

WEIGHING THE OPTIONS

*Key Issues in the Proposed Pacific-European Union
Economic Partnership Agreement*

Briefing Note Prepared for the
Pacific Trade Ministerial
Port Vila, Vanuatu
31 July-1 August 2007



I. Introduction

Less than five months remain until expiry of the World Trade Organisation (WTO) waiver that guarantees Pacific exports duty-free access to the European Union (EU) market. The EU is intensifying the pressure on the African, Caribbean and Pacific (ACP) group of countries to replace the current preferential market access that is part of the Cotonou Agreement with an Economic Partnership Agreement (EPA).

Since the Pacific EPA talks began in September 2004, Pacific negotiators have been seeking a true “partnership” agreement that goes beyond trade liberalisation to include a wide range of economic and trade cooperation measures. This is consistent with the Cotonou Agreement that mandates the parties to negotiate an agreement with the aim of “reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.”¹

On the other hand, as evidenced by their proposals and actions to date, the European Commission (EC, negotiating on behalf of the 27 EU member states) has been taking an uncompromising approach, and is essentially seeking a free trade agreement that is likely to provide better access for EU companies and goods while being damaging to Pacific businesses and people.

As the so-called endgame nears, the fourteen Pacific countries involved in negotiations are faced with a daunting negotiating schedule requiring long-distance flights, late-night consultations, and multiple meetings. There is a danger that the momentum of the negotiations will result in an inadequate agreement being signed without a broader consideration of the costs and benefits for the Pacific. It is timely to consider what is at stake in these talks, the outcome of which are likely to significantly reshape the entire region’s economic framework, and, more importantly, affect the livelihoods and well-being of its eight million people.

As a development organisation with projects and partnerships in Africa, the Caribbean and the Pacific, Oxfam has closely followed the EPA negotiations, both in the Pacific and in the five other negotiating regions. Oxfam New Zealand has worked with civil society groups in the Pacific to help promote active engagement with the issues being negotiated, both within civil society, and with Pacific governments.² In conjunction with our European affiliates and allies, Oxfam has also undertaken research and lobbied European governments and institutions, advocating for an agreement that has just, equitable and sustainable development at its heart.³

¹ The Cotonou Agreement, Article 34.1

² Oxfam New Zealand (Barry Coates and Mary Wareham), “Report of the Pacific Civil Society Conference on Trade Capacity Building, Nadi, Fiji, 13-16 June 2006”.

³ See, for instance, Oxfam New Zealand (Barry Coates) “Key Issues in Pacific Trade Negotiations with the EU: Analysis of the Negotiating Draft submitted by the Pacific June 2006”, October 2006, and Oxfam International (Barry Coates and Nick Braxton), “Slamming the Door on Development: Analysis of the

This paper aims to provide Pacific governments, civil society and members of the public with analysis aimed at clarifying some of the key decisions that need to be taken on the way forward in these negotiations, recognising that Pacific businesses and people need to have assurances about future trading arrangements as soon as possible.

II. The “Deadline” & Other Options

The draft review of the EPA negotiations undertaken by an independent consultant in early 2007 concluded that the prospect of reaching an agreement by the end of the year was “bleak,” at least partly because of the EC’s failure to respond to Pacific proposals.⁴ Even though this statement was edited out in the final official report at the insistence of the EC, there is widespread acknowledgment that there is virtually no chance of reaching an agreement before the end of 2007, let alone an agreement that supports the development aspirations of Pacific countries and their people.

Trade deals between only *two* countries are complicated and time-consuming to negotiate, let alone one as complex as the EPA involving 14 Pacific countries and 27 EU member states. The stakes are high. With an economy 1,400 times larger than the Pacific, a bad deal is likely to have negligible impact on the EU, but could be disastrous for the Pacific.⁵ It is thus vital that the time is taken to get it right.

Although there has been much reference to the looming 31 December 2007 “deadline” by when negotiations must be completed, it is increasingly apparent that the EC is using the this date to apply pressure on Pacific and other ACP negotiators.

The ACP agreed to negotiate EPAs on the understanding that the Cotonou Agreement, under Article 37.6, guarantees that no matter what happens in the negotiations, they would be able to fall back on EU market access at least as favourable as the status quo.⁶ The EC has been extremely reluctant to specify exactly how this access will be provided, but there are several possible options, including expanding the EU’s “Enhanced Generalised System of Preferences” (referred to as GSP+), seeking a new WTO waiver, or temporarily leaving the existing tariffs as they are until a new agreement is reached (so-called “living in sin”).

Oxfam and TWN Africa’s study ‘A Matter of Political Will’ shows that the EU’s GSP+ would provide continued access to the EU market for most ACP goods (including 100

EU’s response to the Pacific’s EPA negotiating proposals” December 2006. For a full list see Oxfam New Zealand’s website www.oxfam.org.nz.

⁴ Rampa, Francesco, ‘Implementation of Article 37(4) of the Cotonou Agreement - Provision of technical support to assist the Pacific ACP Region in the Review of EPA Negotiations: Draft Interim Report’, January 2007, pp. 2, 18.

⁵ While the EU takes 11% of the Pacific’s exports, the Pacific only takes 0.11% of EU’s exports, so it could be said that these negotiations are at least 100 times more important for the Pacific than they are for the EU. Figures from: ECDPM. Overview of the regional EPA Negotiations: Pacific-EU Economic Partnership Agreement (ECDPM InBrief 14D). Maastricht, 2006.

⁶ The Cotonou Agreement, Article 37.6.

percent of goods from Papua New Guinea, the Pacific country included in the study), and fulfils the requirement to be WTO compatible.⁷

Oxfam's analysis shows that an alternative such as GSP+ is not only feasible, but that the EU is legally bound under the Cotonou Agreement and the WTO to offer it to ACP countries that request such an alternative. The Cotonou Agreement explicitly states that the EC must "provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules".⁸

It is important that Pacific leaders know what their options are well before they need to take a decision on whether to sign an EPA. In particular, they need to know what the alternative will be if they choose not to sign. This must not be left until the last minute. These are serious decisions for the Pacific, affecting people's lives and livelihoods. There needs to be enough time for consideration, broad consultation and democratic debate.

Given the lengthy delays in the EU's responses to other Pacific requests and proposals, it is vital that the request to specify an alternative is not left until late in the year. Oxfam New Zealand considers that Pacific leaders now need to make a formal request to the EU to specify the alternative.

There is another important reason to clarify the future trade regime. The EU's refusal to give assurances to the Pacific and other ACP regions about continued market access puts exporters to the EU in a difficult position. During the period between now and the end of the year, exporters will be trying to finalise contracts for supply. Their customers in the EU are likely to have heard that the EU Trade Commissioner has been publicly threatening that there would be increased tariffs under the *standard* GSP regime for those ACP countries that do not sign an EPA (the standard GSP regime gives much less favourable access to the EU market than the GSP+). This creates uncertainty and risks a loss of export trade for the Pacific. The future of Pacific businesses and jobs should not be threatened by the EU's attempt to put the ACP under the pressure of an artificial deadline.

Therefore, both the Pacific countries that may not be in a position to sign an EPA (including the countries that are in the compact of free association with the US), as well as those countries that wish to guarantee access for their exports irrespective of how EPA negotiations proceed, should immediately make a formal request to the EC to provide an option that preserves access for Pacific trade.

⁷ Oxfam International and Third World Network Africa, "A Matter A Matter of Political Will," April 2007. <http://www.oxfam.org.nz/news.asp?aid=1429>.

⁸ The Cotonou Agreement, Article 37.6.

III. Trade in Goods

Due mainly to the large distance between the two regions, the EU accounts for a moderate proportion of Pacific trade: approximately eleven percent of Pacific exports and four percent of its imports.⁹ Two Pacific countries (Fiji and Papua New Guinea) have significant exports, and several others send a smaller volume of their exports to the EU (predominately Samoa, the Solomon Islands and Vanuatu). In recognition of the Pacific's unique circumstances, the EC has accepted a flexible EPA framework agreement with a separate, subsidiary agreement on goods that each Pacific country can consider on an 'opt in' basis.

Pacific negotiators have sought to separate out goods because they are wary that their much larger trading partners, Australia and New Zealand (and the US for the "compact" states), will demand the same market access and concessions that the EU gains through the EPA. In June 2007, both Australia and New Zealand confirmed this view by calling for negotiations to start on the Pacific Agreement on Closer Economic Relations (PACER). Australian Trade Minister Warren Truss stated that, "it's obviously in Australia and New Zealand's interest that any new deal that the South Pacific countries may do with the European Union doesn't disadvantage Australian exporters into those countries."¹⁰ New Zealand's Minister of Trade Phil Goff noted that a free trade agreement between Australia, New Zealand and the Pacific was necessary to ensure that New Zealand "is not disadvantaged by preferential access to Pacific markets being given to European countries."¹¹

These statements dispel any notion that Australia and New Zealand would be willing to give priority to development in the Pacific and accept a less advantageous deal than the EU.

Almost all Pacific exports currently enjoy tariff-free access to the EU market under the Cotonou Agreement. In order to comply with WTO rules, however, the EPA will require Pacific countries to eliminate most of the existing tariffs applied to goods imported from the EU. When Australian and New Zealand imports are taken into account, such a sweeping degree of tariff liberalisation is likely to result in major impacts on government revenue, the ability to protect and grow Pacific businesses, and ultimately on the livelihoods of Pacific people. Considering these impacts, and the EU's obligation to maintain the current level of market access for Pacific exporters, there is obviously no reason to sign an EPA just to preserve the status quo. However, one potential benefit from signing an EPA that has been identified by the Pacific negotiators would be reform of the EU's Rules of Origin.

⁹ ECDPM. 'Overview of the regional EPA Negotiations: Pacific-EU Economic Partnership Agreement (ECDPM InBrief 14D)', Maastricht, 2006.

¹⁰ Radio Australia, "Australia seeks equal trade rights in South Pacific," 13 June 2007. See: <http://www.abc.net.au/ra/news/stories/s1950447.htm>

¹¹ Press Release by Hon. Phil Goff, New Zealand Minister of Trade, "Preliminary Discussions on Pacific Trade Agreement," 12 June 2007.

Rules of Origin

Despite the region's preferential access to the EU market, Pacific exports to the EU remain confined to a few commodity-based products and originate from only a few countries. From the start of negotiations, it was hoped that an EPA would help address some of the constraints that have led to this narrow export profile.

The Pacific views the EU's current Rules of Origin (ROO) as one of the greatest barriers to making the most of EU market access. These rules determine whether a product is deemed to have come from the Pacific, and therefore is eligible to be granted tariff-free access to the EU. As senior UK officials have noted, "Rules of Origin determine the real level of market access which is provided under trading schemes. In the EU's current schemes these Rules are out-of-date, complex and restrictive, impeding take-up by developing countries."¹²

The Pacific negotiators have proposed a straightforward system for ROO based on a change in tariff heading. The EC is currently undertaking a study on introducing a "value-added" approach that may be costly to implement for Pacific exporters, and does not take into account the unique circumstances of the region. There is concern that the EC's proposed system will be worse than the existing Cotonou system.

The Pacific's Lead Spokesman, Samoan Minister of Trade Hans Joachim Keil has said: "A value-added rule of origin simply will not bring developmental benefits to the Pacific because few inputs can be sourced locally and at competitive prices and quality. The result would be to lock the P[acific] ACP into existing patterns of trade as exporters of a few basic commodities to the EU and inhibit the development of our small manufacturing sector. The EPA simply must do more."¹³

If the EPA is to improve on the status quo and provide real duty-free, quota-free access to the EU market, the EC needs to make good on its Cotonou promise to "aim at improving current market access for the ACP countries through, inter alia, a review of the rules of origin."¹⁴ Any agreement that fails to do this is highly unlikely to provide any improvements for Pacific exporters to the EU.

Reciprocal Liberalisation

Unlike the current situation, or possible alternatives, the EPA will require reciprocal liberalisation. Tariffs used by Pacific nations to gather revenue and protect domestic producers will have to be eliminated on a majority of imports. A recent study estimated

¹² Letter from Gareth Thomas, UK Parliamentary Minister for Development, and Ian McCartney, UK Trade Minister to Peter Mandelson, EC Trade Commissioner and Louis Michel, Development Commissioner, November 2006.

¹³ Press Release by Pacific Islands Forum, "Forum Encouraged by outcome of PACP meet with EC," 8 March 2007.

¹⁴ Cotonou Agreement, Article 36.7

that the Pacific would need to eliminate tariffs on roughly two-thirds of its imports in order to satisfy current WTO rules.¹⁵

Tariff-free access would need to be subsequently extended to Australia and New Zealand, the region's biggest trading partners who together account for roughly half of all imports¹⁶, and possibly to other trading partners thereafter. It is unlikely that other donors to the Pacific, such as China and Japan, would not call for at least equal treatment. As a result, the majority of Pacific products would have to compete directly with not only EU products, but a significant proportion of all imports, even in their domestic markets. This would be virtually irreversible, with the majority of tariffs bound at zero.

While allowing this access may seem to be providing a level playing field, the reality is far from it. The EU has built up extremely efficient agriculture and manufacturing sectors through a combination of subsidies and protections, many of which are still in use today. Australia and New Zealand used similar measures to build up their own export industries. Most industries in the Pacific are still fragile, and have not enjoyed the head-start that their competitors have, nor have they had access to large domestic markets. On top of that, the Pacific negotiators have pointed to the region's inherent disadvantages associated with smallness, the distance to markets, and lack of natural resources.¹⁷

To address these challenges, Pacific negotiators have proposed interim measures such as long transition periods (up to 20 years) for tariff liberalisation on some products, as well as the ability to protect new industries (by, for example, raising tariffs on competing imports until the new industry is well established), and the right to temporarily raise tariffs against import surges that threaten domestic industries. These measures would not be available to the EU, and so would provide some level of the special and differential treatment befitting the vastly different circumstances of the two regions.

While these proposals, if accepted by the EU, would provide some degree of breathing space to Pacific companies, the basic requirements of the agreement would not be altered. The Pacific would be required to drop the majority of its tariffs to zero and bind them there. This would be a significant policy decision by Pacific countries, even those that have unilaterally reduced their tariffs. Although few developing countries in the world have done so across such a wide range of products, there are a number of research studies that reveal substantial business closures, job losses and de-industrialisation as a result of tariff reductions under structural adjustment programmes.¹⁸ Pacific countries are being asked to take a major leap into the dark by making these commitments.

¹⁵ Sanoussi Bilal, and Francesco Rampa. "Alternative (to) EPAs: Possible scenarios for the future ACP trade relations with the EU" European Centre for Development Policy Management Policy Management Report 11 (Maastricht: ECDPM, 2006), p. 70. www.ecdpm.org/pmr11

¹⁶ In 2004 Australia and New Zealand accounted for 33% and 13% of Pacific imports respectively. Source: ECDPM. 'Overview of the regional EPA Negotiations: Pacific-EU Economic Partnership Agreement (ECDPM InBrief 14D)', Maastricht, 2006.

¹⁷ Pacific Islands Forum Secretariat, "The Pacific ACP-EU Partnership: The Way Forward," 2004, p.9.

¹⁸ See for instance Buffie, Edward F. "Trade Policy in Developing Countries", Cambridge University Press, 2001.

IV. Trade in Services

There is no requirement to include trade in services as part of the EPA, but many Pacific economies have significant service sectors, such as tourism, and Pacific negotiators have indicated a willingness to include services in the EPA. The Cotonou Agreement requires the EU to “...give sympathetic consideration to the ACP States’ priorities for improvement in the EC schedule, with a view to meeting their specific interests.”¹⁹ The Pacific has set a clear priority for the EU to expand the opportunities for semi-skilled workers from Pacific islands to work in EU member states.

Services Requests

Most service industries are dominated by companies from the developed world. There are few opportunities for Pacific companies to be able to sell their services to the EU or invest there. The temporary movement of Pacific people to provide services (i.e. their labour) in the EU is termed “Mode 4” under the WTO’s General Agreement on Trade in Services (GATS). This is potentially the most useful aspect of a services agreement to the Pacific, creating opportunities for increased remittances, training and skills development. In order to limit the potential social costs and the impacts of a ‘brain drain’, the schemes proposed by the Pacific would be for temporary movement only, and coupled with EU support for training in the Pacific.

However, not all Pacific countries are likely to benefit. Most of the small island states are more concerned with attracting people into their country to reverse population decline rather than creating new opportunities for their people to leave. In addition, GATS is oriented towards the movement of professional and tertiary-educated people and the Pacific proposal covers only professionals and technicians but not labourers, agricultural workers, and those without formal qualifications (called “unskilled workers”) or most categories of semi-skilled workers.

The EC has made it clear that they are unlikely to offer a scheme that would create opportunities for the categories of workers proposed by the Pacific.²⁰ They have encouraged the Pacific to talk to EU member states and create bilateral agreements with them. These would not be binding on the EU member states and could be withdrawn at any stage. In addition, it is not clear why such agreements would need to be linked to the signing of an EPA. The EU member states will not agree to such an arrangement unless it is in their interests, as well as that of the Pacific, and, as with the NZ seasonal worker scheme, negotiation of such agreements can be entirely separate from a regional trade agreement.

¹⁹ The Cotonou Agreement, Article 41.3

²⁰ In a letter from the EC’s Deputy Director for Trade, Karl Falkenberg and the Director General for Development, Stefano Manservigi, to former Pacific Lead Spokesman Kaliopate Tavola dated 20 October 2006, the EC stated that “your ambitions in this area go far beyond the possible offers that we will be able to make in the end.”

Services Offers

In return for such uncertain benefits, the Pacific is being requested to make extensive services commitments. This position is not consistent with the dynamics of current WTO negotiations. Most developing countries in the WTO are extremely wary of making commitments under GATS, and LDCs are not expected to make any GATS commitments at all in the Doha Round. This recognises that services liberalisation is a difficult area for most countries, and GATS is an extremely complicated area of trade law. In addition, the experience of most countries that made commitments during the Uruguay Round has been that the promised benefits from foreign investment have not been achieved²¹.

The Cotonou Agreement also expresses caution and says that there is agreement on the objective of extending liberalisation in services only “after they [the ACP] have acquired some experience in applying the Most Favoured Nation (MFN) treatment under GATS.”²² Pacific ACPs do not yet have this experience. The existing WTO members (Fiji, Papua New Guinea, Solomon Islands) have made few GATS commitments, while Tonga (which completed its WTO ratification in July 2007) has made extensive GATS commitments but these have yet to be fully implemented.

It is also significant that services have not yet been negotiated under PICTA. It would be premature for Pacific countries to be opening up service sectors to the EU before having had experience of services liberalisation within the Pacific region. Commitments on services under PICTA should be sequenced well before the EPA to allow Pacific countries the benefit of experience. This sentiment was expressed clearly by Hon. James Bule, Vanuatu’s Minister of Trade, Industries, Commerce and Tourism, who said in a recent statement that “PICTA is an important regional trade agreement for all of our countries. In my opinion, the process of global integration must first start at home.”²³

Given the complexities of services sectors and the GATS agreement, Oxfam New Zealand considers that Pacific leaders should be cautious when deciding whether to make services offers. In most Pacific societies there are limited opportunities to benefit from competition amongst multiple suppliers in services sectors due to small markets and natural monopolies. Therefore, it is crucial that service sectors are well-regulated. Liberalising services before putting a regulatory framework in place all too often leads to poor quality services, high prices and exploitation of consumers. This has been seen in a succession of examples from developed and developing countries alike, including in sectors such as construction, finance, telecommunications, water, education, healthcare, energy, and rail transport.²⁴ Binding such liberalisation under GATS only compounds the problems, making it more difficult for governments to improve their policy and regulatory frameworks.

²¹ United Nations Conference on Trade and Development “World Investment Report 2000.” Geneva, 2000.

²² The Cotonou Agreement, Article 41.4

²³ Pacific Islands Forum Secretariat, press statement, “Vanuatu calls for preservation of PICTA”, 25 July 2007.

²⁴ See for example, Public Services International Research Unit “GATS and the Electricity and Water Sectors”, Greenwich, 2006.

In particular, liberalisation of essential services that are usually delivered by the public sector can result in serious problems for vulnerable people who rely on services such as water supply, education and healthcare. The provision of such services to all the population at affordable prices is important, as well as sectors such as postal services, telecommunications, energy and transport. Deregulation can allow private providers to ‘cherry pick’ profitable segments and result in a decline in the quality and availability of services for others.

Pacific proposals have called for EU assistance in order to make the regulatory changes that are necessary before services liberalisation. The South Centre calls for regulatory frameworks and institutions to be aligned with a country’s development objectives. This includes, “those related to the creation and strengthening of domestic supply capacities, guarantee universal access to essential services to the population; and be able to address unintended social and/or economic effects of trade liberalisation in services.”²⁵

Even if a country decides to liberalise some of its services, binding them under GATS is a separate decision. GATS is one of the most complex of the WTO’s agreements and many of its provisions have yet to be negotiated (such as whether temporary safeguards can be used in case of an emergency) or tested by a WTO panel. There is even uncertainty over the scheduling of commitments (as shown in the US internet gambling case)²⁶ and the extent of GATS core provisions on market access and national treatment.

GATS commitments are often promoted on the basis that they increase foreign investment. However, this has been challenged by researchers, including from UNCTAD, who have demonstrated that GATS commitments are not always in the best interest of developing countries.²⁷

Crucially, GATS prevents governments from supporting local service providers, a key issue for developing countries since they have little experience in many services sectors. This is potentially a key issue for the Pacific because services can be exported with low or zero transportation costs, meaning the Pacific has less of a disadvantage than in goods trade. Agreeing to GATS commitments would mean that the Pacific loses the policy tools that could be used to nurture and support the development of their own services sectors, helping them to gain a foothold in the global economy and become competitive with foreign companies.

²⁵ South Centre, ‘Negotiating Brief on EPA Topics: Services Negotiations in the Context of the EPA Negotiations, 2006, p. 2.

²⁶ This dispute arose because the US sought to prevent Antigua and Barbuda from providing internet gambling in the US, despite the US having committed to liberalising “recreational services” in its GATS schedule. Although the dispute was originally between Antigua and Barbuda and the US, recently eight WTO Members, including the EU, Costa Rica, and Japan served notice before a 22 June 2007 deadline that they intend to seek compensation for lost revenues. See Bridges Weekly Trade News Digest, Vol.11: No. 24, 4 July 2007. www.ictsd.org/weekly/07-07-04/index.htm

²⁷ See United Nations Conference on Trade and Development *A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations*, New York and Geneva, 2000; and United Nations Conference on Trade and Development *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment*, United Nations, New York and Geneva, 2005.

The Pacific has little to gain from the inclusion of services in an EPA – the possible benefits from temporary movement of labour are more likely to be achieved under mutually beneficial bilateral agreements with EU member states. Pacific countries may choose to seek EU support for building sound regulatory frameworks and institutions, but they should be extremely cautious about making services commitments under an EPA.

V. Investment

Even though Pacific countries have been establishing investment promotion agencies and have offered attractive inducements to investors such as tax holidays, they have attracted only a modest level of foreign investment. Pacific negotiators note that “Even Pacific ACP States that have faithfully followed the prescriptions for economic reform of their external advisers, such as Samoa, have found that this has not been rewarded by any significant increase in the inflow of foreign direct investment.”²⁸

Signing an investment agreement as part of an EPA is unlikely to deliver more foreign investment. A 2002 World Bank study examined whether the amount of investment received by the host country correlated with the number of Bilateral Investment Treaties (BITs) signed. The study looked at 20 years of data, covering bilateral flows between OECD members and 31 developing countries, and found that “countries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact”.²⁹

Another report on investment commissioned by the Pacific Islands Forum Secretariat in 2004 and entitled “Distant Prospects” found that:

It would not make sense for PACPs to purchase fine-sounding arrangements for promotion of an inherently improbable flow of PDI [Private Direct Investment] by Europe, by giving up powers to protect and manage aspects of their domestic economies that they would otherwise use to good effect. Exceptional care is needed in approaching trade-offs between trade and investment issues, where there are substantial asymmetries and imbalances between the EU and ACP positions.³⁰

Another problem with investment in the Pacific is that it has been difficult to attract investment that is accessible to the small and medium sized enterprises that characterise the vast majority of businesses in the region. Oxfam’s report on the tourism industry in Vanuatu highlighted this problem, finding that despite the boom in the tourism industry there, little of the benefits flowed to small, indigenously-owned businesses that struggled

²⁸ The Way Forward, p.13

²⁹ Mary Hallward-Driemeier, ‘Bilateral Investment Treaties: Do They Increase FDI Flows?’ Global Economic Prospects 2003 Background Paper (Washington DC: The World Bank, 2002).

³⁰ Hughes, A.V., “Distant Prospects: Promoting investment in the Pacific through an ACP-EU agreement”, Report to the Pacific Islands Forum Secretariat, December 2004, p.9.

to get the investment needed to compete with the larger, foreign-owned operations.³¹ A February 2007 Pacific workshop on the EPA recommended that policy and financial instruments be made available to help small and medium sized enterprises (SMEs) in the Pacific as opposed to preferences being given to foreign investors through the EPA.³²

Recognising these problems, the Pacific negotiators proposed an investment chapter in the EPA that sought to balance the rights of investors with the sovereign rights of host states to act in the best interests of their people. The negotiators also sought improvements to existing institutions such as the European Investment Bank (EIB), the Centre for the Development of Enterprise (CDE), and the Centre for the Development of Agriculture (CTA), suggesting ways that these institutions could provide funding on a scale useful to Pacific businesses.

The EC appears likely to attempt to avoid the development-friendly requirements of the Pacific's proposed investment agreement by including provisions on investment in the services agreement (referred to as 'mode 3'). However, the proposed services agreement is oriented towards the rights of the foreign investors and lacks any requirements for investors to contribute to the development of the Pacific's economies. Therefore, the inclusion of investment in the services agreement is unlikely to contribute towards the Pacific's aims of attracting high quality investment and supporting investment funding for the Pacific's SMEs.

VI. Intellectual Property

As with services, there is no deadline or requirement to include intellectual property (IP) in the proposed EPA, but the Cotonou Agreement does "recognise the need to ensure an adequate and effective level of protection" for IP.³³ Referencing this, the EC has put forward a "non-paper" on proposing "a set of objectives and possible elements for the EPA text" on IP.³⁴

The development of IP laws is in its formative stages in much of the Pacific. The Pacific's WTO members have had some experience with the WTO's complex trade-related aspects of intellectual property rights (TRIPS) and other Pacific countries that have engaged in WTO accession (Tonga, Samoa and Vanuatu) have been faced with demands to implement TRIPS in shorter time periods and to add IP rules that go beyond WTO requirements.

³¹ Oxfam New Zealand (Claire Slatter), "The Con/Dominion of Vanuatu? Paying the Price of Investment and Land Liberalisation," September 2006.

http://www.oxfam.org.nz/imgs/whatwedo/mtf/vantourism_sept06%20revised.pdf

³² "Outcomes Document, Pacific ACP Regional Workshop for Parliamentarians, Non-State Actors, and Heads of IPAs on the State of the negotiations of an EPA with the EU", Nadi, Fiji, 26-27 February 2007.

³³ The Cotonou Agreement, article 46.1.

³⁴ European Commission, Non-paper: Objectives and possible elements in the Intellectual Property section of the EPA between the EU and the Pacific, June 2007.

Other Pacific governments have little or no experience in this area with varying, and largely unsurveyed, levels of domestic regulation. Scarce resources, uncertain benefits, and more pressing priorities mean that legislation and enforcement of conventional IP law through trademarks, copyrights, patents and other means has barely begun in the Pacific. Nonetheless, at the regional level initiatives have been taken to both strengthen conventional IP laws, and work towards the creation of an institution for the protection of the Pacific's Traditional Knowledge.

The EC's non-paper proposes a raft of measures including "clarifying and complementing" WTO TRIPS provisions, signing up to the International Convention for the Protection of New Varieties of Plants and "improved mechanisms" of enforcement. The paper does also propose including provisions to protect traditional knowledge "without prejudice to the current relevant multilateral discussions".

The non-paper, read in conjunction with similar non-papers and draft legal texts from other ACP regions, suggests several problems with the EC's proposals.

The EC is seeking "TRIPS-plus" commitments, when the majority of Pacific countries are not WTO members, and so do not even have TRIPS commitments. It is likely to be resource-intensive, particularly for the smaller countries, to adhere to the requirements of TRIPS. For example, as a condition of accession to the WTO, Vanuatu was required to train 15 people on TRIPS and establish an Intellectual Property office within 18 months of accession. This was at a time when the entire trade department only employed five people.³⁵ In addition, WTO members will be required to extend any "TRIPS-plus" commitments to all other WTO members, despite the commitments being made as part of a regional trade agreement.³⁶

The benefits of including IP in an EPA are likely to mainly flow to the EU as the Pacific are net importers of intellectual property. In fact, despite being negotiated as part of a "partnership agreement", the inclusion of IP is more in line with the EU's "Global Europe Strategy" that seeks to open markets abroad for European companies to exploit.³⁷ Discussing the strategy in September 2006, EC Commissioner Peter Mandelson was quite frank:

...competitive European companies, supported by the right internal policies, must be enabled to gain access to, and to operate securely in, world markets. That is our agenda. You have to have both the competitive edge and the markets to sell to. ... In the months ahead we will set out how we will adapt and renew our tools for securing more open markets, sharpening our ability to identify and remove new barriers to trade in key markets and sectors whether in

³⁵ Oxfam International (Shuna Lennon), 'Make Extortion History: The case for development-friendly WTO accession for the world's poorest countries', 2005, pp.19-20.

³⁶ Unlike the rules relating to trade in goods or in services, WTO members that agree to TRIPS-plus rules as part of a regional agreement are not exempt from their Most Favoured Nation obligations to extend their TRIPS-plus commitments to all WTO members.

³⁷ Commissioner Mandelson, 'Global Europe: Competing in the world', 4 October 2006.

relation to fair competition, public procurement, IPR or restrictions in trade in energy goods.³⁸

By contrast, the EC non-paper seems to provide little in the way of protection for traditional knowledge, where the Pacific does have an interest, resorting to the caveat that the agreement must be “without prejudice to the current relevant multilateral discussions.” These multilateral negotiations are ongoing, and the EC will avoid agreeing to anything more than is covered by them.

There are several potential impacts from signing an EPA that includes IP. For instance, access to educational materials is likely to be threatened by EU provisions to protect digital texts. WTO rules have exceptions that allow educational institutions to copy digital information for educational purposes, but the proposed EPA would eliminate these flexibilities, allowing companies to directly prosecute anyone who found a way around digital controls, even if they were doing so for legitimate educational reasons. The watchdog Consumers International has noted that expanded IP protection, such as that in the proposed EPAs, has “grave implications” for access to education.³⁹

The EC’s proposal is also likely to stifle technological innovation. The 2001 Nobel Economics Laureate Joseph Stiglitz has highlighted the importance of an intellectual property regime sensitive to technology transfer needs since “knowledge itself is the most important input in the production of knowledge, a badly designed intellectual property regime can stifle innovation.”⁴⁰ Innovators in the EU, the USA and Southeast Asia had the right to access foreign technologies to learn from, imitate and develop them in a process called reverse engineering that lead to innovation and competition. The EC’s proposal would prevent the legal “reverse engineering” of digitally “locked” software, denying the Pacific the same development path that the EU themselves had taken.

Under EPAs, the EU also proposes a very strict version of plant variety protection, which would mean that farmers have to pay not just the first time that they use the seed, but every time they share, exchange or sell the seed they save. The World Bank has noted that without careful application and adaptation, such rules can threaten local livelihoods while benefiting large seed companies.⁴¹

It is difficult to see how the inclusion of IP rules in an EPA would contribute towards development in the Pacific. Under WTO rules, LDCs are not required to implement any intellectual property rules, at least until 2013, and for the rest, there are exceptions that allow the copying of information for educational purposes, the use of reverse engineering, and less strict plant variety protection. Because the majority of Pacific

³⁸ Peter Mandelson, speech at the Churchill Lecture, Federal Foreign Office, Berlin, 18 September 2006.

³⁹ Consumers International ‘Access to Knowledge’, Asia-Pacific Consumer, Volume 43 and 44, 1&2/2005, p.25.

⁴⁰ Stiglitz, Joseph E. “China’s New Economic Model,” 2007. See: <http://www.project-syndicate.org/commentary/stiglitz86>

⁴¹ World Bank, “Intellectual Property Rights, Designing Regimes to Support Plant Breeding in Developing Countries”, 2006.

countries are not WTO members, they are under no obligation to implement these measures. Leading economists have argued that,

Major industrial countries such as Italy, Japan and Switzerland adopted pharmaceuticals patent protection when their per-capita income was about \$20,000; [WTO member] developing countries will adopt it at income levels of \$500 per capita, in the case of the poorest, and \$2,000–\$4,000 for middle-income countries. By these standards, forcing developing countries to abide by TRIPS is about 50-100 years premature.⁴²

Given that the Pacific has only just embarked on a regional approach to IP, including Traditional Knowledge, agreeing to include IP in an EPA is likely to prevent the region developing an approach to the issue that suits the Pacific's needs, varying circumstances, and levels of development. As there seems to be little or no benefit, but substantial drawbacks to including IP in an agreement with the EU, Oxfam recommends that the region does not negotiate on this issue.

VII. Fisheries

With a combined land area of only half a million square kilometres, but a total marine economic zone of approximately 20 million square kilometres, encompassing much of the world's largest tuna fishery, Pacific negotiators view a Fisheries Partnership Agreement as “potentially one of the most important components of an EPA.”⁴³ Despite roughly US\$2 billion worth of tuna being caught in the Pacific each year, the tuna fisheries added only approximately US\$97 million to Pacific GDP in 2005, and employed 11,000 Pacific Islanders.⁴⁴

To enable this enormous shared resource to contribute more to the economic development of the region, Pacific negotiators have identified several factors that need to be addressed including: 1) improved access for Pacific fish to the EU market (the world's largest); 2) a unified position on access for EU vessels to Pacific waters; and 3) assistance to build the Pacific's fisheries industry, including sustainable management of resources.

⁴² Birdsall, N, D. Rodrik and A. Subramanian “How to Help Poor Countries”, *Foreign Affairs* 84(4), 2005, pp.136–52.

⁴³ The Way Forward, p.26.

⁴⁴ “Economic Indicators for the WCPO Tuna Fisheries Second Annual Report: 2007” Paper presented at the 64th Annual Meeting of the Forum Fisheries Committee, Wellington, May 2007. While this employment is obviously hugely valuable, it is also essential that Pacific policy-makers fully consider and seek to address the potential environmental and social impacts of increased fisheries processing in the Pacific. A study on the impact of the cannery in Wewak pointed to a number of problems, including disputes with landowners, low wages, pollution, prostitution, and a failure to provide locals with the opportunity to progress to the better-paid technical, supervisory, and management roles. See Nancy Sullivan et. al. “Fishy Business: The Social Impact of South Seas Tuna Company in Wewak, ESP”, 2006 and Nancy Sullivan et. al., “Tinpis Maror: A Social Impact Study of Proposed Rd Tuna Cannery at Vidar Wharf, Madang”, 2003.

The ultimate aim being that more of the income derived from this resource remains in the region.

Despite the tuna resource being shared, there is great variance in both the value of the resource contained in each country's economic zones, and in the ability and desire of countries to host value-adding activities such as processing. Nonetheless, in November 2006, Pacific negotiators drafted a fisheries text that to a good degree addresses these issues, and represents the minimum that could make a deal more attractive than the status quo.⁴⁵

Many of the fisheries issues are cross-cutting and relevant to the negotiations as a whole, such as the need for additional funding and improved access to the EU market through improved ROO. Considering the current impasse on these issues, the Pacific needs to carefully consider the advantages of a fisheries agreement as part of the EPA, compared with the status quo as guaranteed under the Cotonou Agreement, perhaps with a separate regional fisheries agreement that could cover EU vessel access, management assistance and development funding.

VIII. Funding

The Pacific has called for funding to be provided as part of an EPA agreement to both compensate for the inevitable implementation and compliance costs to the Pacific, and to help improve Pacific businesses' competitiveness. It argues that additional assistance from the EU is needed in order for any trade agreement between partners with such divergent sizes and levels of development to be in the interests of development. There is little point in negotiating for greater access to the EU market if ACP exporters are unable to compete in it, particularly when they are faced with increased competition from imported goods at home. Likewise, there is little point gaining access for Pacific workers to the EU, if those workers are unable to gain the qualifications needed to be eligible for that access.

In recognition of this, Pacific negotiators have linked the liberalisation commitments made in the EPA to *additional* funding from the EU. In the draft Pacific text this funding is designed to both compensate for the losses incurred by the Pacific (for example, diminished government revenue and unemployment),⁴⁶ as well as to help Pacific

⁴⁵ "Draft Agreement for the Establishment of a Fisheries Partnership between the Pacific Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part", January 2007.

⁴⁶ So far there have been two studies on what the costs of signing an EPA are likely to be, using economic modelling. The first, commissioned by the Commonwealth Secretariat, arrived at a figure of €642 million for the Pacific region. The second, commissioned by the Pacific Islands Forum, arrived at the figure of €170m for the first five years. A third assessment is currently being undertaken. Although the figures vary radically, it is clear that there will be a substantial economic cost to signing the EPA, the social costs are less clear, and largely unsurveyed. See Milner, Chris, "An Assessment of the Overall Implementation and Adjustment Costs for the ACP Countries of Economic Partnership Agreements with the EU", Commonwealth Secretariat, 2005 and Smith, David, "Pacific ACP States: Potential Costs of Adjusting to a

exporters make the most of access to the EU market (for example through re-training, assistance to meet strict EU hygiene standards, and promotion of industry development). As many of these costs are new costs associated with the EPA, the Pacific has been very firm that funding must be *new* funding, and incorporated into the legally binding text. Simply compensating for losses is clearly not enough to make the agreement a positive one for development.

The EC has argued that additional funding is not part of its negotiating mandate, and that the European Development Fund (EDF), along with some additional Aid for Trade funding, is the only funding available. Despite the EC's desire to link at least some of this funding to the EPAs, both these funding sources will be available whether EPAs are signed or not, and in fact, the Aid for Trade funding is not specifically tied to the ACP, but is available to all developing countries.

There is the possibility that near the end of negotiations the EC will offer some funding to sign up to an EPA, although potentially this will be achieved by carving out EDF funding and tagging it for EPA-related costs. Even so, the amounts are likely to be a fraction of the amounts that the Pacific would need to cover the costs of adjustment, and would be at the expense of other development projects. National studies are being undertaken currently, but initial indications are that the adjustment costs will be higher than earlier estimates based on a theoretical modelling exercise, and far higher than the amount offered by the EU.

The potential attractiveness of 'new' money for Pacific governments should not be underestimated. Many Pacific countries face difficult circumstances, with constraints on revenues that are sorely needed to address social priorities such as health, education, water, transport, and infrastructure. Yet it would be damaging for the Pacific if relatively small amounts of funding were accepted in order to lock in commitments that damaged their development prospects and vastly reduced their income in the future.

IX. Oxfam New Zealand Recommendations

Identifying alternatives

As part of the Cotonou Agreement, the EU has agreed to provide at least as favourable market access to the EU market for ACP products as is currently available, no matter what the outcome of the EPA negotiations. In order for Pacific nations to be able to make an informed choice on the best arrangement for their future development, the EC must be forced to reveal how this obligation will be met. To ensure this happens, at least one Pacific country should make a formal request to the EC to clarify what the alternative would be if they do not sign up to an EPA goods agreement. More generally, Pacific trade negotiators should respect their negotiating mandate and continue to press for an agreement that benefits the Pacific's people. Over the next five months, negotiators should continue to resist the pressure to rush into signing an EPA.

Pacific Economic Partnership Agreement", United Nations Economic and Social Commission for Asia and the Pacific, 2006.

Goods

By signing an agreement on goods, the Pacific will be choosing to eliminate tariffs on most imports, not only from the EU, but almost certainly also from Australia, New Zealand, and potentially other trading partners. Pacific leaders will be foregoing the ability to use tariffs to protect domestic industries, raise government revenue and generally control imports in the long term, probably forever. These will potentially entail high costs and it is difficult to see how they will be outweighed by the potential benefits, even if the EU offers vastly improved ROO and substantial amounts of additional funding. Oxfam New Zealand recommends that Pacific governments undertake further assessment and consultation before making any commitment to pursuing an EPA goods agreement.

Services

The Pacific's main interest in services is in securing a labour mobility scheme, but it is not clear why this needs to be part of an EPA. Making commitments under GATS is a highly risky undertaking, jeopardising the Pacific's ability to nurture and promote its own service industries, regulate in the interests of its people, and provide essential services. As it is not required to include services in the EPA, Oxfam New Zealand recommends that Pacific governments should not make services commitments.

Investment

The Pacific proposed an innovative investment chapter for the EPA that sought to prioritise development and balance the rights of investors with the sovereign rights of host states. Since the EU has rejected this proposal, and refused to make changes to their existing investment institutions, Oxfam New Zealand recommends that the Pacific should avoid including investment in the EPA.

Intellectual Property

Beyond the potential to gain some assistance with implementing IP laws, there appears to be very little to gain from an EPA that includes IP. Indeed, the costs are potentially high. Oxfam New Zealand therefore believes that IP should not be part of the Pacific's EPA negotiations.

Fisheries

An agreement between the Pacific, a region that contains the world's largest tuna stock, and the EU, the world's largest tuna market, makes sense. However, given the undesirability of much of the proposed EPA, the Pacific will need to be wary of making concessions on other issues in order to achieve improvements on fisheries. Oxfam New Zealand recommends that consideration be given to pursuing a regional fisheries agreement with the EU as a standalone agreement.

Funding

The costs of implementing an EPA are likely to be high and ongoing, and the region will need significant new resources to build up the capacity needed to compete in a liberalised market. It is vital that resources are not diverted from other areas, such as health and education, in order to pay for the EPA. The Pacific will need to remain firm on their commitment on this issue, as a little short-term funding will not be enough to offset the

long-term costs. Oxfam New Zealand advises Pacific governments to consider carefully any offers of additional funding within the context of the far wider and longer-term impacts of an EPA.

© Oxfam New Zealand, July 2007.

This paper was written by Oxfam NZ Executive Director Barry Coates and Advocacy and Research Coordinator Nick Braxton. Advocacy Director Mary Wareham provided editorial assistance.

www.oxfam.org.nz