the problematic ways in which other SIAs have been approached in the region, it will look at the gendered impacts that PACER-Plus will have, how it undermines health outcomes in the Pacific, jeopardises the right to food for Pacific islanders and finally how it erodes the ability of Pacific governments to regulate.

This assessment should be read as an alternative voice to the chorus of praise that is heaped on PACER-Plus by Australia, New Zealand, international financial institutions as well as the Office of the Chief Trade Advisor. There is no vested interest by the authors in their concerns about PACER-Plus, the same cannot be said for its proponents.

This assessment is limited by the information that it has access to, yet this should not be seen as a detraction to the assessment rather an indictment to the level of exclusion that critical, informed voices of free trade endure. That this assessment exists is testament to the tireless work of civil society in defending the belief that the welfare of people should be placed above the belief in free trade.

The more information that is available to base a decision upon the better the chances are of making the best decision. Officials, ministers and leaders are all coming under pressure to conclude PACER-Plus, yet it is being done without all the information. This assessment provides the opportunity to make a better decision on PACER-Plus, one that puts people first.

# *Executive Summary*

The report titled, *Defending Pacific ways of life: A Peoples Social Impact Assessment of PACER-Plus*, was commissioned by the Pacific Network on Globalisation (PANG) to provide Pacific governments, negotiators, parliamentarians, civil society actors, customary landowners and the private sector with an alternative assessment to the impacts that PACER-Plus will have on the region.

**OCTA's Flawed Social Impact Assessment**

Serious concerns over PACER Plus are widely shared by CSOs, government officials, technical officers within regional organisations, and even business people. The demand for a social impact assessment to be carried out well before the start of negotiations on any draft text of PACER Plus chapters had been conveyed by CSOs to OCTA many months ago, to no avail. It was subsequently expressed in a proposal submitted to the Framework for Pacific Regionalism, which was signed by more than 30 Pacific civil society organisations representing a broad cross section of people from 22 Pacific Island countries.

Now, on the eve of the conclusion of PACER Plus negotiations, OCTA has commissioned an eleventh hour Social Impact Assessment. Relying on responses to a 12 page questionnaire survey, face to face consultations with a handful of 'key Non-State Actors (NSAs)' and a series of NSA Consultations, OCTA hopes that this hastily engineered and technically flawed SIA will silence CSO critics and put to rest concerns within FIC governments about anticipated negative impacts of PACER Plus. The nontransparent process by which OCTA appointed the two consultants to undertake this SIA, however, together with the unsuitability of the consultants for the task, and the shallow research method that has been adopted for the SIA, do little to earn respect for OCTA, much less inspire confidence in the SIA's authenticity or independence.

A tender process would not only have been transparent but also fair to prospective independent and qualified consultants within the region. Moreover, as PANG pointed out, it would have removed 'any perceived conflict of interest or bias by the OCTA', and ensured that 'what CSOs [had] been demanding' in terms of an independent and comprehensive social impact assessment of PACER Plus, would be accommodated.

The methodology employed by OCTA for its Social Impact Assessment can similarly be critiqued. It relies on obtaining information and views through a questionnaire survey, consultations with selected stakeholders, and Dialogues with Non-State Actors (NSA), organized in partnership with the Pacific Islands Forum. We consider all three methods, and particularly the questionnaire survey, inappropriate

What the two consultants will be able to make of the hodge podge mix of answers from the questionnaire survey is anyone's guess. But more than likely, and unsurprisingly, they will draw the conclusion as other consultants with their leanings have done before them, that the positive impacts of PACER Plus will outweigh the negative impacts.

OCTA's Dialogues with NSAs through meetings jointly convened with the Pacific Islands Forum Secretariat have not been a modality for genuine consultation and dialogue on issues of concern to CSOs and the communities they represent. CSO participants at the NSA Dialogue in December 2015 were disappointed by OCTA's failure to share the text of PACER Plus agreements or to explain in non-technical language the implications of the agreements for different sectors. They reiterated their call for priority to be given to comprehensive *and independent* impact assessments

of the different components of PACER Plus before negotiations concluded, and for plain language translations of the text to be made available to allow communities to comprehend likely impacts.

**Gendered Impacts of Trade**

Neither gender equality commitments by FICs and Australia and New Zealand nor gender-differentiated impacts of changes in trade policies should be excluded from consideration in regional deliberations and negotiations on far reaching free trade treaties. Failure to be mindful of gender considerations could unfairly exclude women from benefitting from any new economic opportunities that may come though liberalizing trade, as well as unfairly burden them with an unequal share of trade adjustment costs. Both outcomes would have the effect of intensifying gender inequality.

One of the reasons women in FICs are especially vulnerable to hardship and poverty is because of limited employment opportunities in the formal sector and their concentration in either poorly-paid jobs or small-scale income earning activities in the informal sector. Women also face gender-based barriers to trade which are often not recognized. Temporary worker schemes under Labour Mobility should provide unskilled men and women from FICs with equal opportunity to participate in the schemes. Development assistance under PACER Plus could also be specifically sought to support women involved in quality, small-scale informal sector food processing, weaving, jewellery-making, screen printing and such like economic activities in transitioning to production for export to niche (including diaspora) markets in Australia, New Zealand and other FICs.

Comprehensively assessing some of the possible gender-differentiated impacts of PACER Plus requires a separate impact assessment by a gender specialist with SIA experience, and ideally experience in using the Manchester University methodology. We suggest that it is not too late to commission such an assessment.

**The Right to Food**

PACER-plus will severely constrain the capacity of the Pacific FICs to protect, respect and fulfil the right to food.

The right to food is very intricately connected to the concept of food security. Food security has changed over time, moving away from the role of state intervention in promoting and protecting agriculture to then focussing on access to food through the market. The right to food on the other hand is concerned with the right to productive resources such as land, water and seed, as well as the role of the state in the provision of these resources. It also focuses on protecting local producers, processors, businesses and exporters through trade related measures such as tariffs, quotas and subsidies.

FIC states will not be able to use tariffs to protect their countries from cheap dumped exporters, will not be able to protect small local producers, processors and exporters through tariffs and will not be able to protect the health of their citizens by raising tariffs or banning imports of unhealthy foods.

While the FICs will need to reduce their tariffs drastically and thus provide better export trading opportunities for Australia and New Zealand, the export opportunities of their own producers and businesses will by severely curtailed by complicated Rules of Origin (RoO) and onerous Sanitary and Phytosanitary (SPS) Measures.

The investment and services rules of PACER-Plus will negatively affect the right to food since the agreement will not only affect domestic regulations which may be seen as “unnecessary barriers to

trade", they may also have implications for land ownership and thus the right to food.

In consideration of the potential negative effects from tariff cuts and the elimination of Non-Tariff Measures, the proposed PACER-Plus includes Safeguard Measures that would permit the FICs to use tariffs in case of import surges. However, these will not protect the FICs from shocks and could further increase their vulnerability context, therefore compromising their right to food. It is important to note that their application will not be automatic and will be heavily circumscribed by the PACER-Plus rules FICs would be required to "compensate" any affected parties through further liberalisation commitments even in other areas such as investment or services. PACER-plus will thus greatly limit the ability of states to deal with shocks, one of the key indicators for the right to food

Given the multiple negative effects that PACER-Plus will have on the right to food and food security in the FICs, they should not sign PACER-Plus. Far from building resilience in agriculture, this agreement has the potential to destroy local agricultural systems, worsen the nutrition transition in the FICs and severely limit their capacity to regulate at the national level to protect and fulfil the right to food.

**The Right to Regulate**

The chapters on services and investment in the Pacific Agreement on Closer Economic Relations 'plus' (PACER-Plus) show Australia and New Zealand (NZ) are dominating the negotiations with proposals designed to advance their commercial and strategic self-interest, just as they drove the original PACER signed in 2001. Commitments that development would be at the core of PACER-Plus have never materialised.

Such agreements, especially as they relate to investment, are highly controversial and growing number of countries are withdrawing from them and developing substitutes that balance commercial interests with regulatory sovereignty and social rights. The proposed PACER-Plus texts do not contain even the limited safeguards in the services protocol to the Pacific Island Countries Trade Agreement (PICTA TiS), or that Australia and NZ inserted in similar chapters in the recently concluded Trans-Pacific Partnership Agreement (TPPA) in an attempt to quell controversy over the constraints that agreement placed on democratic governance and the sovereign right of states to regulate in the national interest. A review is urgently required to identify and insert the state of the art changes that can provide best protection for the interests of states and their people while advancing the commercial objectives of the parties.

This paper addresses four issues:

- *fetters on state sovereignty* – The wide ranging coverage of PACER-Plus will mean that the scope of government intervention (like regulations, licensing etc) will be impacted. The granting of investor protections will further limit the scope for FIC governments to act in ensuring that their services and investment trade best supports their people and instead opens them up to intensified legal risks if government actions impinge, directly or indirectly on investments.
- *development asymmetries* - From the start, PACER was designed so as to ensure the European Union (EU) did not secure superior advantages in the South Pacific over Australia and New Zealand, and to maintain their historic influence over the region. There is minimal recognition of intrinsic development asymmetries and how the rules in the services and investment chapters would deepen them. PACER-Plus will require FICs to make commitments that go beyond existing global minimum standards and place onerous burdens on them.

- *ineffective protections* – PACER-Plus contains ineffectual protections on the right of governments to regulate. The token gestures attempting to support that right are undermined by their requirements to have any regulation subject to the primacy of commitments in PACER-Plus. The definition of public services is too weak and any proposal to change a countries commitments in case the liberalisation has gone wrong is a highly problematic process.
- *compliance* - PACER-Plus provides multiple pressure points for Australia and NZ to demand compliance, culminating in actual enforcement, in addition to leverage through their aid budgets.

Regrettably, the current investment and services chapters suggest the Pacific Islands governments have accepted, or at least not opposed, the outdated model, negotiated in secret over many years without a comprehensive and independent cost-benefit analysis and often in the absence of the second largest Pacific country, Fiji.

**Health Impacts of PACER-Plus**

There is little evidence in the draft provisions for PACER Plus of any substantial economic benefits that are likely to accrue for the Forum Island Countries. In the two areas where the FICs may have had reasonable expectations of negotiating beneficial arrangements that could conceivably have led to increased employment, remittances and government revenue (namely, labour mobility and development assistance) the legal language is weak and non-binding, requiring no firm commitments from Australia and New Zealand over and above existing arrangements.

On the other hand, the prospects for significant revenue losses for the FICs seem strong, particularly due to reduction or elimination of tariffs, and it is uncertain to what extent these losses can be offset by alternative means of taxation.

It is a positive development that there appears to be no intellectual property chapter in the PACER Plus, since intellectual property rights commonly included in trade agreements are associated with longer monopolies and delayed availability of generic medicines.

There is a chance that liberalising trade in health services could result in improvements to the range or quality of health services and health technologies, but these improvements could come at the expense of access and equity considerations.

If FICs have agreed to liberalise their health sectors, there could be a range of negative consequences for their health systems, including a) a proliferation of high cost, private health services leading to a two-tier health system; b) diversion of health system resources from the public system to service medical tourism; c) loss of policy levers and d) exacerbation of existing health worker shortages.

Reducing tariffs and other barriers to trade in unhealthy products such as processed foods, alcohol and tobacco, and increasing foreign direct investment in industries which manufacture and market these products, has been shown to increase the availability and reduce retail prices of these goods.

The key areas in which the PACER Plus agreement could constrict policy space to address NCDs is through the commitments in the SPS, TBT and investment chapters. These provisions require countries which are not already WTO members to comply to the extent of their capacity with obligations to ensure that regulations and standards are no more trade restrictive than necessary (TBT) and that food safety and animal and plant health measures are applied only to the extent

necessary, and are based on scientific principles and evidence (SPS). The investment chapter includes a range of protections for investors along with a process allowing them to make claims regarding breaches of the investment chapter obligations in courts or administrative tribunals in the host state. This risks acting as a deterrent to measures to regulate unhealthy products.

The proposed PACER Plus trade agreement, as currently drafted, presents a range of risks to health which appear to outweigh the small prospects of health benefits arising from the agreement. In many ways the agreement is unsuitable for developing countries – many chapters contain obligations that are similar to the WTO obligations. While some health exceptions are included, these are generally not strong and in most cases will not be sufficient to prevent disputes over health-related issues. Where special and differential arrangements for developing countries are included, these are very limited and do not provide enough scope for developing countries to support their domestic industries, where such support might be needed.

## Background

The Pacific Agreement on Closer Economic Relations 'plus' (PACER-Plus) is a proposed regional trade agreement currently being negotiated by all the members of the Pacific Islands Forum - the 14 Pacific Islands nations (known as the Forum Island Countries*), Australia and New Zealand.

The genesis of PACER-Plus comes from the Pacific Agreement on Closer Economic Relations (PACER), a framework agreement signed between Australia, New Zealand and the FICs in 2001. PACER set out a process whereupon if the FICs were to enter into negotiations for a trade agreement with any other industrialised country, negotiations would also be offered to Australia and New Zealand. The initiating of negotiations between the FICs and the European Union for the Economic Partnership Agreements were initially argued by Australia and New Zealand to have triggered PACER-Plus, that is until the exclusion of Fiji from the Pacific Islands Forum at the time undermined the legal standing for such a triggering.

As such Australia and New Zealand were quick to frame PACER-Plus as completely separate to PACER, instead it was a stand-alone agreement that would support the development of the Pacific. After much arm twisting and chequebook diplomacy, Australia and New Zealand managed to extract from Pacific Trade Ministers the recommendation to their leaders to launch negotiations.

PACER-Plus negotiations were launched in 2009 at the Pacific Islands Forum Leaders Meeting in Cairns Australia. A decision that was made merely days after the FIC leaders, having met by themselves, still argued for more time before launching negotiations.

As part of the launching of negotiations, Australia and New Zealand had agreed to provide funding for the Office of the Chief Trade Advisor (OCTA), a secretariat to support the FICs in their negotiations – the FICs having no trust in the independence of the Pacific Islands Forum Secretariat as it was felt to serve its paymasters, Australia and New Zealand. Despite starting strongly the OCTA has now received much criticism from some island governments, FIC officials and others for its approach to the negotiations, the advice it provides, and the strategy employed to fight for the best outcome for the FICs.

The chapters being negotiated for PACER-Plus include: Customs Procedures, Development Assistance, Dispute Settlement, Final Provisions, General Provisions and Exceptions, Initial Provisions, Institutional Provisions, Investment, Labour Mobility, Rules of Origin, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Temporary Movement of Natural Persons, Trade in Goods, Trade in Services, and Transparency.

Negotiations on PACER-Plus have been underway for seven years and there is now a push from leaders to conclude the agreement in 2016.

*Forum Island Countries includes Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

# *Chapter 1: OCTA's Flawed Social Impact Assessment of PACER Plus*

*Dr Claire Slatter, University of the South Pacific*

Demands by Pacific CSOs for an independent and comprehensive social impact assessment of PACER Plus to be conducted before Pacific Island states committed themselves to a binding regional free trade agreement that has been framed in the interests of Australian and New Zealand companies and investors had for some time been ignored by the Office of the Chief Trade Adviser (OCTA).

Misleadingly described as an office that 'provides *independent advice and support* to the Pacific Island Countries (PICs) in the negotiations of PACER Plus with Australia and New Zealand', the OCTA does nothing of the sort. Not only is it funded by Australia and New Zealand, the instigators and drivers of PACER Plus, but OCTA's CEO, Chief Trade Adviser, Dr Edwini Kessie, formerly a Counsellor at the World Trade Organisation, is a free trade advocate. Since taking up the OCTA post in 2012, his mission has been to promote PACER Plus as a 'platform that will expand trade and attract investment' to Pacific Island states and thereby benefit their economies. Dr Kessie has openly dismissed CSO criticisms of unfair asymmetries and unbalances in PACER Plus as unfounded, and defended the necessity of Pacific Island states agreeing to legally binding commitments under PACER Plus to give [Australian and New Zealand] investors confidence.

Serious concerns over PACER Plus are widely shared by CSOs, government officials, technical officers within regional organisations, and even business people. The demand for a social impact assessment to be carried out well before the start of negotiations on any draft text of PACER Plus chapters had been conveyed by CSOs to OCTA many months ago, to no avail. It was subsequently expressed in a proposal submitted to the Framework for Pacific Regionalism, which was signed by more than 30 Pacific civil society organisations representing a broad cross section of people from 22 Pacific Island countries.

Now, on the eve of the conclusion of PACER Plus negotiations, OCTA has commissioned an eleventh hour Social Impact Assessment. Relying on responses to a 12 page questionnaire survey, face to face consultations with a handful of 'key Non-State Actors (NSAs)' and a series of NSA Consultations, OCTA hopes that this hastily engineered and technically flawed SIA will silence CSO critics and put to rest concerns within FIC governments about anticipated negative impacts of PACER Plus. The nontransparent process by which OCTA appointed the two consultants to undertake this SIA, however, together with the unsuitability of the consultants for the task, and the shallow research method that has been adopted for the SIA, do little to earn respect for OCTA, much less inspire confidence in the SIA's authenticity or independence.

This chapter scrutinizes and critiques the SIA process adopted by OCTA, including the questionable process it used to engage consultants to carry out the SIA, the methodology adopted to seek views and understand issues of concern in regard to PACER Plus, the fiction of holding consultations with Pacific CSOs, and some of the results of the SIA, which were prepared for the most recent OCTA-sponsored 'NSA Consultation on PACER Plus' in Nadi on 10-11 June, 2016.

The Chapter concludes by raising attention to some gender considerations in relation to PACER Plus.

***OCTA's Non-transparent Hiring of Unsuitable Consultants***

Following news that the OCTA had hired two consultants to carry out a Social Impact Assessment, PANG wrote to Dr Kessie, expressing strong criticism of the non-transparent method used to engage consultants without inviting public expressions of interest through a tender process. A tender process would not only have been transparent but also fair to prospective independent and qualified consultants within the region. Moreover, as PANG pointed out, it would have removed 'any perceived conflict of interest or bias by the OCTA', and ensured that 'what CSOs [had] been demanding' in terms of an independent and comprehensive social impact assessment of PACER Plus, would be accommodated. PANG conveyed to Dr Kessie that this development would be 'rejected by CSOs', that there was now considerable lack of confidence in OCTA's handling of the SIA, and that a formal request was being made to the PIF Secretariat to undertake an independent and comprehensive assessment.

The two consultants hired by OCTA, Ms Alicia Greenidge and Prof. Yekong Hodu both have a long pedigree as 'consensus builders' in the work they do as private consultants in international trade negotiations. Ms Greenidge is a former US Trade Representative and currently advises the ACP and LDC group in Geneva. She is also a former director general of the Geneva-based International Federation of Pharmaceutical Manufacturers & Associations (IFPMA), which has strong interests in intellectual property rights (TRIPs), and the founder and CEO of Summit Alliances International ("SAI"), a Geneva-based consultancy business offering services that include 'trade negotiation techniques' and 'negotiation coaching toward deep consensus and bridge building in international trade, transactions and policymaking".

Dr Yenkong Ngangjoh Hodu of the University of Manchester's Law School, is a regular consultant to governments, regional organizations, and UN agencies on international trade and investment law. He has mainly been a consultant to African governments on RTAs with other WTO member countries, and to related stakeholders on Sino-African trade and investment relations. Investment treaties is his specialism. We may be encouraged by his view that 'the legal framework of foreign investment must protect the legitimate expectations and interests of both the investor and the host state'.[1] Both Ms Greenidge and Dr Yenkong are described, or describe themselves, as 'bridge-builders' and 'consensus builders'.

We have no doubt that both consultants are experienced professionals and specialists in the fields of international trade law and inter-state trade negotiations on binding trade agreements. Skilled negotiators who are independent can be extremely helpful in advising developing states on how to secure what they want in the process of negotiating a binding regional free trade agreement with developed states. Such expertise, however, is not a qualifier for undertaking a social impact assessment of a far-reaching regional free trade agreement between two developed states and 14 SIDS in a region of the world in which they have little knowledge, much less lived experience. Having an understanding of the specificities of small islands developing states, and of Pacific SIDS in particular, as well as some experience in conducting social impact assessments should have been important requirements for the job. We would argue, moreover, that having a critical political perspective on the free trade agenda, who is pushing it, and who it's primary beneficiaries are, is absolutely central to (1) being able to anticipate how PACER Plus will likely impact Pacific Island economies and societies, and (2) being able to advise Pacific Islands states on what they must not agree to, if they are to retain their legal right to regulate to protect their national development interests, which include the ownership and control of land, natural resources and the natural

1 http://www.ejiltalk.org/author/yngangjohhodu/ Accessed 9 June 2016

environment, as well as the livelihoods and social and economic rights of their people. In all these respects, the consultants are not suitable. Their appointment by the OCTA is suggestive of an inside job and, given their specialty in building consensus, is frankly worrying.

***OCTA's inappropriate research methodology***

The methodology employed by OCTA for its Social Impact Assessment can similarly be critiqued. It relies on obtaining information and views through a questionnaire survey, consultations with selected stakeholders, and Dialogues with Non-State Actors (NSA), organized in partnership with the Pacific Islands Forum. We consider all three methods, and particularly the questionnaire survey, inappropriate as we shall explain.

*The Questionnaire Survey*

The questionnaire survey is a quantitative tool unsuited for social impact assessments, which require a qualitative research method. Qualitative research takes more time – it is not something that can be accomplished in an eleventh hour, fly-by-night, effort. But there appeared to be little interest in gaining more in-depth answers or exploring reflections on possible impacts, which would have been obtained by undertaking qualitative research. A far more useful SIA would have called for public submissions from FIC citizens, or else focused on producing case studies of a representative sample of FICs, to be able to illustrate specifically how PACER Plus might impact each of them.

The OCTA questionnaire survey for the PACER Plus SIA, first of all, presents PACER Plus as a 'trade and development agreement' among 16 Pacific countries, when it should have been more accurately described as a free trade agreement that is still under negotiation between the 14 Pacific Island *developing states* and Australia and New Zealand, at the latter two countries' behest.

The questionnaire design is totally inappropriate for a serious social impact assessment. Respondents are asked to answer a series of questions on the impacts of six of the main chapters in the negotiated text of PACER Plus- Labour Mobility, Trade in Goods, Trade in Services, Investment, Movement of Natural Persons and Development Assistance - by indicating with an 'X' on a scale of 1-5, how negatively or positively they view each of a number of listed impacts. Such an approach to gathering data for an assessment of social impacts is ludicrous and very telling about OCTA's and/or the consultants' lack of understanding of and experience in doing social impact assessments. Tabulating responses to such questions will be quite meaningless. There is no way of knowing whether the questions were even understood by the respondents. Asking respondents to tick boxes under each section to indicate which impacts they think would result under each of the 6 areas covered hardly improves the reliability or meaningfulness of the survey results. The design of the questionnaire makes nonsense of the SIA, and is in fact quite a fraudulent exercise. The turnaround time for completing the survey was also short – the questionnaire was distributed on February 24 2016, with a response deadline of March 31.

The barest information is provided on each of the six dimensions of the PACER Plus draft agreement covered in the questionnaire, and some of the descriptions are misleading or obtuse. For instance, **labour mobility** is presented as a certainty - 'The PACER Plus Labour Mobility Arrangement *will increase access* of Pacific workers to the Australian and New Zealand labour markets…*'[emphasis added]* - when in fact Australia and New Zealand have not made binding commitments to any annual quota of seasonal workers from Pacific Island states. The slant in the questionnaire would have skewed answers towards 5 (strong positive impact), without respondents knowing what they were effectively approving. In reality, the Draft Arrangement on Labour Mobility agreed to at the 11th Intercessional Meeting of PACER Plus Officials in Samoa in August

2015 includes a 'recognition' that the operation of existing labour mobility schemes are 'employer-driven and subject to labour market demand'. It also includes recognition of 'the principle that the receiving country citizens and permanent residents have the primary right to employment opportunities in their countries', and that the temporary employment of workers from the sending countries 'should not undercut wages and employment conditions in the receiving country'. We would not disagree at all with the latter statement, but this is a matter that Australia and New Zealand need to enforce with Australian and New Zealand employers, since Pacific Island seasonal workers do not set terms and conditions. The inclusion of the statement in the text is evidently for the purpose of justifying the absence of binding commitments on Labour Mobility by Australia and New Zealand.

Several questions under **Trade in goods** would only make sense being discussed in a Focus Group meeting in which issues can be unpacked. For instance, questions such as 'What impact, if any, will PACER Plus have on gender dynamics/urban-rural dynamics/food security in FICs?' And the leading question:'Are the positive effects of PACER Plus sufficiently large to outweigh any potential decreases in import duty revenues in FICs?'. They make little sense in a questionnaire survey in which respondents are required to simply mark with an 'X' the number between 1 and 5 (from 'large negative impact' to 'large positive impact') that 'most accurately reflects [his/her] views on the question'.

The brief explanation of Trade in goods (as requiring the elimination of import duties on substantially all imports from other Parties) is followed by an obtuse statement saying that it 'can affect the way that goods are traded among the Parties, and even between Parties and Non-Parties', leaving respondents none the wiser as to how trade between Pacific Islands states and non-Parties to PACER Plus may be affected, when this may have quite unexpected and negative impacts. The question of whether there should be a provision in PACER Plus to prevent the dumping of inferior food products in FIC markets by New Zealand and Australia, such as fatty meat offcuts exported by their meat industries, should have been asked, particularly as lifting its ban on these unhealthy food imports was controversially made a condition for Samoa's accession to WTO.

The first question under Trade in goods also misrepresents PACER Plus as meaning that 'more goods from outside are imported into FICs *while FIC goods are exported in the region*', when it should more accurately have stated 'more goods *from Australia and New Zealand* are imported into FICs. Since FICs already have a goods agreement under PICTA, the second part of the explanation makes little sense and ought to have read 'while more FIC goods are exported to Australia and New Zealand', except that there is no guarantee that this will eventuate. A questionnaire in an independent SIA would have pointed out the asymmetry in trading relations between the FICs and Australia. As PANG did in its 2007 Social Impact Assessment of the (proposed) Economic Partnership Agreement with the European Union, by emphasizing that a goods agreement under PACER would have far more significant impacts than the EPA, because of Australia's trade dominance in the region.

The explanatory spiel in the questionnaire on **Trade in services** fails to make clear that PACER Plus will also open up to Australian and New Zealand suppliers such services as aircraft repair and maintenance, the selling/marketing of air transport services, computer reservation system services, specialty air services, ground handling and airport operation services. Since these are the only services which are defined in the Draft Chapter on Trade in Services, they are evidently the services of most interest to Australia and New Zealand, and should therefore have been highlighted in the questionnaire's explanation. Several of the questions relating to Trade in services are slanted towards obtaining views on whether liberalizing services under PACER Plus would 'improve' access, affordability and quality of services, as well as employment prospects, in FICs.'

Asking 'whether *individuals* would benefit from [Trade in Services under] PACER Plus' and if PACER Plus 'will …improve the affordability of services in FICs' needs some context for meaningful appraisal. While service providers in the two largest Pacific Island economies of PNG and Fiji may certainly benefit from the liberalization of Trade in Services under PACER Plus by gaining entry into other FIC markets, service providers in Australia and New Zealand are poised to mostly benefit from the access to services markets in the FICs. If the entry and dominance of real estate markets in Fiji and Vanuatu by Australian and New Zealand real estate companies are anything to go by, which have had the effects of raising both rent and property prices, as well as facilitating the effective alienation of prime coastal land, we have good reason to be cautious about liberalizing trade in services. This section of the questionnaire does include some open-ended questions on positive/negative impacts of liberalizing particular service sectors on businesses/communities/households/individuals, with some space for written answers.

The introductory spiel to the **Investment** section in the questionnaire states that each Party to PACER Plus must abide by 'internationally recognized investment protection standards' on 'fair and equitable treatment of foreign investors', 'expropriation' and 'free transfer of funds'. It does not point out that what is referred to as 'internationally recognized investment protection standards' are highly contentious agreements that privilege the interests of foreign investors over the interests of host states. Under PACER Plus, foreign investors will enjoy equal treatment with investors who are nationals, be permitted to expatriate profits, be legally protected from expropriation or nationalization of their investments, and be entitled to compensation should they suffer such a loss. Most worrying, the definition of an investor in PACER Plus includes an intending investor, while the definition of investment includes '*the expectation* of gain or profit'. No attention is not drawn to the implications of these potentially worrying aspects of the Investment chapter, which could see FICs which make legislative changes to protect national interests being made to compensate intending investors for their estimated 'losses'.

Respondents' are asked to indicate their views on whether 'inward investment' would impact positively or negatively on a range of important considerations including 'FICs' ways of life and culture', 'gender *balance*', 'people's health, wellbeing and crime levels', 'people's personal and property rights', 'political system and sovereignty', 'land tenure system in FICs', 'poverty and hunger in FICs' and 'the affordability of utilities (e.g. electricity, gas and water) in FICs, by simply X-ing a number on a 1-5 scale. Genuine concern about the possibility of impacts in these areas would have warranted discussions with CSO communities.

The questionnaire does not adequately explain what **Movement of natural persons** precisely involves – i.e. a schedule of commitments being made by each PACER Plus party to other PACER Plus partners to facilitate (e.g. through preferential immigration measures) the temporary entry of natural persons for business and employment. Whether the commitments made by Australia and New Zealand under PACER Plus will equal those being made by FICs is not made clear as the questions posed mostly focus on possible benefits to FICs through the entry of natural persons from Australia and New Zealand (e.g. Will this facilitate inward transfer of specialized knowledge *to FICs*? Will it address labour shortages *in FICs*? Increase economic welfare *in FICs*? ). Australian immigration processes have been known to deny visas to bona fide business representatives seeking to attend a two-day business-related meeting. Only one question is open-ended and asks whether it will help or harm service delivery in FICs. The final question in the section asks if the movement of natural persons will have an impact on brain drain *from FICs*, something that has been taking place over many years, in the absence of PACER Plus.

The final area of PACER Plus covered in the questionnaire, on Development assistance, explains

that under PACER Plus, Australia and New Zealand will provide a development assistance package of technical and financial assistance to help FICs meet their obligations under PACER Plus and assist them overcome supply-side constraints so that they can take advantage of market access opportunities. This is trade facilitation, not development assistance, and two heavily slanted, leading questions suggest that development assistance to the region will increasingly be tied in with trade facilitation: 'Is Aid for Trade' more important for the long-term needs of FICs than other types of aid?' and 'Is there any particular type of project or programme that could be delivered through development assistance that would have the largest positive impact on FICs' ability to trade with the rest of the world?' Such questions are informed by the much-critiqued 'trade-led development' perspective of free trade advocates, and expose a free trade bias in OCTA's social impact assessment.

A last section of the questionnaire asks for overall views on PACER Plus, including on long-term impacts on FIC societies, economies and environments, on whether the public has been adequately informed about its technical details, and what policy measures would cushion identified potential impacts. Here too respondents indicate their views as to whether impacts will be negative or positive by marking an X on a scale of 1-5. Only two questions permit open answers (What are most positive/most negative impact of PACER Plus for FICs).
What the two consultants will be able to make of the hodge podge mix of answers from the questionnaire survey is anyone's guess. But more than likely, and unsurprisingly, they will draw the conclusion as other consultants with their leanings have done before them, that the positive impacts of PACER Plus will outweigh the negative impacts.

*Face-to-Face Consultations*

A tentative programme for a scheduled Suva Mission from 4-8 April, indicated a week of planned consultations with Key Non-State Actors (NSAs) on possible social impacts arising from the PACER Plus Free Trade Agreement'. Of the 26 entities listed on the Tentative Programme, only 6 were CSOs (including a regional body of NGOs). The rest of those scheduled for consultations included private businesses (including a bank), employer and industry bodies, Ministry of Labour, educational institutions (including two universities and a regulatory authority), a media organization, one trade union, and the Fiji-Australia Business Council. Similar consultations may have been held with key non-state actors in other FICs. How many of the CSOs listed for consultation in Fiji met with the consultants in April is unclear. Several of the Suva-based CSOs reportedly boycotted the interviews.

*Dialogues with Non-State Actors*

OCTA's Dialogues with NSAs through meetings jointly convened with the Pacific Islands Forum Secretariat have not been a modality for genuine consultation and dialogue on issues of concern to CSOs and the communities they represent. CSO participants at the NSA Dialogue in December 2015 were disappointed by OCTA's failure to share the text of PACER Plus agreements or to explain in non-technical language the implications of the agreements for different sectors. They reiterated their call for priority to be given to comprehensive *and independent* impact assessments of the different components of PACER Plus before negotiations concluded, and for plain language translations of the text to be made available to allow communities to comprehend likely impacts. The Dialogues have since been dismissed by some CSOs as nothing more than a rubber-stamping exercise, and an exercise in 'ticking the box', in which they want no further part. OCTA's power-point presentation prepared for the NSA Consultation on 10-11 June 2016, calls its social impact assessment a 'Sustainability Impact Assessment' and concludes – presumably from the survey responses - that 'Overall economic impacts are likely to be positive and significant', 'Overall social impacts are likely to be positive', but 'Overall environmental impacts are likely to be negative'.

The last finding is surprising, as a main weakness in the questionnaire is the almost complete absence of questions about environmental impacts. Only two questions expressly ask about environmental impacts – under Investment ('What would be the impact of greater inward investment on the environment?') and Overall views of PACER Plus ('What will be the long term impacts of PACER Plus on the environment?'). Evidently an overwhelming number of respondents must have X'ed '1' on both questions -very negative impacts/strong negative impacts. What is neither asked nor conveyed in the survey is the reason respondents hold the view that PACER Plus will negatively impact on the environment. Neither OCTA nor the consultants who carried out the SIA, none of whom are from this region, appear to be interested in the details of Pacific peoples' anxieties about PACER Plus.

The conclusions drawn from OCTA's SIA will have little credibility. There is no excuse for the flawed methodology adopted. A methodological framework developed by the University of Manchester for assessing the sustainability impact of trade agreements provides an accessible best practice model. It emphasizes that the scheduling of an SIA process is crucial as it should be commenced early enough for the results of consultations to be taken into account during the trade negotiations. CSOs had been calling on OCTA to commence a comprehensive and independent SIA for many months and had referred to best practice guidelines for such impact assessments being available. The resulting SIA is a contemptible sham that brings even more disrepute to OCTA.

***Some Gender Considerations in relation to PACER Plus***

The gender dimensions of free trade impacts, including on job creation or job loss, on livelihood security, food security and poverty reduction or increase are significant, if often unexamined, aspects of the changes in economy and society ushered in by liberalizing trade and investment. Neither gender equality commitments by FICs and Australia and New Zealand nor gender-differentiated impacts of changes in trade policies should be excluded from consideration in regional deliberations and negotiations on far reaching free trade treaties. Failure to be mindful of gender considerations could unfairly exclude women from benefitting from any new economic opportunities that may come though liberalizing trade, as well as unfairly burden them with an unequal share of trade adjustment costs. Both outcomes would have the effect of intensifying gender inequality.

This section raises attention to just a few considerations in relation to the need to protect women's economic rights under international law, especially in the context of potential threats to land and livelihoods, the environment and food security that could come in the wake of PACER Plus; and in relation to advancing economic opportunities for women in support of regional commitments to women's economic empowerment.

Firstly, it should be emphasized that both Australia and New Zealand and all FICs except Tonga have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and are thereby bound by the provisions of this international bill of rights for women. CEDAW not only enshrines the right of women to economic equality, it obliges States Parties to take into account 'the particular problems faced by rural women' and the significant roles played by rural women 'in the economic survival of their families, including their work in the non-monetized sectors of the economy …'. This places an obligation on all States Parties to ensure that the livelihoods of women are protected. In the context of FICs, and particularly Melanesian FICs, where a majority of the population are rural dwellers and dependent on subsistence and semi-subsistence livelihoods, this translates to an obligation to protect those livelihoods and the customary land ownership systems on which they depend, not only from loss through dispossession

of land, but also from threats to food security and economic survival as a consequence of environmental degradation caused by investments in industrial agriculture and extractive industries (mining, fisheries, forestry).

Protecting rural livelihoods in FICs also provides insurance against increasing poverty. Although less than half of Fiji's population resides in rural areas, rural dwellers constitute a disproportionate 62.6% of the country's poor. While women may not have as secure rights to land as men under customary tenure systems, the usufruct rights they do enjoy nonetheless does secure them a livelihood, enabling them to feed their families and earn some income from selling surpluses. The supply of urban food markets by rural food producers underlines the wider significance of supporting rural livelihoods for national food security. FICs must ensure that PACER Plus does not deprive them of the right to make law and policy to protect the economic right to a livelihood, especially of their rural populations. Related to protecting rural livelihoods, PACER Plus should also include agreement by all Parties to comply with the principle in international law of seeking the free, prior and informed consent of indigenous landowners before making investments in extractive industries.

Secondly, it should be recalled that one of the priority areas identified for policy and action under the Pacific Islands Forum Leaders' Declaration on Gender Equality, adopted in August 2012, is women's economic empowerment. The policy actions agreed on include removing barriers to women's employment and participation in the formal and informal sectors, and targeting support to women entrepreneurs in the formal and informal sectors, including through financial services, information and training. There are concerns that trade in goods under PACER Plus may negatively impact on manufacturing industries in sectors in which women are presently concentrated – i.e. clothing and footwear and food processing and packaging – through closure and job losses. Whether PACER Plus may open up employment opportunities in other sectors that could benefit women workers is worthwhile exploring.

One of the reasons women in FICs are especially vulnerable to hardship and poverty is because of limited employment opportunities in the formal sector and their concentration in either poorly-paid jobs or small-scale income earning activities in the informal sector. Women also face gender-based barriers to trade which are often not recognized. Temporary worker schemes under Labour Mobility should provide unskilled men and women from FICs with equal opportunity to participate in the schemes. Development assistance under PACER Plus could also be specifically sought to support women involved in quality, small-scale informal sector food processing, weaving, jewellery-making, screen printing and such like economic activities in transitioning to production for export to niche (including diaspora) markets in Australia, New Zealand and other FICs. Another of the priority areas identified for policy and action under the Pacific Leaders' Declaration on Gender Equality is reproductive health services. The policy and action agreed on include ensuring that reproductive health (including family planning) education, awareness and service programs receive adequate funding support. Given the high levels of sexual and reproductive health associated cancers among women in FICs, concessional access to treatment services in Australia and New Zealand for FIC citizens should be sought under PACER Plus. The entry of private health service providers into FICs under PACER Plus could see specialist services being set up in FICs. PACER Plus should not, however, prevent FICs from making law and policy to protect their public health systems on which the majority of their citizens rely.

Comprehensively assessing some of the possible gender-differentiated impacts of PACER Plus requires a separate impact assessment by a gender specialist with SIA experience, and ideally experience in using the Manchester University methodology. We suggest that it is not too late to

commission such an assessment.

# *Chapter 2: Regulatory Impacts for the PACER-Plus Services and Investment Chapters*

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The chapters on services and investment in the Pacific Agreement on Closer Economic Relations 'plus' (PACER-Plus) show Australia and New Zealand (NZ) are dominating the negotiations with proposals designed to advance their commercial and strategic self-interest, just as they drove the original PACER signed in 2001. Commitments that development would be at the core of PACER-Plus have never materialised.

It appears that the services chapter was largely concluded in December 2014. Attention has mainly focused on which services each country is prepared to submit to which of the rules and whether the others, especially Australia and NZ, will agree to that schedule. The investment chapter has taken longer, with some significant points in the text still unresolved. The services schedule also applies to some of the investment rules. Because individual country's schedules are not available it is very difficult to assess the practical social and regulatory impact of PACER-Plus on the Forum Island Countries (FICs). The focus in this paper is on the implications for FIC governments' ability to regulate in the national interest.

The rules on services and investment may appear neutral on their face, but that disguises the reality that Australia and NZ currently dominate both activities in the South Pacific. If adopted in their current form these chapters will deepen the existing economic and development gap with the Forum Islands Countries and impose World Trade Organization-plus obligations on states that are not even parties to the World Trade Organization (WTO).

Such agreements, especially as they relate to investment, are highly controversial and growing number of countries are withdrawing from them and developing substitutes that balance commercial interests with regulatory sovereignty and social rights. The proposed PACER-Plus texts do not contain even the limited safeguards in the services protocol to the Pacific Island Countries Trade Agreement (PICTA TiS), or that Australia and NZ inserted in similar chapters in the recently concluded Trans-Pacific Partnership Agreement (TPPA) in an attempt to quell controversy over the constraints that agreement placed on democratic governance and the sovereign right of states to regulate in the national interest. A review is urgently required to identify and insert the state of the art changes that can provide best protection for the interests of states and their people while advancing the commercial objectives of the parties.

Regrettably, the current investment and services chapters suggest the Pacific Islands governments have accepted, or at least not opposed, the outdated model, negotiated in secret over many years without a comprehensive and independent cost-benefit analysis and often in the absence of the second largest Pacific country, Fiji.

This paper addresses four issues: fetters on state sovereignty, development asymmetries, ineffective protections and compliance, followed by some recommendations. Other aspects of these chapters warrant attention by others, including financial regulation and balance of payments, movement of professionals and recognition of qualifications, and the fraught question of labour mobility for remittance workers.

***Fetters on State Sovereignty***

The reach of this agreement is vast. Its rules affect a broad range of services that affect the daily lives of Pacific communities, from schools and tertiary training providers, water and electricity companies, health clinics, sports facilities, and newspapers, to businesses such as supermarkets and duty free stores, banks, lawyers, advertising firms, fish canning factories and logging or mining operations.

What counts as an 'investment' is open ended and includes land and buildings, businesses, shares, licenses (telecoms, transport, mining, fishing), concessions or contracts (water supply, forestry), intellectual property (copyright, patents), debt instruments, etc. Foreign direct investment (known technically as establishing a commercial presence) covers any type of business or professional establishment, whether greenfields or buying an existing business or asset. Foreign firms can also operate through a branch or representative office, which means they do not have a separate existence from their parent overseas company but operate as that company.

The core rules apply to 'measures', which are basically anything a government does, whether laws on land use, foreign investment, regulations on health and safety, environmental and conservation standards, rules that govern tourism operators or taxis, administrative decisions of a licensing body, school curriculum requirements, approval to operate a restaurant, banking regulation, or granting planning consents. The restrictions apply even where the measure doesn't directly target the service, but *affects* it, such as a tourist resort's rights to own or lease land or have unlimited access to freshwater water.

The services chapter aims to give foreign firms from PACER-Plus countries the right to sell services to customers in each other's territory on the same terms as locals and not face restrictions on how big they grow or how much foreign ownership they have. The transactions must have an international participant. A foreign firm or person might 'trade' their services by setting up a local business inside the country or a branch of a foreign company, or by providing the service from outside the country, especially by the Internet. Someone might travel temporarily to the FIC to deliver the service, such as a consultant or tour operator. Alternatively, a tourist or student from a FIC might go to another country to access the service there.

Investors and investments from PACER-Plus countries are also protected from discrimination. In addition, foreign services firms and other foreign investors who own, say, mining rights, leaseholds over land, or a public-private partnership contract, are given special rights that aim to stop governments regulating in certain ways that significantly undermine the security or value of their investment. They can freely move their money in and out of the country and, as per the WTO, cannot be required to process a certain amount of product locally or use local content (non-WTO members have to list any investments not subject to this rule and can't add to it later! (Art 11)).

Obligations in the services and investment chapters are not limited to central government, or even regional or local government. They also apply to any non-government body that has been given authority by central or local government to make those kinds of decisions. This could even see a decision by a village council as a matter of customary law not to allow certain activity in its area challenged by another state or one of its investors on the grounds that its authority was authorised by central government. The final chapter of PACER-Plus says central government must take reasonable measures available to it to ensure those lower levels comply (Art 2).

**Core rules**
The core rules of the services and investment chapters put handcuffs on what governments can do to provide opportunities for locals providing services such as shops, tourism ventures, media, health care facilities, education, professions, or transport, and protect them from being overwhelmed by big well-resourced foreign firms. For example, the rules say governments can't give better treatment to locals (aside from subsidies and grants). They can't restrict foreign investment generally, or in specific sectors, or require investment through a joint venture with someone local. The number of firms or people who can supply a particular service across the country or in a particular place can't be capped to prevent over-supply that makes it difficult for small local firms, especially, to survive. Nor can the government limit the number of clients of a firm, or its total output, which is a way of ensuring that one or more big businesses do not dominate the market. Similar rules prevent foreign investors or investments from PACER-Plus countries being treated less well than their local counterparts.

**Countries' schedules of commitments**
A government can decide which sectors or parts of sectors it will subject to these rules. Services have many component parts. The tourism industry in the Pacific, for instance, spans hotels, tour guides, restaurants, cruise ships, souvenir shops, eco-tourism operators, airports and seaports, computer booking systems, airline catering, advertising, golf courses, foreign exchange dealers, and much more. Governments have to think through how all these activities might be affected by commitments they make in their schedules, including unintended consequences because once made they are almost impossible to change. It is clear from the PACER-Plus text that Australia and NZ intend to strengthen their control over core parts of the tourism industry in which they have expertise, many of which can be supplied to FICs from outside the country. These include sales and marketing of air travel, computerised reservation systems, flight planning and ground handling at airports, speciality services like sightseeing, and the operation of airport facilities and infrastructure, often through public-private partnerships or management contracts, and related activities such as retail and parking.

Where a government does bring a service under the rules it can still limit which parts of the service or the rule it is agreeing to – for example, retail stores *except* souvenir shops, ground transport *except* for bus services that carry fewer than 10 people, requiring a percentage of local content on broadcast television, or that lawyers or engineers must be nationals to deliver certain services. If no restrictions are listed, then the entire service sector is fully subject to the rules. These schedules do not automatically apply to all the possible rules, so governments must anticipate the impact, including by rules they can't directly exit from in the schedule, such as domestic regulation. Importantly, the rules also don't protect a country from the special protections for foreign investors on minimum standard of treatment or expropriation.

Each country's schedule has to be agreed by the other parties, including Australia and NZ who will be trying to ensure as many sectors as possible are covered. Commitments can be made with different levels of specificity. A broad commitment, such as private education or services related to fishing, can have unforeseen consequences, especially over the years as the way those services are structured and the technologies through which they are delivered change. Likewise, pressure to commit a large number of services can lead governments to tick the boxes they think might not have much impact, such as the long list of financial service sub-sectors; that can cause major problems for governments when they face problems and need to re-regulate those services in the future. It is critically important that FICs have researched the present and future implications of committing specific sub-sectors, written their schedules as narrowly and precisely as possible, and future-proofed them to preserve as much policy space as they can – and are allowed to by the other

parties.

**'Disciplines' on domestic regulation**
There are other intrusive restrictions on future choices about how to regulate services and which criteria should have priority when governments make those decisions. A cookie cutter approach to drafting saw these 'disciplines' imported from the WTO's General Agreement on Trade in Services (GATS) into PICTA Trade in Services Protocol (PICTA TiS) and now into PACER-Plus. Some rules apply to all services, while others apply to the sectors that a government has committed in its services schedule.

The impacts on governments' options are more severe in PACER-Plus than in PICTA because they are likely to apply to more services sectors and because Australia and NZ believe in a hands-off approach to regulating services and can be expected to be aggressive in requiring the FICs to do so too.

There are three main obligations:

1. General laws and policies that apply to the services in a country's schedule must be administered in a reasonable, objective and impartial manner (Art10.1). That may sound perfectly reasonable, but it opens up decisions to challenge for being 'unreasonable', 'subjective', and based on partisan considerations, such as giving priority to community concerns or indigenous rights.
2. Every PACER-Plus government must set up tribunals or other procedures for aggrieved service firms to have decisions reviewed and receive 'appropriate' remedies (Art 10.2). This is not limited to services sectors that a country has committed in its schedule. In addition to the burden this imposes on governments with limited capacity and budgets, the potential for a challenge may have a chilling effect on those who make the original decisions – an effect that is increasingly recognised but very hard to document.
3. The choice of domestic regulations for licensing and qualification requirements or technical standards must reflect narrow considerations like the technical quality of a service, rather than social or cultural factors, and must be the option that has the least impact on the rights of the service supplier under the chapter. (Art 10.4) This only applies to the services in a schedule, but it covers a lot. Technical standards, for example, include water quality standards, toxic discharge levels from mining operations, environment and health and safety rules for logging, eco-tourism accreditation, supermarket size and trading hours, zoning for town planning purposes, mandated school curriculum, etc.

**Special protections for foreign investors**
The investment chapter goes deeper, with constraints that intensify the legal risks under PACER-Plus.

Two special protections for investors pose particular risks. The first is a vague guarantee that an investor or investment must receive a '*minimum standard of treatment'* under customary international law that includes 'fair and equitable treatment' and 'full protection and security' (art 9). This sounds benign, but the concepts are open ended and unbalanced. Investors commonly argue that this entitles them to a stable regulatory environment, ie the rules don't change in ways that adversely affect their investment's value or profits, even when they cause social or environmental problems. The ad hoc system of investment dispute settlement results in routinely pro-investor but inconsistent interpretations. There was a limited attempt to tie this down in the TPPA, and more serious attempt in the recent Canada EU agreement, but there are no such attempts in the PACER-

Plus investment chapter. Even if there was, it would not provide an assurance of clarity, consistency or certainty because the underlying concepts are so opaque. The only safe approach is not to include the provision at all - something that countries like South Africa and Brazil have been doing in their recent new investment rules.

The second problematic rule is on *expropriation* (Art 13). There is an obligation to compensate an investor when direct actions by any level of government, such as the nationalisation of a mine or cancelling a contract for privatised water supply to a village, and actions that have an indirect but equivalent effect on the investment. Indirect expropriation has been used to challenge decisions such as stricter environmental regulations or moves to restrict price increases on necessities like water or electricity. An Annex to the investment chapter sets out criteria for deciding if there is an indirect expropriation, and restricts its application where a government regulates to achieve 'legitimate public welfare objectives', such as public health, safety and environment. That is important, and should make disputes on those issues unlikely, but it is unclear whether 'legitimate public objectives' extends to employment or utilities like mobile phone networks.

Foreign investors tend to rely more on the minimum standard of treatment protection than on expropriation. But both pose massive challenges to FIC governments to assess a claim that they have breached the rules when few have the resources or sophisticated decision making mechanisms that the rules assume, and to stand firm on a decision they believe is in the best interests of the country.

**Cross-fertilisation with other agreements**

A standard rule in services and investment chapters (but not labour mobility!) is that a country must give the firms from one party to the agreement the best treatment it gives to firms of any other country. This is known as the most-favoured-nation (MFN) rule. For example, Australia and NZ would get the benefit of any deal between the FICs and the EU, or among the MSG group, or between PNG and China. The effect is to constantly ratchet up the investor protections and liberalisation commitments that governments make. It also means that an agreement might have quite extensive obligations with few safeguards because it was expected to have little impact between the initial parties (eg the Pacific EPA with the EU), but it has a much bigger impact when it is extended to countries that have more significant interests, such as Australia and NZ.

There is an additional risk for those FICs that have bilateral investment treaties (BITs): PNG with Australia (1991), China (1993), Germany (1983), Japan (2014) and UK (1981); Tonga with UK (1997); and Vanuatu with UK (2006) and China (2003), neither of which is in force. These agreements entitle the other state and its investors to any better treatment the FIC gives in PACER-Plus (or any other agreements that include investment rules). The precise terms vary, so an assessment of the exact consequences needs careful individualised examination.

Depending on how the most-favoured-nation (MFN) provision in PACER-Plus is worded it may also entitle those countries to any better treatment the FIC has given in a BIT. This looks likely for any future BITs (noting that PNG signed one with Japan in 2014), unless additional protection is written into the PACER-Plus text or a FIC has managed to future-proof its exposure in the specific MFN annex.

There are various ways to limit this effect. Both NZ and Australia routinely exclude all existing agreements from the MFN obligation in their FTAs, but they usually agree that better treatment given in any future agreements will be shared. The PICTA TiS protocol took a different approach: Article 4.2 explicitly excluded treatment given to other countries in existing agreements listed in an

Annex (versions of that annex viewed by the writer are blank). It only excluded future agreements between developing countries in the Pacific. Copying that wording would not provide substantial protection because it would effectively give Australia and NZ the right to any better treatment given to any country in a future agreement. The Cariforum EC EPA only applies MFN treatment to future deals with major exporting countries, but that would include China, Russia and Taiwan, so extending them under PACER-Plus would still have a major impact. New model investment agreements from countries like Brazil and India don't include the MFN provision at all.

The services (Art 3) and investment (Art 7) chapters show Australia and NZ are not yet prepared to write any limits on MFN into the text, but will only allow country-specific exceptions in an annex; each entry would have to be negotiated and approved by all the parties. A drafting note says the parties will revisit this depending on what progress is made on market access. This looks like a blatant attempt by Australia and NZ to extract as many concessions from the FICs before they will agree to even a limited provision like the PICTA TiS one. This patch protection is driven by naked self-interest with no concern with the development implications for FICs individually or collectively. Predictably, Australia and NZ protect their own exposure by not extending the MFN obligation to the draft chapter on the Temporary Movement of Natural Persons.

***Development Asymmetries***

Four reasons are usually given for developing country governments to agree to services and investment chapters in regional agreements. All are problematic for the FICS.

1. *To attract investors who would not come otherwise*. Evidence that this occurs is mixed at best, but is especially questionable for remote small island states. They are not attractive venues for investments seeking a market. Investors in extractive and resource industries, which have poor records for reinvestment, human rights, sustainability, and cultural responsibility, are more likely to invest through contracts that provide more rights and benefits than services and investment agreements do. Services firms in banking, education or media may take advantage of new openings, but the rules make it harder to require those firms to have a grounded presence in the country, rather than operating from offshore or by visiting consultants, or as branches whose operations are driven by the interests of their parent companies. There is no requirement that investors are greenfields investment that create new businesses, jobs, downstream commercial opportunities and generate foreign exchange. Again, the rules make it harder for governments to direct investment to the sectors and places it is needed. Even where new ventures are established, such as in tourism, the costs of imports, offshore sales of package deals and repatriation of earnings can neutralise the expected gains.
2. *To build capacity for long term development.* There is no commitment in PACER-Plus to technology transfer and infrastructure development, or for foreign firms to recruit and train local people in sectors such as tourism, finance, telecommunications, fisheries, education or health care. The 'development' provision merely talks of strengthening FICs domestic capacity through access to technology accessible on a commercial basis. (Art 4.1(a)) Australia and NZ seek more access for private education providers, but that is driven by commercial not development objectives.
3. *To secure better treatment for their services providers and investors offshore*. Australia and NZ are the dominant sources of capital and services in the region. Few FICs invest offshore and that tends to be in other FICs, which are already covered by PICTA Services (not yet in force) and the recently revised Melanesian Spearhead Group (MSG) agreement (known as MSGTA3) which is yet to be signed. PACER-Plus also promises liberalisation in sectors

and modes of supply of export interest to the FICs. But the consistent demand of the FICs for greater, binding commitments on labour mobility has not been agreed, and is relegated to a non-binding side agreement.

4. *As a quid pro quo for beneficial concessions in other parts of the agreement.* Again, there is no evidence from available texts that Australia and NZ have made any significant concessions in areas of importance to the FICs, notably labour mobility and quarantine and testing requirements for fruit and other products. PACER-Plus replaces the preferential arrangements previously available under SPARTECA and Australia and NZ have very low tariffs if FICs did have capacity to increase supply.

There is a further rationale: power politics. The FICs have already pushed out the timeline for the PACER-Plus negotiations for a number of years. Despite reservations expressed publicly by several governments, it is difficult to continue to say no to demands and pressure from Australia and NZ when they remain the major aid donors for many FICs and are past-masters at divide and rule.

**Development Obligations**

From the start, PACER was designed so as to ensure the European Union (EU) did not secure superior advantages in the South Pacific over Australia and New Zealand, and to maintain their historic influence over the region. Despite the official rhetoric, it was never about 'development'. There are even fewer token gestures to development in PACER-Plus than in the EU's Economic Partnership Agreements.

Article 4 of the services chapter makes a token nod towards development. It asserts that the FICs will strengthen their capacity, efficiency, competitiveness with access to technology on a commercial basis by making commitments to liberalise the services rules in *the FICs* economies. That is disingenuous - a FIC can choose to liberalise those services already, and PACER-Plus won't guarantee them any better access to technology any cheaper. Instead, it dictates how the FICs need to make these changes and makes it practically impossible for them to alter or revoke those commitments if they prove damaging or alternative approaches would have better outcomes.

There is a development assistance chapter in the agreement, which makes carefully worded promises to address 'mutually determined and prioritised' activities 'taking into account' needs as identified by developing countries. It links aid funding to trade cooperation, with specific funding commitments from Australia and NZ to a work programme that is designed to benefit their commercial interests. But it is unenforceable!

**Survival of local businesses**

Unequal agreements like this carry a major risk that foreign services and services companies, whether operating within a FIC or increasingly from outside the country, will threaten the survival of local firms or the livelihoods of individuals who provide similar services or compete with foreign investors in producing goods.

Rich countries have consistently refused to agree to special safeguards to provide protections when a developing country faces such threats. When the WTO was formed in 1995 a safeguard mechanism for services was promised within 3 years. Nothing has happened. PACER-Plus promises to review the question if these negotiations are ever concluded (Art 14.1), but they never will be. In the meantime, a PACER-Plus country that says its commitments have had a serious adverse impact on a domestic service sector can seek consultations with the countries whose firms have caused the problem. They are required to discuss it in good faith and try to reach an agreement over a reasonable time, but nothing can be done if they don't agree.

In PICTA TiS (Art 12) a country could impose restrictions that breached its commitments in 'response to problematic market conditions in particular service sectors, the correction of structural problems within the market, or the threat of the disappearance of service sectors'. That was subject to very tight restrictions on the kind of measures that could be adopted and for how long, but even that is not in PACER-Plus.

**Asymmetrical commitments**
There is minimal recognition of intrinsic development asymmetries and how the rules in the services and investment chapters would deepen them.

Many FICs are not members of the WTO, for good reason: it is not relevant to their realities, the rules are lopsided in benefiting larger and richer countries, the obligations are too onerous. Yet PACER-Plus imposes *WTO-plus* obligations on them. This is unconscionable and if retained these obligations should at least be unenforceable through dispute settlement mechanisms.

For WTO members, Article V of the General Agreement on Trade in Services (GATS) says developing countries should make fewer commitments in regional trade agreements than developed countries. Under the Doha round developing countries are to have 'appropriate flexibility to open fewer sectors' while LDCs do not have to make any new GATS commitments at all. In other words, all FICs should face qualitatively different levels of new obligations than Australia and NZ. But, even if the overall level of sectoral commitments that FICs make in PACER-Plus is considerably lower than those made by Australia and NZ, the relatively low current commitments of most (aside from countries that acceded to the WTO) means they will have to implement much more than Australia and NZ. The latter will have to do very little if anything and effectively get PACER-Plus for free.

It is not yet known what level of commitments each FIC has made on services and investment in PACER-Plus, and it is of concern that their schedules will not be able to be independently analysed until the deal is concluded. As for future negotiations, the services chapter mirrors the words of the GATS about recognising 'appropriate flexibility' in reviews to extend each country's schedule (Art 18). However, the investment chapter just says parties will 'take into account' the limited capacities of developing countries (Art 24).

It may be argued that the FICs have already made extensive services commitments under the PICTA TiS protocol. That agreement adopted the inappropriate GATS model for the FICs with minimal modifications, and countries made commitments that are far beyond what developing countries and LDCs have been required to do in the WTO (except for countries like Samoa, Vanuatu and Tonga when they joined). The PICTA TiS protocol has been signed by 10 countries: the Cook Islands, Federated States of Micronesia, Kiribati, Nauru, Republic of the Marshall Islands, Samoa, Solomon Islands, Kingdom of Tonga, Tuvalu and Vanuatu, but needs to be ratified by 6 before it comes into force. It remains to be seen how far those countries would then comply with the technical rules and relatively high level of commitments they have adopted in PICTA TiS.

Fiji and Papua New Guinea (PNG), the largest, have not ratified the agreement, along with Federated States of Micronesia, Marshall Islands and Palau. As Fiji and PNG would be the most likely to seek to enforce PICTA TiS, its overall impact on the FICs is likely to be minimal. Moreover, PICTA TiS has limited application to investment, whereas PACER-Plus has a comprehensive investment chapter. The new MSG plus agreement is not yet public but similar issues of scope and compliance would apply.

**Institutional arrangements**
The entry into force and termination provisions confirm that not all parties to PACER-Plus are equal. The agreement only comes into force when it is ratified by *both* Australia and NZ and an as-yet-unspecified number of FICs (Final prov Art 8). Likewise, it terminates if *either* Australia or NZ gives notice of withdrawal, or it is in force for fewer than a (undecided) number of FICs (Final prov Art 10)

The Joint Committee that oversees PACER-Plus and any subsidiary bodies, including the technical committee on Services, Movement of Natural Persons and Investment, comprise all the parties with decisions by 'mutual agreement', rather than explicitly by consensus. This is deliberate. A decision will be binding if no country present at a meeting formally objects – hence any Pacific Way silence will be taken as consent. If a country is not at a meeting there is no provision for a proxy and it will be bound by any decision (Institutional Arrangements, Art 3), although there is a promise of 'appropriate' funding for FICs' participation at meetings (Art 4).

***Ineffective Protections for the Right to Regulate***

The text has various assurances that give an illusion that sovereign rights to regulate are protected. These are either weak or meaningless. The starting point for these agreements is, as the WTO panel that heard the dispute on *US Gambling* famously said:

> *Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired.*

The primacy of investor rights underpins the objectives of the investment chapter (Art 2), which are to encourage a stable and predictable environment to attract and promote investment flows, with 'due respect' to national policy objectives and the government's right to regulate.

The services chapter (Art 2.3) recognises the right of parties to regulate and introduce new regulations, *provided that regulation is not inconsistent with the chapter.* In other words, it confirms that governments can do what the chapter allows them to do anyway, but can't do anything that would breach the chapter.

Likewise, investors and investments from PACER-Plus countries are subject to the laws, regulations and standards of the host country, *provided those laws are not inconsistent with the chapter* (Art 5.1). Elsewhere (Art 19.2), it says the investment chapter shall not be construed to prevent a government from keeping or introducing any measure *otherwise consistent with this Agreement* that it thinks is appropriate to ensure an investment's activity is sensitive to its environmental or other regulatory objectives. In other words, if it breaches the chapter a government can't pursue those objectives unless it has preserved the right to do so in its schedule or it can fit them within another exception in the agreement.

**Exceptions**
Every contemporary agreement has general exceptions that provide a limited defence for governments when they adopt measures to protect public order and morals, human health, environment and conservation. These exceptions look more effective than they are in practice, as there are many layers of conditions that have to be satisfied before they apply and they have rarely provided an effective defence when relied on in the WTO. There will also be a stronger national security exception.

Cross-border services and foreign investment involve flows of capital. FICs must not restrict these flows for investments covered by PACER-Plus or for several kinds of services. That is major for small vulnerable economies with minimal foreign reserves, for example if they wish to stem the outflow of income from tourism. The global financial crisis showed how destabilising large inflows of speculative or shady capital and rapid capital outflows can be. PICTA TiS at least allowed unusually large payments and transfers to be staggered (Art 11.1); there is no such flexibility in PACER-Plus, which permits very limited restrictions (Art 14).

It is worrying that governments will have to explicitly opt out of the protections in the investment chapter for intellectual property rights (Art 6.2), including when importing generic medicines, and they can only do so as far as the WTO allows – even if the FIC is not a WTO member.

**Social responsibility**

The investment chapter has another ineffectual provision on social responsibility. The governments reaffirm the importance of *encouraging* enterprises to *voluntarily* incorporate internationally recognized standards of social responsibility into their internal policies where they have been *endorsed by the particular government* (Art 5.2), and calls it 'inappropriate' for a government *not to enforce its own laws* on environment, health, labour, safety or other regulatory standards (Art 19.1)!

**Public services**

A further feeble protection is the standard exclusion of 'services supplied in the exercise of governmental authority' (Services Art 2.2(a)) drawn from the GATS. This only applies where services are not commercial *and* have no competitor – meaning the service is provided as a monopoly free of charge or possibly at a nominal payment. Very few services meet both these requirements and those that do face constant pressure to adopt user charges or allow competition, which would mean losing the protection. By contrast, the PICTA Trade in Services Protocol (Art 3.4(b) said the term included 'activities forming part of a system of social security or public retirement plans or the public provision of health, education or water services.'

There is also an important requirement that a monopoly or restricted number of authorised providers is not allowed to 'abuse' its monopoly. That is code for cross-subsidising provision of a monopoly service in high-cost locations from revenue in low-cost areas, or using earnings from the monopoly service to support their other activities for social or commercial reasons, which is a common way for cash-strapped governments to fund core public services (Art 13.2)

A footnote says the services chapter doesn't require privatisation of public services (fn2). That is a red herring (although some accessions to the WTO have required privatisations). The privatising effect of PACER-Plus is more subtle: it creates conditions that erode the public good dimension of government services operations and privilege the commercial dimension and the role of private, especially foreign competitors.

There are several positive variations to GATS. Consistent with some other recent agreements, subsidies are excluded from the services chapter, and they are very broadly defined to include loans, grants, insurance etc (Art 15.2.2(c)). However, if a country's subsidies are seen to undermine the benefits that another government expects from PACER-Plus it must agree to consultations, with an expectation of reaching a mutually satisfactory outcome (Art 15.1). Whether they agree is likely to depend on which countries are involved.

**Withdrawing commitments**

Schedules are technical high-risk undertakings. The rules are complex and it can be hard to identify what they mean in practice inside the country and what needs to be protected. Mistakes are easily made – even the US has done so. Local needs and conditions change. So do technologies, which make things possible that were inconceivable when the schedule was drafted. But there are real barriers to adjusting a country's schedule. No changes are allowed for 3 years. After that a PACER-Plus party can tell the others it wants to make a change, and if no other country objects within 3 months it can do so. But if another country objects, the request goes to the joint committee of all the parties for a decision (presumably if there is no explicit objection). That basically gives the country that objected a veto. If they say yes but require new commitments to compensate for what is being withdrawn, no changes can be made until those new concessions are in place. If the government goes ahead without making those changes, it can face forms of retaliation from the other party that can hurt other businesses or exports.

This power has rarely been invoked in the WTO and the outcomes are pure power politics. In November 2008 the Bolivian government of Evo Morales sought to rescind a commitment made by a previous neoliberal government that allowed foreign control of hospital services, because its new constitution declared health care a human right that could not be privatised. The EU consented to the change. At the last minute, the Bush administration in the US lodged an objection requiring the Bolivian government to negotiate compensatory liberalisation in other services sectors with the US. Bolivia's request is still unresolved.

By contrast, changes have been agreed when it serves the interests of powerful countries. The US announced in May 2007 it would amend the commitment on 'recreational services' that was the subject of the *US-Gambling* case, rather than comply with the ruling Antigua had secured in 2005. The US successfully negotiated the change with the EU in 2007. Antigua is still awaiting a resolution of the dispute it won over a decade ago.

PICTA TiS allows a government in the first 5 years to notify the others if it wants to modify its schedule of commitments and the others collectively decide whether to agree (Art 27.5). Consent should not be withheld if that would hinder the country's development. Yet the FIC is still meant to maintain the overall level of its commitments, suggesting some new compensatory liberalisation would be required if it affected a commercially meaningful service. The lack of even this presumption in PACER-Plus exposes most FICs to risks of future breach and pressure to withdraw a measure to avoid the threat of legal action.

**Blocking back door entry**

A business from a country outside PACER-Plus, for instance Taiwan or Russia, could try to use the back door by setting up under the law of a PACER-Plus country and claiming benefits as a national, including the right to challenge measures adopted by Australia and NZ that impact on their operations.

The Investment (Art 18) and Services (Art 16) chapters allow a PACER-Plus country to refuse to provide those benefits, but it must show that the owners come from outside the PACER-Plus group and the business doesn't have any substantive operations in the country it has set up in. This is a judgement call, and could be especially difficult where the business involves services delivered electronically across the border and has little on the ground presence, or when there is limited value added to their global operations.

A PACER-Plus government can also refuse to provide benefits of the agreement when one of its

own businesses tries to get benefits it can't get as a local business by claiming it really belongs to another PACER-Plus country, such as a Fijian business in Australia.

***Compliance***

Governments of small remote countries may assume they can enter into these agreements and make promises that are not going to be enforced. Even if that were true of the WTO or PICTA, it is not true of these new regional agreements. PACER-Plus provides multiple pressure points for Australia and NZ to demand compliance, culminating in actual enforcement, in addition to leverage through their aid budgets. While PICTA TiS also has some of these obligations (Art 22), it seems unlikely that they have been implemented, monitored or enforced.

**'Transparency'**

Several chapters of PACER-Plus set down procedures and 'transparency' rules relating to goods and services, including actions of local government and non-government bodies. This will impose a heavy burden, even on central government, which must also take 'such reasonable measures available to ensure their observance' by lower levels.

There is a long list of measures that FIC governments will have to publish in print or post online, including licensing requirements and procedures, qualification requirements and procedures and technical standards for services (Art 17.3). The information must include details like requirements, criteria, procedures, fees, timeframes and monitoring mechanisms. Because the services chapter applies to sub-central government and non-government decision makers, this requirement includes their general rules and procedures. The objective is to remove discretion from decision makers as far as possible and empowers commercial interests to intervene with government to advance their interests. Although it only applies 'to the extent of the government's capacity', this can be contested by the other parties.

PACER-Plus governments must respond promptly to all requests from each other for information about laws, policies, procedures that 'pertain to or affect' the operation of the services chapter, even if they do not *directly* relate to a particular service or obligation. There is no flexibility in that provision (Art 17.4), even 'to the extent of their capacity'.

**Institutional oversight**

Australia and NZ will dominate the institutional mechanisms of contacts points, cooperation and technical discussions because they have the expertise, resources and commercial interests to drive the process in the direction that benefits them. The Joint Committee will oversee implementation of the services and investment chapters. This will involve much stronger oversight than the periodic Trade Policy Reviews of WTO members and focus on compliance with the rules and obligations, involving officials from government agencies that have little or no understanding of trade rules.

Future reviews are designed to extend the liberalisation agenda of PACER-Plus, not to review its operation in the FICs and make changes if there are adverse development impacts. By contrast, at the time the Cariforum EC EPA was signed the Cariforum countries insisted on a Declaration that guaranteed a review after 5 years of the costs and consequences of implementation of the EPA. The first review in July 2015 makes for sober reading and should be considered closely by all the PACER-Plus negotiating parties before anything is agreed.[2]

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2 http://www.europarl.europa.eu/meetdocs/2014_2019/documents/dcar/dv/working_/working_en.pdf

A general review of the agreement is scheduled for 3 years after entry into force and 5-yearly after that (Institutional Art 1.2(k)). The Committee on Services, Investment and Natural Persons is to review the chapters and annexes within just 2 years after the agreement comes into force and report to the main committee (Institutional Art 2.1(e)).

Negotiations to extend the FICs commitments must begin within 3 years after PACER-Plus comes into force (Investment Art 24, Services Art 18), with 'appropriate flexibility' in services for developing countries as required by GATS Article V (discussed earlier). That means pressure to commit more services to the rules and more resources to negotiations while FICs are trying to implement rules already agreed to.

**State-state enforcement**

One of the most outdated parts of the proposed agreement is the process for settling disputes. States can enforce the rules and obligations against other states before ad hoc tribunals with each state appointing one arbitrator and the chair by agreement. Unlike most recent agreements, including the TPPA, there is no commitment to openness and disclosure of documents, no provision for amicus curiae briefs from concerned parties, and no code of conduct for arbitrators or rules on conflicts of interest. Because Australia and NZ are the most likely complainants on behalf of their commercial interests, these omissions strip the FICs of crucial protections, including pressure from concerned community groups in those two countries.

**Enforcement of investment rules**

The FICs have proposed to make the problematic investment protections enforceable in their own domestic courts (Art 21). That would be disastrous, given the legal uncertainty of the rules under an ad hoc system of international arbitration that does not operate through precedent, the potential cost of defending a dispute and any remedies, and the difficulties a dispute would pose to government lawyers and national judges.

An actual dispute is not the only problem. Arguably, the bigger danger is the 'chilling effect' of potential disputes on domestic decisions. This might result from a direct threat of litigation by an investor. That was evident in NZ with the plain packaging law after the tobacco companies threatened an investment dispute. The possibility of litigation can also cast a more general shadow over decisions, so that governments become super-cautious when making policy decisions that foreign investors don't support. The UNCTAD has recognised this is a growing concern.

The proposal may have started as an attempt to stave off the inclusion of the highly controversial investor-state arbitration mechanism found in most investment agreements. Investor-state dispute settlement (ISDS) allows foreign investors to sue governments in private ad hoc offshore tribunals, whose arbitrators are often practicing investment lawyers and can award unlimited compensation against governments, including lost future profits with compound interest. As Australia and NZ are not seeking to include ISDS there is no rationale for retaining the provision.

***Recommendations***

This agreement should not proceed without full, independent and contestable scrutiny of all documentation. If it is nevertheless to proceed, the following changes are essential to provide a modicum of protection for the FICs in the services and investment chapters:

1. No most-favoured-nation provision (as per recent investment instruments from India and Brazil) or at the least applying only prospectively (Australia and NZ in the TPPA) and future agreements by the size of other state (Cariforum - EC EPA Title II, chapter 2, Art 9).

2. No minimum standard of treatment provision (NZ Singapore FTA, and recent investment instruments by South Africa and Brazil).
3. A new public services carveout or stronger public services protection (PICTA Services).
4. No obligations on LDCs to make sectoral commitments (Hong Kong Ministerial Declaration, WTO Doha round) and exempt LDC from disputes.
5. Exclude FICs who are not WTO members from WTO and WTO-plus obligations.
6. Recognition by Australia and NZ that GATS Article V requires limited new commitments from other FICs, especially when weighted by the quantum of services trade.
7. Sectoral commitments in FICs' services schedules drafted narrowly and precisely with reference to rules and sub-sectors, preserving maximum policy space and protection against automatic coverage of delivery by new technologies.
8. A strong safeguard mechanism where domestic industry threatened (building on PICTA TiS).
9. Review within 5 years after date of signing on costs and consequences of implementation (Declaration at the signing of the Cariforum EC EPA).
10. Transparency, amicus curiae, code of conduct and other rules for arbitral tribunals in state-state disputes (TPPA and Canada EU trade agreement).
11. Drop the FICs proposal for domestic enforcement of investor protections.
12. Make commitments in the development chapter enforceable

# *Chapter 3: A Health Impact Assessment of PACER-Plus*

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### *Introduction*

This paper presents a prospective, desk-top health impact review of the proposed PACER Plus Agreement, based on leaked draft chapters available in June 2016.

Participants in the PACER Plus negotiations include the member states of the Pacific Islands Forum: Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu. The Pacific island country members of the Forum (ie the Pacific Islands Forum Countries excluding Australia and New Zealand) are referred to as Forum Island Countries (FICs) throughout this report.

PACER Plus builds on the existing Pacific Agreement on Closer Economic Relations (PACER), an agreement between the Pacific Island Forum Countries which came into effect in 2002. Negotiations for PACER Plus have been ongoing for almost seven years, and have proved to be controversial and difficult, with several deadlines for completion missed.

The chapters being negotiated for PACER Plus include: Customs Procedures, Development Assistance, Dispute Settlement, Final Provisions, General Provisions and Exceptions, Initial Provisions, Institutional Provisions, Investment, Labour Mobility, Rules of Origin, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Temporary Movement of Natural Persons, Trade in Goods, Trade in Services, and Transparency. Leaked drafts are available from the Pacific Islands News Association at http://pina.com.fj. Interestingly, there appears to be no intellectual property chapter in PACER Plus.

Few of the leaked drafts have remaining bracketed text, suggesting that the agreement is in the final stages of negotiation.

The Australian Government website says (DFAT, n.d.):

> Australia's approach to the PACER Plus negotiations is different to that taken in traditional free trade agreement negotiations. Australia's primary objective is to promote the economic development of Forum Island Countries through greater regional trade and economic integration.

In many ways, the proposed PACER Plus Agreement differs from, and is more suitable for, developing countries than some other recent regional agreements such as the Trans Pacific Partnership Agreement (TPP). But PACER Plus includes countries with widely varying levels of development (including some countries classified as Least Developed Countries) and few goods and services to export, and there are concerns that even provisions similar to those in the World Trade Organization (WTO) agreements are inappropriate for many of these countries.

Pacific island countries face unique challenges related to their small size, remote location, limited natural resources, vulnerability to natural disasters and the effects of climate change (World Bank, n.d.). Four of the Forum Island Countries are classified as Least Developed Countries by the United Nations Committee for Development Policy (2016): Kiribati, Solomon Islands, Tuvalu and Vanuatu Table 1 lists the PACER Plus countries in descending order of GDP per capita (PPP). Each of the FICs has only a fraction of the GDP per capita (PPP) of Australia and New Zealand. Health

expenditure per capita (PPP) is also markedly lower: under $1,000 for all of the FICs for which data is available, with the exception of Palau, in comparison with over $4,000 for Australia and New Zealand. Life expectancy at birth is also markedly lower for the FICs in comparison with Australia and New Zealand. Eight FICs are not currently members of the WTO.

**Table 1: Socioeconomic and health indicators and World Trade Organization membership**

| PACER Plus country | GDP per capita PPP, (World Bank, 2014) | Income Classification (World Bank, 2016) | Health expenditure per capita, PPP (World Bank, 2014) | Life expectancy at birth (WHO, 2015) | WTO membership |
|---|---|---|---|---|---|
| Australia | 45,925.5 | High | 4,357 | 82.8 | Yes |
| New Zealand | 37,679.0 | High | 4,018 | 81.6 | Yes |
| Palau | 14,756.7 | Upper-middle | 1,429 | - | No |
| Fiji | 8,792.4 | Upper-middle | 364 | 69.9 | Yes |
| Samoa | 5,789.0 | Lower-middle | 418 | 74.0 | Yes |
| Tonga | 5,211.1 | Upper-middle | 270 | 73.5 | Yes |
| Tuvalu | 3,765.3 | Upper-middle | 585 | - | No |
| Republic of the Marshall Islands | 3,529.7 | Upper-middle | 680 | - | No |
| Federated States of Micronesia | 3,057.1 | Lower-middle | 473 | 69.4 | No |
| Vanuatu | 3,030.6 | Lower-middle | 150 | 72.0 | Yes |
| Papua New Guinea | 2,854.7 | Lower-middle | 109 | 62.9 | Yes |
| Solomon Islands | 2,130.4 | Lower-middle | 108 | 69.2 | Yes |
| Kiribati | 1,809.0 | Lower-middle | 184 | 66.3 | No |
| Cook Islands | - | - | - | - | No |
| Nauru | - | - | - | - | No |
| Niue | - | - | - | - | No |

Sources: World Bank, GDP per capita, PPP (current international $): http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD: World Bank, Country and Lending Groups: http://data.worldbank.org/about/country-and-lending-groups: World Bank, Health expenditure per capita, PPP (constant 2011 international $): http://data.worldbank.org/indicator/SH.XPD.PCAP.PP.KD; World Health Organization, Global Health Observatory data: Life Expectancy: http://www.who.int/gho/mortality_burden_disease/life_tables/situation_trends/en/; World Trade Organization, Members and Observers: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

### *Method*

Health impact assessment (HIA) is defined by the European Centre for Health Policy (1999: 4) as "…a combination of procedures, methods and tools by which a policy, program or project may be judged as it its potential effects on the health of a population, and the distribution of those effects

within the population." It involves measuring both direct and indirect effects on health (European Centre for Health Policy, 1999). There is a variety of different approaches to HIA, but regardless of the specific approach, it follows a structured series of steps to assess potential health impacts and derive recommendations for policy-making (Harris & Gleeson, 2014; Hirono et al, 2015).

Over more than two decades, health impact assessment has been used to measure and predict health impacts of policies at a range of different levels including local and state/provincial government, national and international (Harris and Spickett, 2011; Haigh, Harris & Haigh, 2012). HIA has been recommended by the World Health Organization's Commission on Social Determinants of Health (2008) for monitoring policies in all sectors in order to ensure policy coherence and improve health equity.

The use of health impact assessment in the context of trade negotiations is a relatively recent but growing phenomenon. It has proved particularly useful in context of negotiations for the Trans Pacific Partnership Agreement (TPP): examples include a prospective, advocacy-focused HIA examining the potential impact of the proposed TPP on four areas of health policy in Australia (Hirono et al, 2015; 2016) and a summary health impact review conducted by a team of primarily Canadian academics based on the final text of the TPP (Labonte, Schram and Ruckert, 2016; Ruckert et al, 2016). A prospective HIA of the proposed Trans-Atlantic Trade and Investment Partnership has also been conducted (Khan, Pallot, Taylor and Kanavos, 2015).

Within the HIA literature there are several different approaches that can be used. The European Centre for Health Policy (1999) has distinguished between **rapid health impact appraisal** (involving a rapid but systematic assessment involving a combination of experts, policy makers and members of affected communities), **health impact analysis** (a more in-depth and multi-disciplinary approach) and **health impact review**, (which produces a "convincing summary estimation" of health impact based on previous research and analysis). This study uses a prospective health impact review methodology based on leaked draft negotiating documents and existing literature about the potential health impacts of provisions found in trade agreements.

The first step in a HIA is **screening**: reviewing the potential relationships between the policy and health, based on existing evidence (European Centre for Health Policy, 1999). At this stage, all leaked draft chapters available for PACER Plus were reviewed for content that may impact on health and any exceptions/safeguards that might assist governments in defending health related measures. Chapters on Customs Procedures, Rules of Origin and Transparency were excluded from further analysis as they were deemed unlikely to have health impacts other than those arising from economic issues discussed in the context of other chapters. All other PACER Plus chapters for which draft documents were available were included in the analysis.

The second stage, **scoping**, involves a closer consideration of which potential health impacts need further exploration and which methods or approaches should be used for the study (European Centre for Health Policy, 1999). At this stage it was decided to consider both positive and negative potential health impacts, but only for the Forum Island Countries, as the effects on Australia and New Zealand would be expected to be minimal in comparison given the size of their populations, existing health status in these countries and their existing commitments under other trade agreements. A health impact review was chosen as the appropriate method given the limited time available and lack of a multidisciplinary team environment in which to conduct the study. Ideally, a full health impact analysis would examine the potential health impacts in each country; this was beyond the scope of the study, however efforts were made to consider the specific issues for countries that are not currently members of the WTO and particularly the Least Developed

Countries (LDCs). Environmental impacts, while important for health, were considered beyond the scope of this review.

**Appraisal**, the third step, involves generating a report documenting potential impacts and making recommendations to improve the health outcomes (European Centre for Health Policy, 1999). The appraisal step in this study involved scanning each draft chapter of PACER Plus for provisions that may impact on health, either positively or negatively. These provisions were described with reference to the leaked draft texts, the potential positive and negative health impacts were identified and the likelihood of these health impacts arising was estimated, drawing on the existing research and literature regarding trade and health. Finally, recommendations were made based on the appraisal.

The final steps in a HIA generally involve action on the HIA findings, followed by monitoring and evaluation. These steps are beyond the scope of the work undertaken for this report.

***Pathways***

The existing literature was scanned to examine what is known about the pathways through which trade agreements affect health. No single existing framework for analysis was found that is sufficiently comprehensive or suited to the Pacific island context.

Legge, Gleeson, Snowdon and Thow (2013) identified some chapters and provisions generally found in trade agreements that are associated with both possible benefits and possible risks for health. These include: trade in goods chapters, particularly reduction of tariffs and quotas; trade in services chapters; labour mobility provisions; protection of intellectual property rights; investment protections; government procurement chapters; sanitary and phytosanitary measures and technical barriers to trade. They identified four ways in which trade agreements pose risks for the prevention and management of non-communicable diseases (NCDs): 1) increased supply of imported healthy products and corresponding decreased demand for locally produced healthy food; 2) cheaper unhealthy imported products; 3) reduced 'policy space' for the prevention and control of NCDs; and 4) reduced health system capacity to prevent and manage NCDs (Legge et al, 2013).

A wide range of chapters and provisions have been found to have potential implications for health in studies of other trade agreements. For the Trans Pacific Partnership Agreement, these include intellectual property, investment, technical barriers to trade (TBT), sanitary and phytosanitary measures, regulatory coherence, government procurement, transparency and anti-corruption, and market access chapters (Labonte et al, 2016; Ruckert et al, 2016; Hirono et al, 2015; 2016). A framework developed by Ruckert et al (2016) for a health impact assessment of the TPP identified three main pathways: market access and spread of unhealthy commodities; threats to equitable access to essential health services and affordable medicines; and reductions in government regulatory flexibility.

In a comprehensive review of the literature on trade policy and public health, Friel, Hattersley and Townsend (2015) identified five pathways associated with "twenty-first century" trade policy, which they characterised as: "investment liberalisation; unhealthy commodities; health services; working conditions; and environmental effects".

Building on the frameworks developed by Legge et al (2013) and Ruckert et al (2016), four pathways were identified to guide the appraisal stage of this health impact review, bearing in mind the particular context for Pacific island countries:

1. Economic and social determinants of health;
2. Access to health services and technologies;
3. Availability of unhealthy products; and
4. Policy space to address non-communicable diseases.

Each draft chapter of PACER Plus included in the analysis was systematically examined for potential impacts, both positive and negative, through each of these pathways.

### *Draft PACER Plus chapters and their potential health impacts*

*Trade in Services*

The draft PACER Plus Chapter on Trade in Services appears to be largely based on the WTO's General Agreement on Trade in Services. It applies to central, regional and local government and to non-government organisations in cases where power has been delegated to them by any level of government (Article 1.1(i)). The chapter covers four modes of trade in services, as set out in Article 1.1(v):

> Trade in services means the supply of a service:
> 13. from the territory of one Party into the territory of another Party ('Mode 1');
> 14. in the territory of one Party to the service consumer of another Party ('Mode 2');
> 15. by a service supplier of one Party, through commercial presence in the territory of another Party ('Mode 3');
> 16. by a service supplier of one Party, through presence of natural persons of a Party in the territory of another Party ('Mode 4')

Article 2 specifies that the chapter does not apply to "services supplied in the exercise of governmental authority", and a footnote provides clarification that "…nothing in this Chapter shall be construed as requiring the privatisation of public services supplied in the exercise of government authority" (Footnote 2).

An exception (Article 2.3) states:

> For greater certainty, the Parties recognise the right of all Parties to regulate and to introduce new regulations to regulate the supply of services within their territory in order to meet national policy objectives, *provided that such regulation is not inconsistent with this chapter*. [italics added]

This is a weak exception, as it is undermined by the italicised wording at the end, which essentially privileges the obligations of the chapter over the right to regulate.

The chapter uses a "positive list" approach where each party chooses the sectors in which it wishes to make commitments, and can specify certain limitations and conditions. This is preferable to a "negative list" approach (i.e. everything is covered except for what is listed), which generally captures a broader range of services and can have unintended effects, such as inadvertently capturing future service configurations that are difficult to forecast.

The obligations of the PACER Plus Trade in Services Chapter are substantial. Under Article 5.2, for each sector a country nominates for market access commitments, it must not introduce limits, (except where specified in the schedule) on: the number of service suppliers; the total value of service transactions; the total number of service operations or quantity of service outputs or the participation of foreign capital. Nor can it restrict or specify types of legal entity through which services are supplied (Article 5). A Most-favoured-Nation Treatment clause (Article 3) means that parties must treat services and service suppliers of another party no less favourably than those of a third party (except where specific exemptions are listed) and Article 6 on National Treatment indicates that parties must treat services and service suppliers of another party no less favourably

than their own.

Article 10 specifies that "In sectors where specific commitments are undertaken, each Party shall ensure that all measures of general application affecting trade in services are administered *in a reasonable, objective and impartial manner*" [italics added]. These terms contain pitfalls as their meaning is open to interpretation and could become a matter for dispute.

Potential positive health impacts

It is possible, but does not seem likely on the basis of existing evidence, that the liberalisation of services in the FICs could create improved market access for FIC services, resulting in economic benefits, leading ultimately to better living standards and better health. Australia and New Zealand have far bigger and more established service sectors which are more likely to be able to take advantage of increased market access to the FICs, and it is likely that any benefits will accrue to these countries. The FICs in contrast have limited capacity to use such opportunities.

It is also possible that liberalisation of the health sector could result in an expanded range or improved quality of health services and health technologies (Smith, Chanda & Tancharoensathien, 2009). However, developed countries have far greater ability than developing countries to utilise the opportunities provided by high-technology health care (Smith et al, 2009). Any benefits to be gleaned from health sector liberalisation could also be achieved through unilateral liberalisation or development cooperation, and in ways that make it easier to meet other goals such as access and equity.

Potential negative health impacts

Liberalisation of trade in services generally could have a negative impact on health in the FICs through indirect routes such as increasing unemployment (particularly if the FICs have made substantial commitments in sectors such as tourism). Trade liberalisation can also increase wage inequality in the labour market, if wages rise for highly skilled workers and fall for those in lower-skilled jobs (Friel et al, 2015). The impacts of increased foreign direct investment on nutrition (which can arise from Mode 3 commitments in the Trade in Services Chapter or through the investment chapter) are discussed in Section 4.5.

It is difficult to evaluate potential direct negative health impacts on the health system without access to the Schedule of Specific Services Commitments. While the health sector is not carved out of the Trade in Services Chapter, presumably FICs have the freedom to choose not to liberalise trade in health services. However, if health services are liberalised, there are significant down-sides, explored below.

Liberalisation of the cross-border supply of health services (Mode 1) can lead to the proliferation of higher cost, private services which can only be accessed by wealthier sections of the population. This can ultimately lead to a two-tier health system and erode access and equity. Trade in services commitments do not force countries to privatise their health services (and a footnote in the PACER Plus text explicitly indicates that this is not the case). However, when governments do privatise services, binding commitments in trade agreements can make it difficult to unwind privatisation and reconfigure health systems according to population need and governmental priorities (Smith et al, 2009). Services privatised by one government may not be able to be returned to governmental control by the next. Trade in services commitments can also place limits on governments' ability to regulate health services and support local service development. As noted above, the exception protecting governments' 'right to regulate' is weak and privileges the obligations of the chapter.

Liberalisation of the health sector via Mode 2 promotes the consumption of health services abroad (i.e. medical tourism). While there can be some economic benefits involved for developing countries, this type of activity can detract from the health system in the destination country by diverting needed human and other resources from the public health sector, reducing access to health care (Missoni, 2013). The policy implications of medical tourism include potential increases in patient co-payments, an increasing proportion of private services, implications for quality control, the availability of specialists in the public health sector and the future training and supply of health professionals (Pocock and Phua, 2011; Johnston, Crooks and Ormond, 2015).

Mode 3 health sector liberalisation (commercial presence abroad) facilitates foreign direct investment in the health system. This can erode equity in health systems, increase out-of-pocket payments and move countries further away, rather than closer, to universal health coverage (Misson, 2013). Benefits flowing from increased capital investment can also be undermined by loss of policy levers due to foreign control of health service provision and loss of resources from domestic public health services (Smith et al, 2009).

The potential effects of Mode 4 commitments are discussed in the next section.

*Temporary Movement of Natural Persons*

This chapter, essentially an expanded Mode 4 Schedule, applies to the temporary entry of nationals, citizens or permanent residents of one PACER Plus country to another PACER Plus country. The aim is to facilitate and streamline their movement. The scope of this chapter is not yet clear: Article 2 includes several categories of persons that are not yet agreed. There does seem to be agreement that the chapter will cover business visitors, intra-corporate transferees and installers and servicers. The specific commitments made by each country are set out in an Annex, the contents of which are not available. Article 8 specifies that the PACER Plus dispute settlement mechanism can only be used for a dispute over a refusal to grant temporary entry if:

4. the matter involves a pattern of practice on the part of the granting Party; and
5. the natural persons affected have exhausted all available domestic remedies regarding the particular matters.

Article 9 indicates that the commitments in this chapter will be reviewed periodically, starting with a review within three years of entry into force, in order to "progressively liberalise the movement of natural persons among the Parties".

Potential positive health impacts

It is possible that facilitating temporary entry generally may bring economic benefits to the FICs, leading to better health. However, there is no evidence to suggest this is would be a likely outcome. The only categories of persons which appear to have been agreed to date are business visitors, intra-corporate transferees and installers and servicers. At least for the first two categories, these provisions are likely to benefit Australia and New Zealand to a greater extent than the FICs. Movement of health professionals under Mode 4 might also bring increased remittances and result in other benefits for the health sector, such as increased knowledge and skills (Missoni, 2013). However, even if these potential benefits are realised, they may be outweighed by the negative effects noted below.

Potential negative health impacts

Without access to the specific offers made by each country, it is difficult to determine the potential negative health impacts of this chapter. If FICs have submitted offers for health professionals, it is possible that existing health worker shortages could be exacerbated through movement from FICs

to Australia and New Zealand, or as a result of movement between FICs. Movement of health professionals from least-developed countries to wealthier countries has exacerbated poor access to health services in Africa (Friel et al, 2015). Scarce resources invested in training health professionals can also be lost due to movement of health professionals across borders (Missoni, 2013).

Health worker migration from the Pacific islands to Australia and New Zealand has been shown to contribute to shortages in the Pacific, with one study (Negin, 2008) finding more nurses and midwives from Samoa, Tonga, Fiji and Niue in the Australian health workforce than the numbers working in their own countries. A later study by Yamamoto et al (2012) suggests that human resource shortages in the Pacific islands have intensified since this time, with shortages reaching critical levels in three countries (Papua New Guinea, Samoa and Vanuatu).

*Labour Mobility*

The stated purpose of the Draft Arrangement on Labour Mobility (incorporating outcomes of the 11th Intersessional Meeting) is to "strengthen Pacific labour mobility cooperation between the Participants" (Paragraph 1). The Arrangement is drafted in aspirational language: for example, Participants "recognise their mutual interest in opportunities to enhance the operation of existing labour mobility schemes…" (Paragraph 5.2) and variously "recognise", "acknowledge", "support" and "endeavour to" take a range of actions to support and enhance labour mobility arrangements. The main mechanism through which cooperation is to be advanced is a Pacific Labour Mobility Annual Meeting established under Paragraph 4, which is to meet annually and report to the Pacific Islands Forum Trade Ministers' Meeting "for their consideration and appropriate action".

There are two potential impacts on health arising from this Arrangement: employment and economic benefits, with a potential positive impact on the social determinants of health; and 'brain drain' of health workers to Australia and New Zealand.

<u>Potential positive health impacts</u>

Labour mobility appears to be the primary area in PACER Plus where there could have been prospects for the FICs to negotiate arrangements which could have generated significant employment and economic benefits through increased remittances. But the Draft Arrangement appears to contain no levers to actually improve labour mobility arrangements to the benefit of the Forum Island Countries and it is difficult to see that it could achieve its stated purpose when it is non-binding and simply defers action to the Trade Ministers' Meeting.

<u>Potential negative health impacts</u>

The second potential health impact is the prospect of increased movement of health professionals from the Forum Island Countries into Australia and New Zealand. Paragraph 9, if implemented, may facilitate this movement through increasing recognition of qualifications and registration of occupations, contributing to a flow of health professionals away from the FICs. Whether the Arrangement is likely to lead to this outcome is unclear, since the commitments are non-binding.

*Trade in Goods*

The objectives of the Draft Trade in Goods Chapter (incorporating outcomes of the 14th Intersessional Meeting) are to "…avoid unnecessary barriers to trade, facilitate and liberalise trade and thereby promote integration between the economies of the parties" (Article 1). The main mechanism through which this objective is achieved, like the World Trade Organization's General Agreement on Tariffs and Trade, is through the reduction or elimination of tariffs. This chapter appears to be at an earlier stage of development than many of the others, with large sections of text

still bracketed.

The chapter does provide some forms of special and differential treatment for developing countries, but these appear quite limited. For example, a developing country may modify or withdraw a tariff concession through mutual agreement with other parties, but is expected to make compensatory adjustments in other areas (Article 3.7). Article 8 provides for transitional safeguard measures which can be applied if the quantity of imports of a particular goods "cause or threaten to cause serious injury to the domestic industry that produces a like or directly competitive good". However, the parties seem to be proposing very short transition periods in which these measures can be used, as well as limits on the duration of maintaining them. Australia and New Zealand have proposed that transitional measures not be used more than once for a particular good. The safeguards proposed for infant industries also appear to be complex and limited. Given the degree of economic inequality between the PACER Plus parties and the vulnerability of their domestic industries, it would be a better outcome for the FICs if there were no limits placed on the use of these safeguards. Schedules of commitments on tariffs are not yet available so it is difficult to make predictions about the potential health impacts of this chapter.

Potential positive health impacts

Reducing or eliminating tariffs on goods could lead to cheaper imported consumer goods in the Pacific islands, which may have some impact on living standards and the social determinants of health. If imports of healthy foods (such as whole grains and fresh fruits and vegetables) reduce in price, this could also be expected to have a direct positive impact on health. However, such benefits are likely to be undermined by the significant negative health impacts that may arise in a number of areas (see below).

It seems very unlikely that the exporters in the FICs would benefit substantially from tariff elimination by Australia and New Zealand, as tariffs are already low for these countries.

Potential negative health impacts

The reduction or elimination of tariffs is likely to have a significant economic impact on the FICs, some of which are highly dependent on tariffs as a source of revenue. A 2007 report by Nathan Associates Inc. found that Fiji, Papua New Guinea, Samoa and Vanuatu could lose in excess of $10 million in revenue each year and the total revenue for the Cook Islands, Kiribati, Samoa, Tonga and Vanuatu could be reduced by more than 10%. While it may be possible in some cases to replace revenue generated from tariffs with excise or value added taxes, these taxes are more resource intensive to collect and can be difficult to enforce in developing countries (Legge et al, 2013). Historically, developing countries have been slow to recover from revenue losses arising from trade liberalisation, even when value-added taxes are introduced to offset these (Baaunsgaard & Keen, 2005). Furthermore, tariffs can be targeted to discretionary items purchased mainly by those on higher incomes, whereas value added taxes are generally distributed across the whole population, creating equity concerns for low income groups.

There is a substantial body of evidence indicating that reduction of tariffs and other 'barriers to trade' in food products can lead to increased availability and lower prices of unhealthy foods, and can affect household food security (Labonte et al, 2011). The availability of fresh locally produced foods may also be reduced if agriculture and production is diverted towards export production (Legge et al, 2013). Intensification of export crop production has in some countries resulted in decreased production and increased prices of traditional crops (Legge et al, 2013).

*Investment*

The intent of the Draft Chapter on Investment (incorporating outcomes of the 11th Intersessional Meeting) is to "encourage a stable and predictable environment to attract and promote the flow of investment between the Parties with due respect to national policy objectives and to the right of each Party to regulate" (Article 2).

The chapter is sweeping in its scope. It contains a broad definition of investment, including intellectual property rights and other intangible property rights (Article 1.5). These types of intangible property 'rights' have been at issue in many health-related investor-state disputes. The definition of an investor is also broad: "…a Party, or a natural person or an enterprise of a Party that has made *or seeks to make* an investment in the territory of another Party." (Article 1.6, emphasis added). The chapter applies the actions of central, regional or local government, as well as non-governmental bodies which are delegated power by any level of government (Article 1.8), and to a wide range of "measures" including laws, regulations, rules, procedures, decisions and administrative actions (Article 1.7).

The Draft Investment Chapter includes provisions for National Treatment (meaning that Parties must treat investors of other parties no less favourably than their own) and Most Favoured Nation Treatment (investors of any other party must be treated no less favourably than investors of a non-party). The National Treatment and Most Favoured Nation provisions (Article 6 and 7) state that parties may derogate from these obligations "provided this is not inconsistent with the WTO TRIPS Agreement or relevant international agreements on intellectual property rights…". The implications of these clauses are not completely clear, particularly those countries which are not WTO members.

Article 9 (Minimum Standard of Treatment) and Article 13 (Expropriation) are problematic. Language on "fair and equitable treatment" in Article 9 tends to be interpreted broadly in investment disputes. The definition of expropriation in Article 13 includes indirect expropriation, which also tends to be invoked in investor-state disputes. Fortunately, there is an exception for compulsory licenses, however for WTO members, the exception only applies provided that the issuance is "consistent with the TRIPS Agreement and with the applicable international agreements on intellectual property rights binding on the Parties" (Article 13.5). This is a concern if it means that compliance with the TRIPS Agreement may be determined in a context outside of the WTO.

Article 19 includes an exception, which is not very strong: parties can implement measures to ensure that investment is sensitive to environmental and other regulatory objectives, but only if such measures are "otherwise consistent with this Agreement". The Annex on Expropriation and Compensation, however, does include a stronger public health exception (albeit applying only to disputes over indirect expropriation):

> Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety and the environment do not constitute expropriation of the type referred to in paragraph 2(b).

Fortunately, there is no investor-state dispute settlement (ISDS) mechanism, as these are very problematic from a health perspective. However, the FICs appear to have proposed an alternative process whereby an investor can submit a dispute for resolution to the courts or administrative tribunals in the host state, which can consider the PACER Plus investment chapter (Article 21). While far preferable to ISDS (which requires that disputes be dealt with in international arbitration), the alternative dispute settlement process still allows foreign investors additional levers, in comparison with domestic companies, to contest government decisions. There remains a risk that large companies based in Australia or New Zealand may launch, or threaten to launch claims over perceived breaches of the investment chapter obligations. Such actions may deter governments from

introducing policies which impact negatively on large foreign companies.

Potential positive health impacts

It is possible that the PACER Plus Investment Chapter may encourage foreign direct investment in the FICs, leading to economic development and better health, however this is by no means certain, or supported by evidence. While the investment chapter does not include ISDS, it provides a relatively extensive set of investment protections, however there is no empirical evidence that such protections stimulate FDI. On the other hand, there are significant risks from a health perspective.

Potential negative health impacts

Promoting foreign investment can conflict with public health goals where it facilitates FDI in industries that produce and/or market health damaging products such as ultra-processed foods, tobacco and alcohol. There is a substantial body of evidence demonstrating that increasing FDI in developing countries increases the penetration of transnational food corporations, increases the availability of foods of poor nutritional value, and reduces prices of these foods (Labonte 2011; Friel et al, 2015). Similarly, evidence suggests that investment liberalisation results in increased levels of FDI by the tobacco and alcohol industries, with corresponding decreases in the price of tobacco products, and increased availability, promotion and advertising of alcoholic beverages (Friel et al, 2015).

Furthermore, investor rights to bring disputes can have a chilling effect on government regulation. While the alternative dispute settlement procedure proposed by the FICs does not carry the same prohibitive legal costs as international arbitration, there is still a risk that corporations may use it to deter governments from regulating their products.

*Technical Regulations, Standards and Conformity Assessment Procedures (Technical Barriers to Trade)*

The draft Chapter on Technical Regulations, Standards and Conformity Assessment Procedures (incorporating outcomes of the 7th Intersessional Meeting) is similar to the WTO Technical Barriers to Trade Agreement in many respects. It appears to be essentially concluded, with only two short sections of bracketed text remaining.

The intent of this chapter (and its equivalents in other trade agreements) is to ensure that technical regulations, standards and conformity assessment procedures do not present unnecessary barriers to trade. Like the WTO TBT Agreement, the chapter will apply to such regulations, standards and procedures developed by the central government in PACER Plus countries; and each Party is to take "reasonable measures" to ensure that local government and non-government bodies also comply with its obligations (Article 2).

The chapter requires parties that are WTO members to comply with the WTO TBT Agreement. Developing country parties that are not members of the WTO are required to base any new technical regulations, standards and procedures on the TBT Agreement "only to the extent of such Party's capacity" (Article 4). It is not made clear who will assess the extent of the developing country party's capacity.

The contents of the chapter appear broadly similar to the terms of the WTO TBT Agreement, and the commitments are substantial. Article 5 requires parties not to discriminate between products of national origin and imported products. Article 6 obliges each party to respond to reasonable written requests for information about its technical regulations, standards and conformity assessment procedures and to provide reasons in writing if it "does not use an international standard, guide or

recommendation…as a basis for a technical regulation or conformity assessment procedure" or in a range of other situations including when another party believes it is using a regulation or procedure that is more trade restrictive than necessary or applied more strictly than necessary. Article 7 requires observance, for WTO members, of the Code of Good Practice for the Preparation, Adoption and Application of Standards at Annex 3 to the TBT Agreement (non-WTO members are to observe the provisions of the Code to the extent possible). Article 8 requires publication/notification of proposed technical regulations or conformity assessment procedures and the provision of time to comment. Article 10 addresses cooperation on standards, technical regulations and procedures and Article 12 provides for meetings through the Joint Committee and a review of the chapter three years after entry into force.

Provisions on special and differential treatment in Article 13 borrow from certain sections of Article 12 of the WTO TBT Agreement (Special and Differential Treatment of Developing Country Members). However, the special and differential treatment provisions in Article 13 are nowhere near as comprehensive as those in the TBT Agreement and leave out key obligations on parties to ensure that international bodies involve participation by developing countries and prepare international standards relevant to developing country products. There is no mention of the provision of full or partial exceptions from the chapter's obligations, as is included in the WTO TBT Agreement Article 12.8.

There does not seem to be much here, if at all, that imposes obligations on PACER Plus parties that are additional to the WTO TBT Agreement. However, it is concerning that the PACER Plus countries which are not currently WTO members will face pressure to conform to provisions very similar to the TBT Agreement, to the extent of their capacity to do so.

The PACER Plus chapter on Technical Regulations, Standards and Conformity Assessment Procedures does not explicitly reference the requirements in Article 2 of the TBT Agreement that technical regulations do not create unnecessary obstacles to trade or are "not more trade restrictive than necessary to fulfil a legitimate objective…"(art 2.2), or that they should be based on international standards, where these exist (art 2.4). However these expectations are implicit in Article 6, which requires them to explain in writing when another party believes they are applying a regulation which is more trade restrictive than necessary, or when they don't use an international standard as the basis for a regulation or procedure. Thus, the chapter may in practice have the same effect as having all countries accede to the WTO TBT Agreement.

<u>Potential positive health impacts</u>
It is difficult to identify positive health impacts resulting from this chapter (or the SPS chapter, discussed below) for the FICs or their exporters given that Australia and New Zealand are WTO members and already have SPS and TBT commitments in other trade agreements. It is possible that there may be some small economic benefits for Pacific island companies which export to other FIC countries which are not already members of the WTO. However, Australia and New Zealand are likely to be the main beneficiaries of FIC compliance with TBT rules.

<u>Potential negative health impacts</u>
The potential negatives are considerable, particularly in the context of resource-poor countries. The requirement to justify regulations or standards that are perceived by other parties as more trade restrictive than necessary or applied more strictly than necessary places a large burden on small island states with few resources to commit to developing a strong evidence base for policy interventions. There has been a range of disputes at the WTO over health-related measures that are perceived as technical barriers to trade. For example, claims by the US and other countries that

Thailand's proposed front-of pack traffic-light labelling scheme for snack foods breached the WTO TBT Agreement led to the Government backing away from this measure (Friel et al, 2015). Similarly, Thailand's plans for graphic alcohol health warnings were challenged as a breach of the TBT Agreement by a number of other countries, including Australia (Friel et al, 2015).

*Sanitary and Phytosanitary Measures*

The draft Chapter on Sanitary and Phytosanitary Measures (dated June 2014) appears to be essentially concluded, with one remaining short bracketed section of text. The aim of SPS provisions is to ensure that food safety and animal and plant health measures (such as quarantine regulations or food safety requirements) do not present unnecessary barriers to trade.

One of the explicit aims of the draft PACER Plus SPS chapter is to "promote the application of the requirements of the SPS Agreement by Parties that are not WTO Members" (Article 1.1(e)). Like the TBT Chapter, the SPS chapter requires compliance by WTO Members but states that developing countries that are not WTO Members must base SPS measures on the WTO SPS Agreement "only to the extent of its capacity".

As for the WTO SPS Agreement, there is a requirement that SPS measures are applied "only to the extent necessary to protect human, animal or plant life or health", and they must be based on scientific principles underpinned with scientific evidence (Article 5.1). Furthermore, SPS measures should be based on international standards, where these exist (Art 5.3). If a party wishes to implement an SPS measure that exceeds relevant international standards, there must be a scientific justification.

The SPS Chapter includes a weak exception similar to that in the Trade in Services Chapter, indicating that parties can take SPS measures "…provided that such measures are not inconsistent with this Chapter" (Article 4.1).

<u>Potential positive health impacts</u>
As for the TBT chapter (see Section 4.6), it is difficult to identify any significant benefits for the FICs.

<u>Potential negative health impacts</u>
The requirement to base SPS measures on scientific evidence creates a significant burden for the FICs and potentially rules out some policy options that may be sensible in the context of small island states with large burdens of non-communicable diseases.

*Development Assistance*
Amongst the leaked documents is one entitled 'Draft Chapter on Development Assistance – Working Document incorporating outcomes of the 10th Intersessional Meeting'. The purpose of this chapter is described as improving "existing development and economic cooperative partnerships in trade and investment related areas, taking into account the needs identified by the developing country Parties and mutually prioritized and determined by the participating Parties." (Article 1.2). At its core is an agreed 'Work Programme' defined as "the programme of development and economic co-operation activities mutually prioritised and determined by the Parties taking into account the needs identified by the developing country Parties…" (Article 2(b)). The Work Programme is firmly focused on trade and investment and in particular, implementation of, and compliance with, the PACER Plus obligations. The Dispute Settlement Chapter does not apply to disputes arising from this chapter.

An accompanying document titled 'Technical Assistance Needs for Pacer Plus Implementation' sets out the technical assistance needed by the FICs to implement the Agreement. There is no provision in this list for assistance to health officials to analyse the potential health impacts, develop policies to mitigate them, or to design trade-compliant health policies. The assistance appears to be overly focused on compliance at the expense of considering and mitigating wider impacts.

Potential positive health impacts

As for labour mobility, development assistance is an area of PACER Plus where the Forum Island Countries may have had a reasonable expectation of gaining benefits that could have conceivably led to improvements in living standards, and therefore health. There is little here, however, that suggests the chapter or its work programme will achieve these outcomes.

Potential negative health impacts

The development assistance to be provided focuses on PACER Plus implementation and compliance. Given the contraction of foreign aid funding, particularly in Australia, and the low likelihood of future increases (at least under the current Federal Government), there is a risk that financial investment in the work programme will redirect funding from other programs and channels which could have given rise to greater health gains. There is also a legitimate concern with the provision of 'Aid for Trade' by countries that stand to gain economically from the arrangements. The Budget Subcommittee to be set up to manage the Work Programme expenditure also appears to be dominated by Australia and New Zealand. Appendix 1 indicates that it will comprise two representatives from Australia, one from New Zealand and two from the FICs.

*Institutional Provisions*

The Draft Chapter on Institutional Provisions (incorporating the outcomes of the 11th Intersessional Meeting) establishes the Joint Committee that will oversee the implementation of the agreement, and its subsidiary committees. The rules by which this Joint Committee and its subsidiary bodies operate will be important in determining the outcomes for the FICs.

Article 3 indicates that decisions of the Joint Committee and its subsidiaries will be made by 'mutual agreement' between the parties. Clause 2 of Article 3 specifies that "Except as otherwise provided in this Agreement, the Joint Committee or subsidiary body shall be deemed to have acted by mutual agreement if no Party present at any meeting when a decision is taken formally objects to the proposed decision". It appears that Australia and New Zealand will essentially have veto rights on issues where their interests conflict with those of the FICs. Furthermore, Article 4 states that the developed country parties will provide funding for the participation of FIC representatives to attend these meetings, and that the number of officials to be funded will depend on the issues on the agenda. This appears to give a lot of power to Australia and New Zealand to influence the decision making process at the Joint Committee and its subcommittees, exacerbating the existing power imbalance between the developed and developing countries.

*General Provisions and Exceptions*

Article 1 of the Draft Chapter on General Provisions and Exceptions (dated May/June 2016) incorporates the general exception in Article XX of the World Trade Organization's General Agreement on Tariffs and Trade (GATT 1994). This exception applies to the following chapters: Trade in Goods, Rules of Origin, Customs Procedures, Sanitary and Phytosanitary Measures (SPS), Technical Regulations, Standards and Conformity Assessment Procedures. The part of the GATT Article XX exception relevant to health is as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a

> means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:…
> (b) necessary to protect human, animal or plant life or health

Article 1 of PACER Plus also specifies that these measures "include environmental measures necessary to protect human, animal or plant life or health".

Article 1.5 of the General Provisions and Exceptions Chapter sets out a similar exception applying to the investment chapter.

The health exceptions set out here may assist a government introducing, or attempting to introduce, a health-related measure, in the event of a claim by a PACER Plus party or an investor that the agreement had been breached. However, the exceptions do not prevent such claims from being made.

***Conclusions and Recommendations***

The final section of the report draws some conclusions in terms of the four main pathways by which PACER Plus could affect health, presents some general comments about the nature of the agreement and makes some recommendations for mitigating the negative health impacts in the context of the negotiations.

*Economic and social determinants of health*

There is little evidence in the draft provisions for PACER Plus of any substantial economic benefits that are likely to accrue for the Forum Island Countries. In the two areas where the FICs may have had reasonable expectations of negotiating beneficial arrangements that could conceivably have led to increased employment, remittances and government revenue (namely, labour mobility and development assistance) the legal language is weak and non-binding, requiring no firm commitments from Australia and New Zealand over and above existing arrangements. If the Forum Island Countries have any prospects of gains in these areas, it would seem that these are extremely limited within the context of a trade agreement.

On the other hand, the prospects for significant revenue losses for the FICs seem strong, particularly due to reduction or elimination of tariffs, and it is uncertain to what extent these losses can be offset by alternative means of taxation.

*Access to health services and technologies*

It is a positive development that there appears to be no intellectual property chapter in the PACER Plus, since intellectual property rights commonly included in trade agreements are associated with longer monopolies and delayed availability of generic medicines.

There is a chance that liberalising trade in health services could result in improvements to the range or quality of health services and health technologies, but these improvements could come at the expense of access and equity considerations.

If FICs have agreed to liberalise their health sectors, there could be a range of negative consequences for their health systems, including a) a proliferation of high cost, private health services leading to a two-tier health system; b) diversion of health system resources from the public system to service medical tourism; c) loss of policy levers and d) exacerbation of existing health worker shortages.

*Availability of unhealthy products*

Reducing tariffs and other barriers to trade in unhealthy products such as processed foods, alcohol and tobacco, and increasing foreign direct investment in industries which manufacture and market these products, has been shown to increase the availability and reduce retail prices of these goods.

*Policy space to address non-communicable diseases*
The key areas in which the PACER Plus agreement could constrict policy space to address NCDs is through the commitments in the SPS, TBT and investment chapters. These provisions require countries which are not already WTO members to comply to the extent of their capacity with obligations to ensure that regulations and standards are no more trade restrictive than necessary (TBT) and that food safety and animal and plant health measures are applied only to the extent necessary, and are based on scientific principles and evidence (SPS). The investment chapter includes a range of protections for investors along with a process allowing them to make claims regarding breaches of the investment chapter obligations in courts or administrative tribunals in the host state. This risks acting as a deterrent to measures to regulate unhealthy products.

*General comments*
In conclusion, the proposed PACER Plus trade agreement, as currently drafted, presents a range of risks to health which appear to outweigh the small prospects of health benefits arising from the agreement. In many ways the agreement is unsuitable for developing countries – many chapters contain obligations that are similar to the WTO obligations. This is despite the fact that PACER Plus includes many developing countries, some of which are classified as Least Developed Countries and many of which are not currently WTO members. While some health exceptions are included, these are generally not strong and in most cases will not be sufficient to prevent disputes over health-related issues. Where special and differential arrangements for developing countries are included, these are very limited and do not provide enough scope for developing countries to support their domestic industries, where such support might be needed.

This health impact review presents a summary picture of the main potential health impacts related to four pathways through which trade agreements can affect health. It is a desk-top review based on leaked draft documents and a review of existing evidence in the published literature on trade and health. More comprehensive health impact assessments are needed to examine the potential impacts for specific countries, and should be based on evidence from a range of sources, including local data and stakeholder consultations.

*Recommendations*
In order to minimise the negative health impacts and maximise any potential positive outcomes, the Forum Island Countries should consider:

I. Investigating alternative avenues through which their objectives could be met, rather than a trade agreement.
II. Undertaking thorough, independent health and human rights impact assessments of the proposed text in each country prior to conclusion of the negotiations.
III. Developing comprehensive mitigation plans and indicators to measure health impacts over time, and collecting baseline data prior to implementation.
IV. Avoiding nominating the health sector for market access commitments in the Trade in Services and Investment chapters.
V. Avoiding any commitments regarding health workers in the Temporary Movement of Natural Persons chapter and the Arrangement on Labour Mobility.
VI. Insisting on meaningful commitments by Australia and New Zealand to expand and improve seasonal worker programs, along with enforcement mechanisms.
VII. Insisting on more flexible and generous special and differential treatment provisions for

developing countries throughout the Agreement, including removing limitations on the use of transitional safeguard measures in the Trade in Goods Chapter.

VIII. Avoiding the elimination or reduction of tariffs on health damaging products such as processed foods, alcohol and tobacco.

IX. Narrowing the scope of the investment chapter, removing language on fair and equitable treatment and strengthening the health exception in Article 19.

X. Withdrawing the proposal for settlement of disputes between the parties and foreign investors (Investment Chapter Article 21).

XI. Removing the requirement for non-WTO members to comply with the SPS and TBT chapters to the extent of their capacity.

XII. Insisting on meaningful commitments for development assistance that guarantee broad-based assistance beyond the implementation of PACER Plus and according to the priorities of FICs.

XIII. Reconsidering the make-up of the Joint Committee and its subsidiary bodies and the process for decision making to ensure adequate FIC representation and input.

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# *Chapter 4: The Implications for the Proposed PACER-Plus for the Right to Food and Food Security in the Pacific Island Countries*

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### *Introduction*

According to the Universal Declaration of Human Rights (1948, art. 25.1) "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food…". Since then, the right to food has been reinforced in more than one hundred binding and non-binding international agreements **(**Overby 1990). For the UN Special Rapporteur, the right to food is:

> "the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear" (Ziegler 2001).

We argue in this paper that PACER-plus will severely constrain the capacity of the Pacific FICs to protect, respect and fulfil the right to food. These states will not be able to use tariffs to protect their countries from cheap dumped exporters, will not be able to protect small local producers, processors and exporters through tariffs and will not be able to protect the health of their citizens by raising tariffs or banning imports of unhealthy foods. While the Pacific FICs will need to reduce their tariffs drastically and thus provide better export trading opportunities for Australia and New Zealand, the export opportunities of their own producers and businesses will by severely curtailed by complicated Rules of Origin (RoO) and onerous Sanitary and Phytosanitary (SPS) Measures.

We also argue that the investment and services rules of PACER-Plus will negatively affect the right to food since the agreement will not only affect domestic regulations which may be seen as "unnecessary barriers to trade", they may also have implications for land ownership and thus the right to food. Few development benefits will come from this agreement from a food security and a right to food perspective. PACER-Plus is not a development agreement. It is trade agreement which is based on the assumption that freer markets will raise all boats. To begin with, this assumption does not hold true for small island countries which have small markets and are very geographically isolated. Secondly, this is a lop-sided agreement which compels the FICs to open their markets while at same time restricts their market access through non-trade barriers such as strict SPS and RoO.

### *The Right to Food*

The right to food consists of two components: the right to adequate food and the right to be free from hunger. The right to adequate food is a progressive right that states must address as promptly as possible within the scope of their available resources, to ensure the full realisation of the right to food in all aspects. (Ganesh 2010; Hawkes and Plahe 2013). Nevertheless, the availability of food is not sufficient itself; it is also about the right to be free from hunger, which establishes the minimum requirement of states to ensure that sufficient safe and nutritious food is available. Unlike the former, it is a stricter obligation that requires immediate and absolute fulfilment (Ganesh 2010; Feunteun 2012). The right to food imposes obligations on governments both in their local

jurisdictions, as well as when acting in concert with each other at the international level to respect, protect and fulfil the right to food. In the words of De Schutter (2009):

> "As members of the United Nations, all States have committed themselves to cooperate internationally for the fulfilment of human rights (Article 56 of the UN Charter). The Universal Declaration of Human Rights refers to the right of everyone to an international social order which is conducive to the full realization of human rights" (De Schutter 2009, p. 45).

Under the international human rights framework, governments must protect, respect and fulfil an individual's entitlements to earn a livelihood, produce and purchase food, and benefit from government services for food security (Mechlem 2004). The right to food is respected when governments refrain from actions that infringe upon their citizens' ability to access or produce food. The right to food is protected when a state takes measures 'to ensure that enterprises or private individuals do not deprive individuals of their access to adequate food' (CESCR 1999, par. 15). This means that actors or forces (local and global) are prevented from negatively affecting the ability of citizens from accessing or producing food. The right food is fulfilled when a state proactively engages in activities and programs 'to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security" (CESCR 1999, par. 15). In doing so, government services will directly provide or facilitate citizens with the means to provide themselves with food **(**Motala 2010; Ganesh 2010; Hawkes and Plahe 2013).

Entitlement theory developed by Amartya Sen in the 1980s has made an important contribution to the right to food. According to Sen, starvation occurs 'not from people being deprived of things to which they are entitled, but from people not being entitled… to adequate means for survival' (Sen 1984, p. 73). In 1996 the global peasant alliance known as La Via Campesina introduced the concept of food sovereignty, which emphasises the role of states and communities to determine their own food policies. Declarations by La Via Campesina highlight the Right to Food, agro-ecology, the involvement of communities in decision-making, social justice and fair trade rules (Hawkes and Plahe, 2013).

The right to food is very intricately connected to the concept of food security. The most widely used definition of food security is from the 1996 World Food Summit, which states that food security "exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life". However there are key differences between these approaches. In the 1970s the concept of food security focussed on the role of the state to promote agriculture through subsidies, minimum support prices and procurement policies. This however changed with the neoliberal agri-food regime which emerged in the early 1990s. As the World Food Summit definition demonstrates, the focus shifted from the state to the individual. Food security since then has focussed on access to food through the market. The right to food on the other hand is concerned with the right to productive resources such as land, water and seed, as well as the role of the state in the provision of these resources. It also focuses on protecting local producers, processors, businesses and exporters through trade related measures such as tariffs, quotas and subsidies **(**Simonyi 2008; Fairbairn 2011).

Despite the change in definition in food security, over the past ten to twelve years there has been renewed focus on the importance of the state to protect the right to food. This is partly due to the advocacy by the Special Rapporteur on the Right to Food. In 2004, "Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security" were adopted by the 127th Session of the FAO Council (FAO 2005). While not legally binding, they explicitly recognise the role of the state in protecting the right to food of its citizens. Following the adoption of the guidelines in 2009, the FAO published the Guide to Conducting a

Right to Food Assessment.

In 2013 Governments around the world adopted by consensus the Global Strategic Framework for Food Security and Nutrition. It is the first framework which calls for the need to implement the right to food into policies at the global, regional and national levels (FAO, 2013). The framework outlines indicators which can be used to measure the right to food in a given country context. These indicators are grouped under the following dimensions: (a) availability, (b) access (physical and economic) (c) utilisation (d) stability, (e) vulnerability and (f) shocks. In 2010, Renzaho and Mellor made a further contribution to the right to food through the lens of food security. The authors argue that food insecurity cannot be understood or even measured without considering the social, cultural and political contexts in which it occurs. Furthermore, they argue for the inclusion of asset creation as another dimension to measure food insecurity (Renzaho and Mellor 2010). Insights from these different understandings of the Right to Food inform the conceptual model we use in this paper to analyse the implications of the PACER-plus agreement for the right to food in the FICs. Using the FAO (2013) indicators and the model developed by authors such as Renzaho and Mellor (2010) we use a Right to Food Framework outlined in Table 1 below to assess how the proposed PACER-Plus will affect the right to food in Pacific Island Countries (FICs). We focus not only on the dimensions of food security, but on important government regulations and trade measures which affect the right to food.

The Agreement has various Chapters dealing with different areas of trade. The following sub-sections analyse how the Trade in Goods Chapter and the Trade in Services and Investment Chapters will affect the right to food in the FICs.

**Table 1: Food Security under a Right to Food Framework**

| | Dimensions of food security | Definitions | Government Regulations Affecting the Right to Food | Government Trade measures affecting the right to food |
|---|---|---|---|---|
| 1 | availability | food production (own or from the market) land ownership and use; the use of other productive resources such as water and seed; soil management; storage facilities, international trade. | Land Tenure Laws, Patent regime, Performance requirements, Agricultural extension services, Domestic subsidies, | Tariffs, Domestic Support, NTMs, TRIMS, TRIPS, SPS, TBT, Preferential RoO, |
| 2 | economic and physical access | food affordability, social safety nets, subsidies for local producers, adequate infrastructure such roads and railways | Social Safety Nets, Labour Laws, Performance requirements, Price Controls, Subsidies | Tariffs protect livelihoods, TRIMS |
| 3 | utilisation | access to cooking fuel and cooking facilities; good physical health so that food can absorbed; safe water and sanitation facilities; safe preservation of food; government | Food Safety Laws, Quarantine Laws, | NTMs, SPS, Labelling, RoO |
| 4 | stability | Consistent prices and production levels | Marketing Boards, Price Controls, | Tariffs to buttress against price |

| | | | | |
|---|---|---|---|---|
| 5 | vulnerability | cereal import dependency ratio; percentage of arable land equipped for irrigation; value of food imports over total merchandise exports; tariffs | Domestic policies to encourage local food production; domestic subsidies; | instability, Price controls, Tariffs, NTMs, |
| 6 | shocks | political stability and absence of violence/terrorism; domestic food price volatility; per capita food production variability; per capita food supply variability; | Tariffs, food price control measures | Tariffs, |
| 7 | asset creation | ability to generate income; resource conservation; sustainable coping strategies, | Land Tenure | Domestic support, Patent Regime |

Source: FA0 (2013) and Renzaho and Mellor (2010)

***The Proposed Chapter on Trade in Goods and the Right to Food Implications for the FICs***

*Market Access: The Reduction of Tariffs*

The market access provisions of PACER-plus which affect the agri-food sector are based on the Agreement on Agriculture (AoA) of the WTO. The AoA seeks to reduce the use of tariffs, and requires all Member states to convert NTBs into tariffs through a process known as "tariffication". All tariffs are then bound (including converted tariffs) with an understanding that they will be further reduced during subsequent negotiation rounds. It is important to note that tariffs cannot be increased without compensating those states who may be affected. At the time when the AoA came into effect, developed countries were required to reduce their tariffs by an average of 36 percent across all goods over six years; developing countries had to reduce their tariffs by 24 percent over ten years; and Least Developed Countries (LDCs) were not required to reduce their bound tariffs. However the rules for countries which later acceded to the WTO, such as Vanuatu and Samoa, were much more stringent when compared to original rules of the AoA. Building upon the AoA, PACER-Plus requires further commitments on tariff reductions through WTO-plus commitments. This means that those countries which are already members of the WTO would have to reduce their tariffs further. Non-WTO Members would also have to reduce tariffs, which could have a profound effect on their food security.

As Table 2 illustrates, the vast majority of tariffs in the Melanesian states are bound at more than 15 percent. These are 99.7, 79.9, 86.3 and 99.3 percent for Fiji, PNG, Solomon Islands and Vanuatu respectively. However the applied tariffs are lower. This means that in general most products enter either duty free or face tariffs of between 0.1 and 10 percent (Table 2). Papua New Guinea grants duty free access to 75 percent of the goods in its tariff schedule. For Fiji, the Solomon Islands, and Vanuatu, the majority of their tariffs are between 0.1 and 10 percent. However, the difference between bound and applied tariffs provides the FICs with flexibility to safeguard food security. The reduction of tariffs could prevent the FICs from respecting, protecting and fulfilling the right to food (Downes 2007; Nierenber 2011). Firstly, if the bound tariffs are further reduced under PACER-Plus, the flexibility available to FICs to safeguard food security by increasing the applied tariff will be compromised. Even though FICs have a fairly liberal trading regime, they do apply high tariffs in certain categories (see Table 3). These tariffs make food more available and

accessible; they also reduce the vulnerability context of the population and are used to deal with shocks.

Higher tariffs are used to protect a small proportion of locally produced goods. For example PNG has a 40 percent tariff on edible vegetables and certain roots and tubers, edible fruits and nuts, peel of citrus or melons, sugars and sugar confectionery. Similarly, Fiji maintains a 32 percent tariff on dairy produce, bird's eggs, natural honey, edible vegetables, certain root crops and tubers; meat and edible meat offal, shrimps and prawns, and tobacco extracts and essences. Tariffs may also be used to protect certain domestic industries which provide employment to people, and which make use of local goods and services. They also facilitate asset creation allowing small businesses to develop and to build local economies of scale. Tariffs therefore both protect and fulfil the right to food of citizens. A reduction in tariffs could mean an end to local businesses, indirectly impacting food security in the FICs through loss of employment and income and negative effects on the entire value chain of local industries. A reduction in tariffs could wipe out not only local industry, but small niche artisanal agri-food businesses. This would negatively affect access to culturally appropriate and nutritious food in the FICs.

In analysing the effects of the AoA on countries in sub-Saharan Africa (SSA) with both a large percentage of the population engaged in small scale agriculture and with both "static and dynamic comparative advantage", Gayi (2006, p. 2) argues that these countries would be better off pursuing policies which would allow them to be self-sufficient in order to be food secure. The small size of the FICs puts them in the same position as many small countries in SSA. Drastic reduction in tariffs, far from assisting communities in the FICs who practice subsistence agriculture, will compromise the assets that communities have and require to be food secure.

Secondly, tariffs are also used to protect public health by deterring the population from consuming certain foods that are high in fat and sugar, and which impact their health negatively (De Schutter 2009; Thow et al. 2010). Samoa for example was forced to reverse its ban on the imports turkey tails under its WTO accession agreement (Singer 2014). This is a prime example of how trade rules negatively affect the right to food. The nutrition transition of the FICs due to trade liberalisation is documented in the Health Impact Assessment in this report. The dumping of fatty, sugary and highly processed food will worsen under PACER-plus severely compromising any government programs or measures to deal with the non-communicable disease (NCD) burden in some of the FICs. It will severely undermine their capacity to make culturally appropriate and nutritious food more available to citizens. It will also hinder the FICs governments' efforts to reduce the vulnerability context of citizens through the use of tariffs or import bans. This means that PACER-Plus will not only undermine the capacity of the FICs governments to protect the right to food, but also from fulfilling this right.

Thirdly, tariff revenue is used to provide vital Government services which directly and indirectly protect the right to food. Even a small reduction in tariffs could reduce government revenue, in turn negatively affecting the availability and the accessibility of food. These include government infrastructure projects as well programs to strengthen food security such as the Fiji Plan of Action for Nutrition – 2010-2014. This will directly affect the economic and physical access to nutritious and culturally appropriate food, and certainly the capacity of governments to both facilitate and to provide food security.

**Table 2: Melanesia Bound and Applied Tariffs on Agricultural Products* (2013)**

| **Country** | **Simple Average[o]** | **Du** |
|---|---|---|

| | | | ties > 15 %+ |
|---|---|---|---|
| | *Bound* | *MFN Applied* | *Bound (%)* |
| Fiji | 42.5 | 18.5 | 99.7 |
| PNG | 44.2 | 12.7 | 79.9 |
| Solomon Islands | 71.4 | 12.2 | 86.3 |
| Vanuatu | 43.6 | n/a | 99.3 |

Source: World Tariff Profiles 2014
*As defined by the WTO
o Simple average of the ad valorem or AVE HS six-digit duty averages.
+ Share of HS six-digit subheadings subject to ad valorem duties or AVEs greater than 15 per cent. When only part of the HS six-digit subheading is covered by such duties, the calculation is done on a pro rata basis.

**Table 3: Tariff Protection of Food and Agricultural Products***

| | FIJI | | Papua New Guinea | | Vanuatu | | Solomon Islands | |
|---|---|---|---|---|---|---|---|---|
| Duty Range | No. | % | No. | % | No. | % | No. | % |
| Duty Free | 259 | 4.54 | 4170 | 75.52 | 1309 | 25.84 | 11 | 0.21 |
| 0.1-5% | 3701 | 64.94 | 0 | 0 | 1240 | 24.48 | 841 | 15.99 |
| 5.1-10% | 0 | 0 | 1 | 0.02 | 887 | 17.51 | 4401 | 83.69 |
| 10.1-15% | 834 | 14.63 | 447 | 8.09 | 1067 | 21.06 | 6 | 0.11 |
| 15.1-20% | 0 | 0 | 762 | 13.8 | 232 | 4.58 | 0 | 0 |
| 20.1-25% | 0 | 0 | 49 | 0.89 | 26 | 0.51 | 0 | 0 |
| 25.1-30% | 0 | 0 | 0 | 0 | 252 | 4.97 | 0 | 0 |
| 30.1-35% | 905 | 15.88 | 33 | 0.6 | 0 | 0 | 0 | 0 |
| Over 35% | 0 | 0 | 60 | 1.09 | 53 | 1.05 | 0 | 0 |
| Total | 5699 | | 5522 | | 5066 | | 5259 | |

Source: Tariff Online Download Facility (TAO) *Using the Harmonised System of Classification, tariff lines from section I through IV were assessed: (i) live animals and animal products; (ii) vegetable products; (iii) animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes; and (iv) prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes. The most recently available data was collected from the World Integrated System Database.

*Market Access: The Elimination of Non-Tariff Measures (NTMs)*

The proposed PACER-plus provisions require NTMs to be eliminated which will have a profound impact on non-WTO members since they have not previously made international commitments in this area. From a right to food point of view, any NTMs in place to protect local industries could be seen as "trade distorting" and would have to be eliminated. The closed door negotiations of the agreement means that measures that are ultimately included in the final annexes of PACER-Plus will depend upon the lobbying power of the industries that want market access, and on the negotiation capacity of their Governments. In the case of PACER-plus, clearly the FICs have very little lobbying power compared to Australia and New Zealand.

As highlighted in Table 4 a number of laws exist in all four Melanesian countries stipulating licenses and permits for the importation and exportation of goods that may endanger the health and safety of their people, environment and agricultural sectors. In the case of Fiji, licenses to import certain categories of rice exist to protect the local industry. License fees are also an important source of revenue for countries. In addition, some goods have been banned outright.

From a right to food perspective the elimination of such NTMs under PACER-Plus would affect the right of FIC governments to both fulfil and protect the right to food. This action would affect the capacity of governments to make food available and accessible. They could also lose revenue to implement food and nutrition programs, compromising the utilisation of food through government funded programs.

*Safeguard Measures for the FICs*

The reduction of tariff and NTMs will increase the agri-food imports from Australia and New Zealand. Both countries are already top sources of imported foods for Melanesia. Indeed, food exports are a significant share of their total merchandise exports to the four islands (see Tables 3 and 4). This is already affecting the right to food in the FICs in terms of increasing the vulnerability of citizens to unhealthy imported food.

The ratio of food imports to exports from Australia and New Zealand paints a very grim picture. The worse trade balance is experienced by the Solomon Islands with food imports from Australia and New Zealand at a staggering 95.3 and 12.7 times their exports respectively. Fiji stands at 4.0 and 2.7, PNG at 5.0 and 8 and Vanuatu at 5.9 and 1.8 (see Table 5). The FICs vulnerability dimension in terms of the right to food framework outlined in Table 1 is already very high and will be much higher after the agreement is enforced.

In consideration of the potential negative effects from tariff cuts and the elimination of NTMs, the proposed PACER-Plus includes Safeguard Measures (SSG) that would permit the FICs to use tariffs in case of import surges. The agreement currently proposes Bilateral Safeguard Measures, Provisional Safeguard Measures and Transitional Safeguard measures. However, these will not protect the FICs from shocks and could further increase their vulnerability context, therefore compromising their right to food. It is important to note that their application will not be automatic and will be heavily circumscribed by the PACER-Plus rules. The FICs would first have to negotiate a 'mutually agreed outcome' with 'interested parties' in order to raise tariffs. This could take time, but importantly the FICs would be required to "compensate" any affected parties through further

liberalisation commitments even in other areas such as investment or services. PACER-plus will thus greatly limit the ability of states to deal with shocks, one of the key indicators for the right to food

| **Table 4: FICs Food Imports from Australia and New Zealand* (2011)** | **Australia** | | **New Zealand** | |
|---|---|---|---|---|
| *Countries* | *Partner Position* | *Import Product Share (%)[+o]* | *Partner Position* | *Import Product Share (%)* |
| Fiji | 1 | 32.71 | 2 | 33.14 |
| Solomon Islands | 2 | 21.78 | 10 | 17.52 |
| PNG | 1 | 15.92 | 7 | 34.67 |
| Vanuatu | 1 | 36.38 | 4 | 19.19 |

**Source: World Integrated Trade System (WITS)**
*SITC Standard Product Groups Rev. 2: Food and Live Animals, Beverages and Tobacco, Oil seeds and oleaginous fruit, and Animal and vegetable oils, fats and waxes.
+The share of total merchandise trade (export or import) accounted for by the product in a given year.

***Table 5: Melanesia Food Trade Balance with Australia and New Zealand (2011)***

| | **Australia** | | | | **New Zealand** | | | |
|---|---|---|---|---|---|---|---|---|
| *Countries* | *Exports (US$ '000)* | *Imports* | *Balance* | *Imports / Exports* | *Exports (US$ '000)* | *Imports* | *Balance* | *Imports// Exports* |
| Fiji | 35,271.06 | 139,850.82 | -104,579.76 | 4.0 | 36,958.03 | 99,451.82 | -62,493.79 | 2.7 |
| Solomon Islands | 341.07 | 32,516.82 | -32,175.75 | 95.3 | 383.74 | 4,854.78 | -4,471.04 | 12.7 |
| PNG | 76,603.91 | 383,435.96 | -306,832.05 | 5.0 | 7,482.72 | 60,852.55 | -53,369.83 | 8.1 |
| Vanuatu | 5,181.42 | 30,294.27 | - | 5.9 | 3,645.86 | 6,834.76 | - | 1.8 |

| | | |
|---|---|---|
| | 25,112.85 | 3,188.90 |

**Source: World Integrated Trade System (WITS)**
*SITC Standard Product Groups Rev. 2: Food and Live Animals, Beverages and Tobacco, Oil seeds and oleaginous fruit, and Animal and vegetable oils, fats and waxes

*Market Barriers for the FICs: Rules of Origin*

As the use of tariffs and non-tariff measures have fallen worldwide, developed countries have aggressively resorted to using other trade restrictive measures, chief of which are stringent Rules of Origin (RoO). By identifying the origin of imported goods, RoO allow countries to apply other trade measures on either a non-preferential or preferential basis (Imagawa and Vermulst 2005). WTO trade rules are primarily concerned with the harmonisation and transparent application of non-preferential RoO. Unsurprisingly, however, it falls silent on the usage of preferential RoO which have been proven to be ineffectual and trade restricting. Although their stated purpose in PTAs is to activate market access benefits, developing countries, especially small island states with limited resources, and incompatible production processes and marketing methods, find it difficult to comply with complex RoO (Henson and Loader 2001; Wiig and Kolstad 2005; Anders and Caswell 2009). On the other hand, empirical evidence clearly illustrated that developed countries have experienced positive growth after stringent RoO are applied (Jaffee and Hanson 2004 in Anders and Caswell 2009).

The draft PACER-Plus dedicates a whole Chapter to RoO, adding to the complexity of variable and overlapping rules that already exist. In general, the existing PTAs use one or a combination of three criteria to determine the origin of goods that are not "wholly-obtained" or "wholly-produced" in the participating member country from which they are exported: The three criteria used are: (i) the Percentage Criterion test, (ii) the Change in Tariff Heading (CTH) test, and (iii) the Technical test. Using these methods, a member country can claim origin for its exports on the basis of "significant changes" or "substantial transformations" (Anson et al. 2005). The percentage criterion test determines what percentage of import content, domestic content, or value of parts is needed for a product to be considered originating from a particular country. Under the CTH test a good is deemed to originate in a country where manufacturing results in a change in its tariff heading. Finally, with the technical test, origin is determined by identifying specific production or sourcing processes (Imagawa and Vemulst 2005).

Within the Chapter on RoO, an originating good is defined as "wholly obtained or produced in a Party; and produced entirely in one or more of the Parties, by one or more producers exclusively from originating materials*"* (Article 2a and 2b). When a good cannot meet these criteria, product specific RoO (PSR) will determine the substantial transformation requirements that confer origin by examining 'processes performed entirely in the territory of one or more of the Parties by one or more producers' (Article 2c). This will be to Australia's and New Zealand's benefit because they have the capacity and resources to engage in extensive value added production.

It has already been proposed that this will be established by the use of materials that have undergone a change in tariff classification, or a specific manufacturing or processing operation. This will also be satisfied by a regional value content criterion (percentage criterion) solely or in combination with any of the previous criteria. However, the highly complex and technical nature of such rules will make determining origin a costly endeavour for the FICs. As one representative of the private sector interviewed for this study noted about their experience with PICTA:

> "Our custom codes, HS codes, these are very important documents when you trade, it may not be up to the latest updates. You may be 2007, you may be 2012, but Fiji may be up another level… when you send your goods in here, it doesn't match there, so you have these kind of trade barriers".

Such costs will only increase for those FICs that are party to multiple PTAs, with different RoO requirements (Augier, Gasiorek and Tong 2005). It is well documented that businesses in developing countries would much rather pay a higher tariff than expend scarce resources on meeting complex and stringent RoO requirements which differ in each export destination. As Brenton and Imagawa (2005) note, the "difficulties that may arise in satisfying the rules of origin and the costs of proving conformity with those rules are suggested by the relatively low utilization rates that are observed in preferential trade schemes". It is not clear why PACER-plus has such stringent RoO measures, especially since it is being sold as a "development" agreement, when it is well known that RoO very negatively affect market access opportunities of exporters from small and less diversified developing countries like small islands states (Brenton and Imagawa 2005; p.191). This is one area where the rules could have been relaxed for some of the smallest and most geographically isolated countries in the world.

Restrictive RoO will negatively affect the income and welfare of the exporters of intermediate and final goods in the FICs. They will also contribute to a general deterioration in their balance of payments with Australia and New Zealand. These two developed countries will be able to take advantage of both market access commitments, and restrictive RoO to increase their share of exports. However, for manufacturers in the FICs, RoO are the most restrictive NTMs that they will face (ITC 2015). As such RoO will negatively affect food security in the FICs, and asset creation through trade will be compromised.

RoO may also play a role in retarding the development of local food processing industries. In Fiji, there have been discussions about using the countries abundant and widespread supply of breadfruit to produce flour that can serve both the domestic and export market. However, the combination of lower tariffs for imported wheat and other flour from Australia and New Zealand plus restrictive RoO, will work against any moves toward producing value added goods for export. Although PACER-Plus is being sold as an agreement that will provide opportunities for local producers and businesses, it will reinforce a dependence on exports of primary agricultural produce at the expense of the development of local food industries. This will therefore negatively affect the availability of healthy, locally produced and culturally appropriate food.

*Sanitary and Phytosanitary Measures*

Sanitary and Phytosanitary Measures (SPS) are the quarantine and biosecurity measures and procedures that are implemented to protect the safety and health of humans, food and animals. Their main objective is to prevent countries' exposure to agri-food imports that contain toxins, contaminants, diseases and pests etc. The WTO's Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) has little to do with health and safety (Silvergrade 2000). Instead it is a 'business oriented' agreement to reduce SPS as barriers to trade.

Although WTO trade rules require scientific justification for the application of all SPS, biosecurity laws have been used at times as trade restricting measures (Henson and Loader 2001). In fact, the evidence shows that SPS do restrict trade in agricultural goods (Disdier, Fontagne and Mimouni 2008). Developed countries impose quarantine and biosecurity measures that are "scientifically justified", but are beyond the normal production processes and resources of small developing countries (Henson et. al. 1999). In order to access foreign markets producers from developing countries have to completely update their whole systems of production. Developed countries are often insensitive to this reality, and give minimum adjustment periods to comply with their SPS measures. Added to this, developed countries have been unwilling to recognise the equivalency of developing countries SPS. Thus, developing countries exporters face high rejection rates for their

goods and incur significant losses for exports because of transport costs, losses in product value, and costs associated with the re-export and sometimes even the destruction of goods (Henson et. al 2000). These costs are exacerbated by the low access to information and relative frequent changes of SPS, making it difficult for developing countries to be up to date with compliance requirements (Oduru and Yahya 1998 in Henson et. al. 2000). Even in circumstances where imports are not prohibited, complicated inspections involving costly and time consuming procedures, can effectively bar entry (Henson et. al 2000; Jensen 2002).

Key informants interviewed for this study in Fiji raised a number of concerns regarding SPS rules. Firstly, while speaking about technical requirements in general, and SPS more specifically, a representative of the private sector highlighted the excessive costs that they impose. Furthermore, the differing SPS standards used by importing nations, even Australia and New Zealand, pose additional costs for exporters from the FICs. They find that they must engage in different processes to conform to the SPS of either country. For example, New Zealand accepts the use of High-Temperature Forced Air (HTFA) as an effective treatment for papaya against fruity fly infestation. It is a safe method that does not require the use of chemicals. However, Australia requires a different method to meet bio security standards. In some cases, the lack of harmonisation between standards has raised questions about the legitimacy of the SPS. One Fijian exporter explained their experience exporting taro. Whereas to enter New Zealand this produce needs to be washed to remove all the soil and cut appropriately, Australia requires taro to be peeled. This latter requirement reduces the shelf-life of taro as it creates a point for pathogens and the onset of rot. Exporters are therefore deterred from entering the Australian market.

Concerns were not only raised by the private sector however. A consumer representative also noted that many SPS do not exist in Fiji. This means that the country is exposed to the entry of goods that can be damaging, not only to consumer health, but also to its environment and biodiversity.

> "We don't have standards in place, most of the phytosanitary standards are not there. This means that there will be things coming in. But if we have to export, what would be the situation then? Do we have to meet the standards set by Australia and New Zealand or will they relax their standards?"

The provisions of PACER-Plus do not seem to adequately address these concerns. The Chapter on SPS is very similar to the WTO SPS Agreement. For a long time developing countries have been very critical of the WTO's SPS Agreement for blocking agri-food export opportunities (Jensen 2002). As affirmed by Silvergrade (2000, p. 521), "the SPS Agreement does not adequately provide for special consideration of developing countries…". Since the signing of this agreement international standard setting bodies have "become trade battlegrounds" (Silvergrade 2000). However, the participation of developing countries in these institutions and bodies are quite low (Henson and Loader 2001). The PACER-Plus agreement facilitates the use of SPS measures that are more restrictive than international standards, guidelines or recommendations. Although they must also adhere to scientific justification, this provision makes international standards irrelevant as a benchmark that FICs can use to challenge overly restrictive SPS from Australia and New Zealand. This is important in light of the concerns already being raised by local exporters. The agreement also establishes the use of provisional SPS on the basis of "pertinent information" where scientific evidence is insufficient. However, it creates this discretionary use of SPS without defining what constitutes pertinent information.

In addition, the provisions on equivalency are also inadequate. Article 6.1 places the onus on exporting countries to demonstrate that they conform to the SPS standards of importing countries. FICs may not have the capacity to do so. This is raised in article 6.5 which determines that countries may enter in technical discussions when one "considers limitations on its capacity to objectively

demonstrate achievement of an importing Party's appropriate level of sanitary and phytosanitary protection to constitute an obstacle to acceptance of the case for equivalence". However, this is a difficult task as the importing country can decline the request for technical discussions (Article 12.5), or may refuse to accept equivalence. In the latter instance, FICs will not be able to reopen discussions unless there has been: a) a material advancement in relevant science, technology or domestic processes; or b) a material improvement in the risk profile of the exporting Party (Article 12.4).

It is unlikely that the FICs will gain much from PACER-plus given stringent SPS rules. PACER-Plus is a lop-sided agreement compelling the FICs to open their markets, but simultaneously blocking their efforts to export products to Australia and New Zealand. This will indirectly constrain the right to food in the FICs since there will be fewer gains from trade for producers and businesses in the FICs when compared to their counterparts in the Australia and New Zealand.

### *The Proposed Chapter on Trade in Services and Investment and the Right to Food Implications for the FICs*

*Rules on Investment Liberalisation*

Investment, especially foreign direct investment (FDI) could bring about potential benefits to the FICs including much needed capital for development, new employment opportunities, markets for local inputs, technology transfers etc. (Morrissey 2001; Read 2008). These benefits can have positive spill-overs for food security, by improving livelihoods and contributing to poverty reduction. However, they are not automatic since the goal of foreign investing companies and the development goals of the host state may not be the same. In order to make sure that FDI meets development goals, host governments often set performance requirements (PRs) for foreign investors. The primary objective of these requirements is to maximise benefits and reduce adverse costs to the host country (Nikièma, 2014).

PRs are defined as "stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country" (UNCTAD 2003, p. 2). PRs include local equity requirements, technology transfer, local hiring targets, and funds and profits repatriation (OECD 1996). The use of PRs however are prohibited by the WTO's Agreement on Trade-Related Investment Measures (TRIMS Agreement). Specifically targeted are local content and trade balancing requirements, government procurement of goods from locals, and any other trade-related investment measure that is inconsistent with the provisions at GATT Article III (National Treatment on Internal Taxation and Regulation) and Article XI (General Elimination of Quantitative Restrictions) that are mandatory, enforceable under domestic law or administrative ruling, or with which compliance is required to receive an advantage (Wade 2003). Developing countries can only use such measures when experiencing balance of payment problems. They cannot be used to meet development policy goals.

The TRIMS Agreement was designed primarily with investors in mind. As a result, it fails to consider the vast economic power of TNCs, which many use to engage in restrictive and trade distorting business practices for their own benefit (Morrissey 2001). TRIMS, therefore, have the potential to do damage to developing countries that do not have the capacity to adequately regulate TNCs. As an NGO representative noted of Fiji:

> "There is really no political will to ensure the safety of the landowners and the environment. Our government machinery speaks to that, the dept. of the environment absolutely has no driving force to be able to handle the influx of investors who are coming in. So you are saying throw our doors open and bring investment in, it looks good because it looks like we are building our economy, but really our

> systems are so weak it cannot withstand the pressure that's coming in, and what happens is the landowners feel it on the ground".

The PACER-Plus agreement proposes that WTO members implement measures that are consistent with TRIMS (Article 11.1). Non-WTO FICs are required to list all non-compliant PRs within two years of the agreement's entering into force. Thereafter, they will be restricted to the use of those that are listed, and cannot introduce any new non-compliant measures (Article 11.3). This could severely impact their capacity to meet development goals including the right to food.

Although the Melanesian Islands have not notified the WTO of any measures that are inconsistent with the TRIMS, some do make use of such requirements. In Fiji, investors in cigarette production must source locally a minimum of 75 percent of grown and processed tobacco. Also, in the Fisheries sector, 30 percent equity must be held by a Fijian citizen (WTO 2016). In Solomon Islands, foreign investments in plant crop cultivation and livestock farming exclusively for the domestic market has been prohibited (WTO 2009). Given the Investment Chapter of PACER-Plus, these requirements could become illegal.

The agreement also stipulates that National Treatment be applied to foreign investments. This means that they cannot be discriminated against in favour of local investors in terms of "acquisition, management, conduct, operation and sale or other disposition of investments" (Article 6.1). The parties will also specify the sectors to which these will apply. It is possible that this provision may have an impact on land tenure systems in the FICs. These are particularly innovative in that they protect native land ownership, often only providing for leasing and not the sale of land. However, regulations could be challenged as not meeting the National Treatment criteria since they essentially prevent non-nationals from owning land. This may also be of limited importance since leases are for periods ranging from 30 years to 99 years. Loss of land ownership could have significant impacts on food security in the FICs especially with regard to the availability of food.

PACER-Plus goes even further than TRIMS by including a provision on the composition of Senior Management and Boards of Directors. In this regard, it prohibits countries from using PRs to build their human resources. Senior Managers or a majority of the board of directors cannot be appointed based on nationality, unless it is listed in their exemptions (Article 10). This Article has the potential to directly affect the FICs. The extent to which this provision will affect them depends on their lobbying power for specific exemptions in PACER-Plus. If they do not gain exemptions, then suitably qualified locals may be overlooked in favour of foreign nationals; FDI will not allow FICs governments to improve the welfare of their citizens through further education, transfer of knowledge and enhancement of their capacities through experience. This could indirectly affect the right to food, in as much as the obligation to facilitate-fulfil embodies ensuring that employment and capacity building opportunities are available to improve livelihoods in the FICs.

The prohibition of export requirements may have even more far reaching consequences on the right to food. The investments that developing countries receive across different sectors could be harmful to the environment and food security. These include investments by extractive, heavy manufacturing, and chemicals (chlorine and pesticides) production industries (Clapp 1998). In fact, while investments in such hazardous industries are declining in developed countries, they are increasing in developing ones. For example, in Fiji a large proportion of FDI seems to be directed to extractive industries. Investors will be keen to explore and exploit more of the islands resources. The environmental deterioration and soil depletion that accompanies such investments hurt both the income and health of those that depend on the land, such as small-scale farmers, and traditional land-owners. As one NGO representative remarked:

> "A lot of the rural resource persons are self employed. They are farmers. So they are really agricultural based people, and they use this everyday in our line of work… Their daily living is from these places. So it's important for them to keep a hold of it for many reasons, not just for their future generations, but for their daily consumption. Yes they supply, they also become the suppliers of root crops and natural produce to the markets. So they sell it to the middlemen who then comes to the supermarket… It also provides the basis of… part of the whole machinery of the economy, that they supply raw produce and materials to the middlemen who then make something out of it. And when they use their land, they use it out of respect for what they need to do. Obviously they don't use mass areas…. Obviously this doesn't work for the mining companies and the extractive industries who just want to strip everything… For example the big one right now is bauxite".

Commenting further, this representative gave the example of women that produce local mats noting that they:

> "…can no longer find the pandanus to make the fine mats that they are famous for. And all this so that the [investors] can make aluminium…. It becomes a thing of the benefit of other people at the expense of this local group of people. And people are saying we need to develop, we need to go further. And the landowners are saying yes, but why is it at my expense that you lead your life the way you want and I can't".

Investment also limits the access of agricultural producers to their productive resources. The land tenure system of the Melanesian islands has already been mentioned. The extensive duration of leases to foreign investors can create a situation where locals are barred from using land for their own needs within their lifetime. In 2015, 71 special prospecting licenses were issued, with 53 for mineral exploration alone (see Table 6). Tim Anderson (2010) has documented in detail how "land value studies" do not take into consideration the right to food dimensions of subsistence agriculture making food both available and accessible.

**Table 6: Licenses, Mining Lease and Special Site Rights Granted in Fiji**

| Special Prospecting License | Special Mining Lease | Permit to Mine | Special Site Rights | Oil Exploration Licenses | Prospectors R |
|---|---|---|---|---|---|

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | | |
| (PM, EM, MM, GR)* | | | (PM, EM, MM) | (PM, EM, MM) | (PS, WR, TD, PWR, SPLF)+ | | |
| Mineral Exploration | 53 | 71 | 8 | 0 | 4 | 3 | 29 |
| Geothermal Exploration | 2 | | | | | | |
| Offshore Mineral Exploration | 16 | | | | | | |

*Precious Metals, Earthy Minerals, Metalliferous Minerals, Geothermal Resources and their heat.
+Pumping Station, Water Right, Tailings Dam, Passageway Right, Stock Pile Loading Facility

*Rules on Services Liberalisation*

The Services sector is one of the most important for certain FICs such as Fiji, Vanuatu and the Solomon Islands. It accounted for 70.1, 62.7 and 48.2 percent of GDP in 2014 respectively (World Bank 2016). Exports of commercial services are also significant for Fiji and Vanuatu being 28.8 and 39.5 percent of GDP. In Papua New Guinea and the Solomon Islands it is much less at 2.5 and 9.4 percent (WTO Trade Profiles). Fiji's main services subsectors are information and communication, accommodation and food services, financial and insurance activities, retail and repair, and wholesale (WTO 2016). In Papua New Guinea it is construction, finance, real estate and business services, community, social and personal services, and wholesale and retail trade (WTO 2010).

The PACER-plus Chapter on Services is based on the WTO's General Agreement of Trade in Services (GATS). The Chapter seeks to ensure that "measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures do not constitute unnecessary barriers to trade in services".

The aim of the Chapter is to make sure that any domestic measure or regulation will not restrict trade. This could negatively affect the right to food since FICs may be obliged to replace trade measures with "least trade restrictive" measures. Services liberalisation is not designed to be "least harmful to human rights". By restricting trade measures that a given FIC nation can take, the use of domestic regulations, technical standards and licensing requirement to protect the right to food will be heavily circumscribed by the Services Chapter of PACER-Plus.

Unlike the GATT Agreement of the WTO, nothing is up for liberalisation under GATS unless a government lists it in its schedule under the following four modes of supply: cross-border supply, consumption abroad, commercial presence and presence of natural persons. Cross-border supply are

transactions that take place by producing services in one country and then exporting or trading them to another. Their movement is detached from both receivers and factors of production. The second category, consumption abroad, refers to the movement of the consumer into the country where the service is being rendered in order to obtain it. In the case of commercial presence, factors of production are moved or established in another country to provide the service to the consumers that live there. Finally, natural persons as providers of the service, can move to the country where consumers reside. It is important to note that even though countries are free to choose which sectors to liberalise and under which modes and by how much, there is a lot of pressure on them to open up certain sectors. Once opened up, the FICs cannot "roll back" these commitments unless they fully compensate any investor that incurs losses.

The PACER-Plus agreement uses the GATS provisions on market access. As with GATS it obligates countries to remove limitations including on:

> "the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test; the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test except measures of a Party which limit inputs for the supply of services" (Art. 5.2).

Thus, PACER-Plus has the potential to open up new service sectors as WTO members will be expected to make commitments in addition to those under GATS. The Melanesian islands have displayed a reluctance in opening up services as demonstrated by their limited commitments. Fiji has made the least commitments only opening up the Tourism and Travel Related Services sector.

Reservations on market access are often tied with creating employment opportunities in managerial or skilled positions or upskilling local employees, possibly towards creating an avenue for locals to take on these positions. In the Solomon Islands, an economic needs test based on three criteria are used to evaluate whether or not commercial presence should be permitted: (i) provision of new services; (ii) improvement of productive structure of the economy; (iii) viability of the new project especially with respect to foreign exchange earnings or savings; (iv) implications for employment in the Solomon Islands (WTO 2009). These criteria are important for countries that are looking to protect and facilitate the right to food as they are aimed at ensuring that investments are welfare enhancing.

The proposed Chapter in PACER-plus goes further than GATS on market access by stipulating that there should be no restrictions on the movement or transfer of capital with the cross border supply, and presence of natural persons mode of supply if they are essential for the services being carried out (Articles 5.3 and 5.4). Although unclear, it seems to establish the legitimacy of commercial presence for all endeavours. The dangers of FDIs have already been detailed above.

It is not clear how the proposed Services Chapter will affect customary ownership of land. Even if there are assurances that the agreement will not affect customary laws, these can be demanded at a later level, especially if restrictions on ownership of land by foreign companies are lifted under WTO negotiations. For example in WTO GATS negotiations, the EU has requested that PNG and the Solomon Islands remove restrictions to foreign ownership of land. As pressure mounts on multiple fronts, it will be very difficult for the FICs to continue to resist (Man 2013). This will compromise subsistence agriculture, food sovereignty and the right to healthy and nutritious food in the FICs.

If PACER-plus is signed then the FICs will be obliged to progressively continue to open their services sector under the four modes of supply. This Chapter will have significant impacts on the capacity of governments to introduce and indeed even maintain regulations to protect the right to food if they are deemed to be "more trade restrictive than necessary". The FICs will lose their freedom to introduce laws, policies and regulations to protect and fulfil the right to food. This will affect availability of and accessibility to food, and will also increase the countries' vulnerability context.

***Recommendations***

Given the multiple negative effects that PACER-Plus will have on the right to food and food security in the FICs, they should not sign PACER-Plus. Far from building resilience in agriculture, this agreement has the potential to destroy local agricultural systems, worsen the nutrition transition in the FICs and severely limit their capacity to regulate at the national level to protect and fulfil the right to food.

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