PACER-Plus Trade in Goods Analysis: Tariff cuts, poor safeguards, and an inability to support local industries

Pacific Network on Globalisation

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Introduction

This paper[1] analyses the final Trade in Goods Chapter of the Pacific Agreement on Closer Economic Relations 'Plus' (PACER-Plus) and shows some of the negative implications for the Forum Island Countries (FICs) that have signed onto the agreement. Liberalisation of goods and other commitments in the area of goods have major implications on the development prospects of Forum Island Countries.

The conclusion of the analysis is that the Trade in Goods Chapter will severely hamper the development prospects of FICs. They restrict the FICs from being able to ensure that their economy meets the needs of its people and their economic aspirations. FICs are being asked to take on more erroneous obligations than they have done at the World Trade Organisation (WTO), without access to adequate safeguards and protective measures provided in other trade arrangements. For those FICs not yet WTO members, the PACER-Plus and its Trade in Goods Chapter are effectively WTO accession 'through the backdoor'.

Based on this analysis, PANG has serious concerns about the Trade in Goods chapter and feels that it is undermining the ability of the FICs to determine the policy needs of their domestic industries and producers.

The analysis of the Trade in Goods chapter relates to five areas:

1. Market access commitments of trade in goods will benefit Australia/NZ not the FICs;
2. Inadequate safeguards for FIC industries
3. Reduced ability to support domestic producers;
4. Trade Facilitation Agreement and other WTO Agreement through the backdoor
5. Clauses that would oblige Pacific to give more to Australia and New Zealand in the future

Below PANG has provided an analysis of the Trade in Goods Chapter in accordance to the five areas mentioned above.

[1] PANG would like to acknowledge the work of the South Centre for their support and guidance with this analysis.

I. Market access commitments - liberalisation of trade in goods will benefit Australia and NZ not the FICs

Current agreements and trading structure

PACER-Plus is very unlikely to bring any substantial market access gains for the FICs. In fact there is clearly a significant imbalance between the market access gains potentially available to the PICs on the one hand and Australia and New Zealand on the other.

At present, FICs are already exporting under the **South Pacific Regional Trade and Economic Co-operation Agreement (SPARTECA)** and in addition Papua New Guinea can export under the **PNG-Australia Trade and Commercial Relations Agreement (PATCRA).** Fiji also has a special bilateral trade arrangement with Australia for textiles, clothing and footwear (**SPARTECA (S-TCF**) Scheme). In addition, the Cook Islands and Niue have a constitutional commitment from New Zealand that preserves duty-free access which was established when both nations became independent.

Under these agreements FICs already have duty-free quota-free access to Australia/New Zealand.[2] Informally that access is not under threat. The Pacific Agreement on Closer Economic Relations provides (Article 5.3) that *"with respect to any Forum Island Country, Australia and New Zealand shall maintain all existing arrangements relating to market access at the time this Agreement enters into force, until such time as that particular Forum Island Country has concluded new and/or improved trade arrangements providing equal or better access to their markets".*

At the same time the value of the existing market access is being steadily diminished by the erosion of the FICs "preferential position" in the Australia and New Zealand markets as those two countries conclude Free Trade Agreements (FTA's) with an ever-widening circle of partners, including especially the ten ASEAN countries (who are set to see the removal of 99% of tariff lines by 2020 under the AANZFTA[3]) and also China in the case of New Zealand and the United States in the case of Australia. PACER-Plus will not change this situation**, and no language has been included to preserve the current margin of preferences.**

For Australia/New Zealand the FICs are an important export market. In fact, together they represent the 13th largest trading partner for Australia/New Zealand. The four main importers among FICs are Papua New Guinea, Fiji, Solomon Islands and Samoa. Papua New Guinea and Fiji take up more than 80% of Pacific Island Countries' import from Australia/New Zealand and the fact that both of those countries (as well as Palau, The Federated States of Micronesia and The Republic of the Marshall Islands) are not signatories to PACER-Plus highlights the shortcomings of the final deal. Recent figures indicate that FIC exports to NZ totalled to NZD$23 million whilst exports from New Zealand and Australia to the PACER-Plus parties were valued at NZD$376million and NZD$455million respectively.[4] This excludes the major markets of Papua New Guinea and Fiji which accounted for NZD$612million of exports from New Zealand alone.[5]

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2 An exception appears to be Fiji's exports of sugar to Australia (which is banned according to 2009 WTO Trade Policy Review).

3 Gay, D. 2017, "Brief Analysis of PACER-Plus legal text", accessed at http://www.pina.com.fj/index.php?p=pacnews&m=read&o=1975932573593f622d83eb753e83c5

4 New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/PACER-Plus-National-Interest-Analysis.pdf

5 New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-

On the other hand, Australia and New Zealand are relatively not so important export markets for the FICs, with the exception of certain products. Australia and New Zealand only buy around 28% of FICs exports (measured in value), most of it in the form of pearls and precious stones. If precious stones are excluded, **Australia and New Zealand only account for 15% of Pacific exports**. For many products, Australia and New Zealand is even of less significance – less than 10% of exports of fish and fish products, milling products, oil seeds, animal/vegetable fats, oil seeds, cocoa and cocoa preparations, beverages, articles of rubber, wood and articles of wood, paper and paperboard, nickel and articles end up in Australia/New Zealand (see also Annex). It is unclear how PACER-Plus would make a difference given that the tariffs are at 0 for these products in Australia/New Zealand.[6] However, in return FICs are asked to liberalize 'substantially all trade' with Australia/New Zealand.

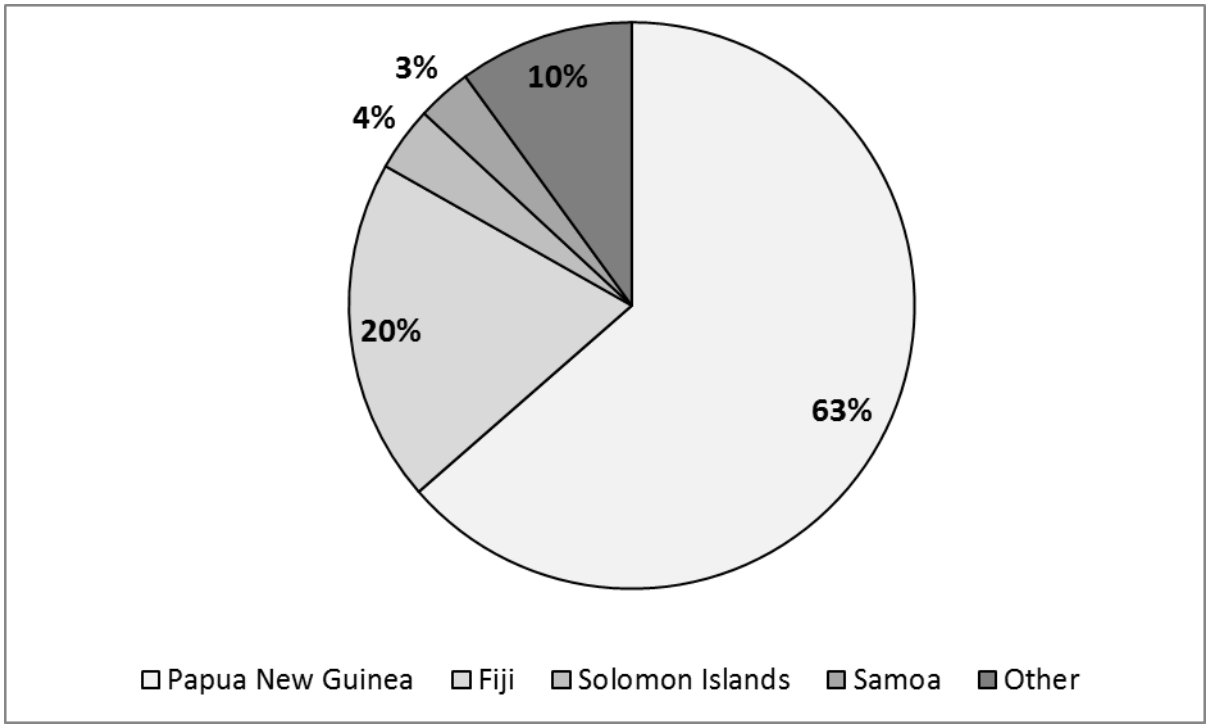
Pacific Island Countries are the 13th largest trading partner of Australia/New Zealand

No	Country	AUSNZ export in 2014 (USD billion)	No	Country	AUSNZ export in 2014 (USD billion)
1	China	89.7	11	Thailand	5.3
2	Japan	45.6	12	United Kingdom	4.6
3	Korea, Republic of	19.4	**13**	**Pacific Island Countries**	**3.4**
4	United States of America	13.9	14	United Arab Emirates	3.4
5	India	8.5	15	Viet Nam	3.2
6	Singapore	8.4	16	Hong Kong, China	3.2
7	New Zealand	7.2	17	Saudi Arabia	2.7
8	Taipei, Chinese	7.1	18	Netherlands	2.5
9	Malaysia	6.3	19	Philippines	2.1
10	Indonesia	5.3	20	Germany	1.8

Plus/PACER-Plus-National-Interest-Analysis.pdf

[6] A response to this could be that PACER-Plus will try and address the failing of SPARTECA to support FIC exports to A/NZ. This is very unlikely as several issues of interest to Pacific (SPS, rules of origin) are marginally addressed.

The four main importers among PICs are Papua New Guinea, Fiji, Solomon Islands and Samoa. Papua New Guinea and Fiji take up more than 80% of Pacific Island Countries' import from Australia/New Zealand.



The absence of PNG and Fiji undermine any chance of PACER-Plus facilitating intra-Pacific trade. As Daniel Gay, Adviser on Least Developed Countries at the UN Department of Economic and Social Affairs., writes:

> "...given that the annual output of these two economies together is worth approximately $21.3 billion compared with a collective $4.1 billion for the remaining Pacific island economies, meaning that Papua New Guinea and Fiji are together worth more than five times the remainder of the Pacific's economies combined. Without the two regional heavyweights, any purported gains from intra-regional trade are negligible. The absence of these two countries in effect also works against regional integration, contrary to the purported aim of enhancing regional cohesion."[7]

Papua New Guinea and Fiji represent almost 85% of the Pacific economy, not to forget that Palau, Federated States of Micronesia and Republic of the Marshall Islands are also not included. A trade deal that excludes close to 90% of the economy betrays even the lofty promises of integration that accompany it.

[7] Gay, D. 2017, "Brief Analysis of PACER-Plus legal text", accessed at http://www.pina.com.fj/index.php?p=pacnews&m=read&o=1975932573593f622d83eb753e83c5

'Substantially all trade' does not need tariff liberalisation by Forum Island countries

Australia has stated that tariff liberalisation would have several objectives, including:

1. increasing freedom of trade and facilitation of trade that will lead to closer economic cooperation;
2. ensuring the removal of duties on substantially all the trade between Parties;
3. addressing the concerns of FICs revenue loss through staged tariff reductions over a long period of time and addressing other sensitivities;

These are problematic assumptions. Firstly, 'freedom of trade' and the 'facilitation of trade' can't be assumed to lead to economic cooperation. An influx of goods from Australia and New Zealand also cannot be assumed to be 'economic cooperation', one would argue that healthy, competitive and mature domestic industries in the FICs would be the best outcome for economic cooperation – an outcome that has been shown to come about through careful, deliberate tariff policy.

The 'substantially all trade' criterion is derived from the WTO. All free trade agreements that involve developed countries must follow the rules of Article XXIV of the General Agreement on Tariffs and Trade (GATT), one of the basic agreements within the WTO.[8] A free trade agreement that liberalises trade between the parties should cover 'substantially all trade' (SAT) within a 'reasonable time period' for it to be WTO-compatible. The idea is that free trade agreements discriminate against other countries which is against Most-Favoured Nation treatment, a principle of the WTO. However if an agreement covers 'substantially all trade' it is considered OK.

There is no agreement on what constitutes 'SAT' or 'reasonable time frame' – it is up to parties to negotiate. So it is largely the stronger developed countries that can dictate the terms. Australia is known to have set very high standards in agreements with more developed countries than the FICs – 80 or even 90+%. The target of the European Commission has been liberalisation of 80% of imports in the Economic Partnership Agreement negotiations with African, Caribbean and Pacific (ACP) countries. It appears to have reached this goal in most instances. However, the Economic Partnership Agreement between EU and 16 West-African countries West Africa agreed to liberalize 75% in a timeframe of 20 years. However, 75% liberalisation is still having a major impact on nascent industries and the agreement has not been signed yet by all parties.

Papua New Guinea is the largest market for Australia and New Zealand. Interestingly, a trade agreement is already applicable in the trade between PNG and Australia and New Zealand. This agreement does NOT require PNG to liberalise. Nonetheless, **Australia defended the non-reciprocal PNG-Australia agreement as being compliant with Article XXIV:**

> *6. In 1974-75 and 1975-76 more than 95 per cent of Australian imports from Papua New Guinea were duty free and it was estimated that in 1977 more than 99 per tent of Papua New Guinea exports to Australia would be admitted free of duty. In 1974-75, almost 82 per cent of total two-way trade between Australia and Papua New Guinea was duty free.- Consequently, the parties to the Agreement considered that PATCRA conformed fully to the provisions of Article XXIV of the General Agreement in that it was a full free-trade area in GATT terms from the time it came into operation.*
>
> *7. The representative of Australia stated that although Papua New Guinea would not be extending any reverse preferences to Australia under the Agreement, trade statistics showed*

[8] More flexible rules apply for free trade agreements between developing countries under the so-called 'Enabling Clause'

that substantially all the trade was covered within the meaning of Article XXIV:8(b). It was pointed out in this connexion that Article XXIV did not contain any specific provision with respect to reverse preferences. The absence of reverse preferences in favour of Australia did not, in the view of his authorities, affect the free-trade area status of the Agreement.
(GATT document L/4571, 14 October 1977)

Consequently, Island countries need not have had to liberalize their imports in order to satisfy the requirement to liberalize 'substantially all trade'.

The FTA between Australia and PNG is notified as an Article XXIV RTA - i.e. meeting the requirement of substantially all trade

Despite the previous position from Australia to defend non-reciprocity at the WTO, PACER-Plus is very much about opening up FIC markets. New Zealand has stated that with PACER-Plus "88 percent of New Zealand exports will be bound at current rates with tariffs gradually eliminated on 84 percent of New Zealand exports at the full implementation of PACER Plus"[9]. As the table[10] below indicates the coverage of PACER-Plus in regards to New Zealand exports is extensive by any FTA standards, least of all a deal with non-WTO member countries who are Small Island Developing States.

Party	Average NZ exports (2013-2015) NZD$	% of liberalised trade at full implementation	% of trade bound or duty free at full implementation
Elimination commences on entry into force and is completed within 25 years of entry into force			
Samoa	109 million	86.64%	97.54%
Cook Islands	99 million	74.36%	74.36%
Tonga	57 million	91.69%	97.06%
Niue	15 million	89.63%	89.63%
Kiribati	10 million	96.30%	96.30%
Elimination commences 10 years after entry into force			
FSM	4.9 million	98.15%	98.15%
RMI	3.5 million	84.26%	84.26%
Nauru	1.3 million	94.24%	94.38%
Palau	0.4 million	98.41%	99.81%
Elimination commences on graduation from Least Developed Country status or 10 years after entry into force whichever is later			
Vanuatu	42 million	80.20%	82.81%
Solomon Islands	29 million	82.70%	82.70%
Tuvalu	4.7 million	97.42%	97.87%

Australia has also secured extensive commitments on market access by the FICs. As Australia has stated, FICs "will have eliminated tariffs on 91.5 per cent of their tariff lines, covering 88.5 per cent of Australia's exports in 2016 (a total value of $0.36 billion)", see table below.[11] Australia also states that:

> The Cook Islands, Niue, Samoa and Tonga will provide early tariff reductions or tariff-free access for Australian exports of beef, sheep meat, poultry meat, dairy products, fruit juices, wine, medicaments, insecticides, agricultural chemicals, toiletries, packing materials, gold coin, iron and steel products, engine parts, machine parts, computer parts, measuring equipment, electrical and electronic goods, car parts, telecommunications equipment, professional

[9] New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/PACER-Plus-National-Interest-Analysis.pdf

[10] New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/PACER-Plus-National-Interest-Analysis.pdf

[11] Australia Department of Foreign Affairs and Trade, 2017, National Interest Analysis Pacific Agreement on Closer Economic Relations Plus, https://dfat.gov.au/trade/agreements/not-yet-in-force/pacer/Documents/pacer-plus-national-interest-analysis.pdf

instruments, breathing apparatus and fishing equipment.[12]

Pacific Island Country Tariff coverage commitments for Australian Goods Exports

Pacific Island Country	Tariff Elimination coverages (per cent) of:		Year of:[13]	
	Australia's exports to the Party	Total number of the Party's tariff lines	First tariff reductions[14]	Last tariff reduction
Cook Islands[15]	92.0%	93.6%	2019	2021
Kiribati[16]	90.4%	94.2%	2019	2019
Republic of the Marshall Islands[17]	88.2%	66.6%	2029	2053
Federated States of Micronesia*	99.0%	96.1%	2029	2053
Nauru	92.9%	98.6%	2029	2053
Niue	97.3%	97.4%	2019	2043
Palau*	99.7%	96.4%	2029	2053
Samoa	85.8%	85.3%	2019	2043
Solomon Islands#	85.1%	92.8%	2029 or later	2053 or later
Tonga	98.6%	97.8%	2019	2043
Tuvalu	94.5%	97.4%	2029 or later	2053 or later
Vanuatu	85.0%	81.5%	2029 or later	2053 or later
All 12 Parties	**88.5%**	**91.5%**		

Whilst PACER-Plus may contain longer timeframes for tariff reductions than the EPAs, the comprehensive coverage undermines any development standards set in other FTAs.

[12] Australia Department of Foreign Affairs and Trade, 2017, National Interest Analysis Pacific Agreement on Closer Economic Relations Plus, https://dfat.gov.au/trade/agreements/not-yet-in-force/pacer/Documents/pacer-plus-national-interest-analysis.pdf

[13] Note: Entries in these columns assume the Agreement will enter into force during the 2019 calendar year.

[14] Note: Where a Party has agreed to eliminate a tariff and the initial tariff reduction occurs after 2019 (the assumed year of entry into force), the tariff is bound at the base rate (based on its applied rate of duty) until reductions commence. Where a Party has agreed to bind a tariff at the base rate but not to eliminate the tariff, the tariff is bound at the base rate from the date of entry into force.

[15] Note: Due to its low duties and existing extensive duty-free treatment, Cook Islands will eliminate tariffs in 2021 or year 3 (assuming 2019 is the year of entry into force, year 1). Kiribati is an LDC, but had eliminated all its ordinary customs duties in 2014. Accordingly, Kiribati's tariff elimination will be effective on entry into force (in 2019 or year 1, assuming 2019 is the year of entry into force).

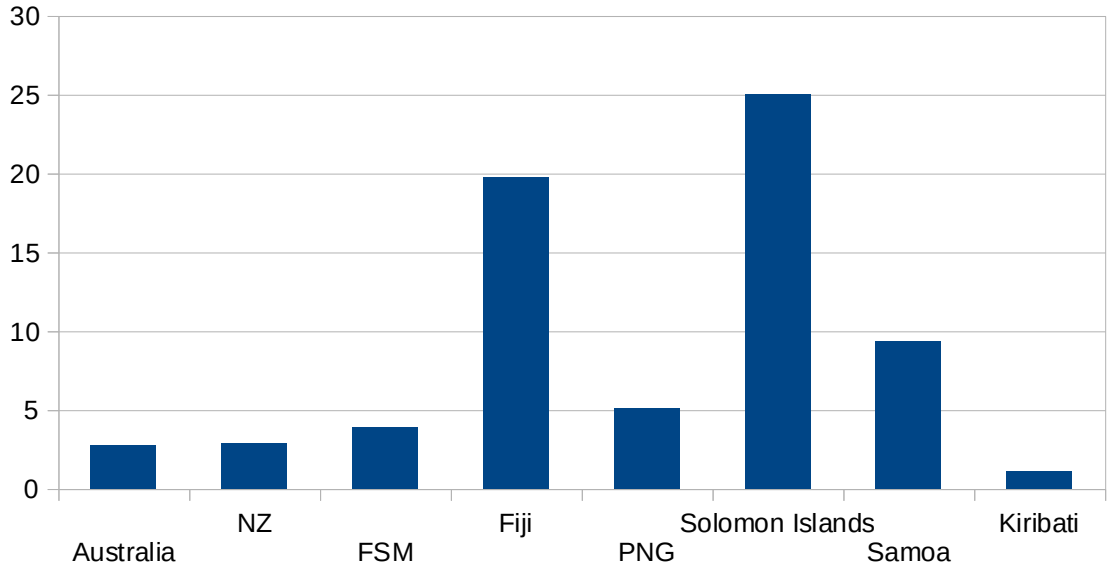
[16] Note: The Least Developed Countries (LDCs) at the time of conclusion of negotiations were Kiribati, Solomon Islands, Tuvalu and Vanuatu. An LDC Party concluding negotiations at that time will not take their first tariff reductions until the year after the date on which the United Nations graduates it from LDC status or the 11th year (2029) from the year of entry into force, whichever is later. Those Parties' last rescheduled reductions will occur in the 35th year (2053) or later.

[17] Note: The Republic of the Marshall Islands, the Federated States of Micronesia and Palau participated in the decision of Trade Ministers to conclude negotiations made in Brisbane on 20 April 2017, but have yet to sign the Agreement**.**

FICs derive a lot of government revenue from trade taxes

Forum Island Countries are quite dependent on trade taxes – import/export tariffs and revenue from import licenses and fees/charges levied separately from import tariffs. PACER-Plus will significantly reduce or eliminate income from import tariffs, revenue from import licenses as well as fees and charges. In contrast, the governments of Australia and New Zealand have multiple other sources of government revenue. As a matter of fact, based on 2015 World Bank data, Australia and New Zealand only derive 2% of revenue from trade taxes whereas Samoa derives almost 10% of their income from trade taxes and Solomon Islands more than 25%:

Dependence of FIC and A/NZ countries on trade taxes (% of revenue)



Source: World Bank, based on 2015 data[18]

The latest World Bank figures for Vanuatu and Fiji have them deriving over 15% and 20% of government revenue from trade taxes respectively

Tariff revenue losses

Some studies demonstrate that lowering import tariffs on Australian and New Zealand goods, where most Pacific imports originate, could lead to big tariff revenue losses – in the order of US$110 million across the FICs. The biggest losers would be Cook Islands (6-12%), Samoa (12- 14%), Tonga (17-19%), and Vanuatu (17-18%) The tax bases of the tiny Pacific administrations are already vulnerable – and some are tax-havens. They will struggle to establish and collect new revenues.[19]

As New Zealand announced at the conclusion of negotiations on PACER-Plus, their exporters will save NZ$20million from tariff cuts under PACER-Plus once in full effect[20] - this figure excludes the high value markets for New Zealand, namely Papua New Guinea and Fiji. This is money lost from Pacific governments. The Australian Parliamentary Joint Standing Committee on Treaties noted the impact of lost government revenues stating

> "The Committee is concerned PACER Plus may impact on Pacific Island Government revenues, which are not significant in any case and have to stretch a long way in remote, isolated, low income communities. The impact on the public health capacity as a result of reduced government revenues and access to tariff free products that cause harm has been a

[18] http://data.worldbank.org/indicator/GC.TAX.INTT.RV.ZS
[19] http://www.pacificpolicy.org/wp-content/uploads/2012/05/D08-PiPP.pdf
[20] https://www.beehive.govt.nz/release/details-released-landmark-pacific-trade-deal

significant issue in the inquiry".[21]

This loss of revenue was such a concern that Vanuatu, when announcing its decision to sign the agreement, raised a number of issues that needed to be "satisfactorily resolved", one of which stated:

> "The Government of the Republic of Vanuatu also raised the need for both Australia and New Zealand to increase their development assistance programme to Forum Island Countries, not only through the PACER Plus framework but also for increased bilateral development assistance programmes for FICs and in particular budget support for Vanuatu as it faces adjustment in the years ahead."[22] (emphasis added)

An updated PANG analysis shows that tariff revenue losses will actually be more than previously calculated: **Pacific countries that are Parties to PACER-Plus are set to lose more than USD60 million per year**, based on imports during the years 2012-2014:

Tariff revenue loss for Forum Island Countries will be more than USD 200 million based on current imports from Australia/New Zealand (2012-2014).

Country/ Territory	Binding coverage	Bound average	MFN average applied tariff on imports	Imports from AUSNZ during 2012-2014 (USD 000)	100% lib on imports from AUSNZ – Loss in USD 000	Loss when 88% liberalized, in USD 000
Samoa	100	21.3	11.4	125,071	14,258	12,547
Solomon Islands	100	78.3	10	147,827	14,783	13,009
Tonga	100.0	17.6	11.7	70,445	8,242	7,253
Vanuatu	100.0	39.7	9.1	94,056	8,559	7,532
Other PICS			9.7[23]	237,700	23,096	20,324
Subtotal						**60,665**
Fiji	51.1	40.4	11.4	787,447	89,769	78,997
Papua New Guinea	100	32.2	4.7	2,553,106	119,996	105,596
Total PICs						**245,259**

Source: WTO (binding coverage, bound average, MFN applied average)

If Papua New Guinea and Fiji were to enter into PACER Plus the loss of government revenue for FICs would increase to over USD$245 million.

Finding alternative sources of government revenue is difficult

The FICs have good grounds to be worried about what the implications will be for government revenue as many currently utilise tariffs as an easily obtainable and convenient form of revenue collection. It is also worth noting that tariffs are also a manner of which to, in general, target those

[21] Parliament of Australia, Joint Standing Committee on Treaties, *PACER Plus Agreement*, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/NuclearFuel-France/Report_179/section?id=committees%2freportjnt%2f024162%2f25858#footnote51target

[22] Government of Vanuatu, "Vanuatu to sign PACER Plus Agreement", 1 September 2017, accessed at https://www.gov.vu/en/public-information/306-vanuatu-to-sign-the-pacer-plus-agreement

[23] Estimate based on simple average

who have more money and are able to afford luxury imported items, shifting to other forms of taxation such as value added taxes shift the burden to the entire population, a population that isn't wholly engaged in the cash economy. Whilst tax reforms are happening in the region is it important to bear in mind the ability of other forms of taxes to replace the revenue of those gained from tariffs. According to IMF economists, if low income countries, like most FICs, cut their tariffs they are at best likely to recover 30% or less of this lost tariff revenue from other taxation sources.[24] The difference between the tax reforms that are being undertaken now in some FICs and the commitments on tariffs is that those made under PACER-Plus are irreversible in the event that FICs cannot obtain the necessary government revenue.

Unaddressed market access issues

The main potential for improved access to the Australian and New Zealand markets the FICs could come from improvements in rules of origin and more constructive approaches to Sanitary and Phytosanitary (SPS) issues. In the areas of SPS as well as rules of origin, the PACER-Plus has not achieved any perceptible result. The SPS Chapter of PACER-Plus essentially copies some provisions from the WTO's SPS Agreement without really addressing the real problems associated with small island states.

Rules of Origin (RoO) commitments under PACER-Plus fail to offer much in the way of improvements for FICs that what currently exists under SPARTECA. Whilst FICs may have lacked capacity to fully take advantage of SPARTECA, the onerous rules of origin meant that they were unable to easily comply with the agreement.

Analysis of the RoO text by Daniel Gay highlights how little progress was made in the chapter:

> "Despite calls for greater simplicity on RoO in PACER Plus, insufficient progress has been made. Whilst it is a welcome development that the SPARTECA requirement for 50% of the value of a finished product to be added in the islands has been reduced to 40% for most goods, and that a change in tariff classification requirement has been introduced, 40% is still quite high. Several organisations, including the Tony Blair Commission for Africa and the World Bank, have argued that a change in tariff classification or value-addition requirement of as low as 10% would most benefit developing countries. If PACER Plus were genuinely development-orientated, it would have further eased RoO.
>
> It also appears that the text proposed by the Forum Island Countries included in article 5 of Chapter Three (on Cumulative Rules of Origin[25]) of the draft which was leaked in 2016 has not been included in the final text. The FICs had proposed a specific relaxation of the strict requirement that goods originate within their own borders. The denial of this request again adds to the impression that the RoO are unlikely to constitute a big enough advance on SPARTECA.
>
> The language proposed by the FICs in the leaked text on de minimis, under article 7, also appears to have been excluded from the final negotiated text. This would have allowed FICs a higher threshold for origination than Australia and New Zealand in the event that a good did not undergo a change in tariff classification.
>
> Better RoO, however, would probably have been too late to have much impact in any case, given that the ASEAN Australia New Zealand FTA (AANZFTA) will eliminate tariffs on 99% of trade with key ASEAN markets by 2020, eroding any relative benefits of any improved market access for the islands – be it through enhanced RoO or otherwise. In this sense PACER

[24] 'Tax Revenue and (or?) Trade Liberalization', Baunsgaard and Keen, June 2005, IMF Working Paper, WP/05/112, http://www.imf.org/external/pubs/ft/wp/2005/wp05112.pdf.

[25] This refers to the leaked chapter on Rules of Origin at the 15th Intersessional meeting on March 10th, 2016

Plus could only have been beneficial – and only for a limited time – if negotiations had been concluded much earlier. There will soon be little incentive for ANZ to source goods from the Pacific islands when they can import them duty free from the larger and more competitive ASEAN nations."[26]

Concluding remarks

The definition of 'substantially all trade' could be made without the FICs making any commitments. As has been mentioned above, Australia has previously argued at the WTO that "*the absence of reverse preferences in favour of Australia did not, in the view of his authorities, affect the free-trade area status of the Agreement."* The final outcome and extensive coverage shows just how much the final text of PACER-Plus has failed the FICs. It is worth noting in 2013 the FICs comments at the 4th Intersessional:

> "The FICs indicated that they would be offering a SAT level of 60% and contended that the market access offers under the EPA were conditional upon global sourcing for products under the HS 0304/05 and 1604/05 as well as development assistance. In a similar vein, they argued that any market access commitment that they would make in PACER Plus would be contingent upon legally binding commitments on labour mobility and development assistance."

There was a legal argument for FICs to make no commitments on tariff cuts and that should be strongly argued in the negotiations, yet it appears that this did not happen. FICs already have Duty-Free Quota-Free access to the Australian and New Zealand markets, therefore the increase in trade will come from commitments made by the FICs, again it appears the FICs are shouldering the burden of commitments in PACER-Plus.

[26] Gay, D. 2017, "Brief Analysis of PACER-Plus legal text", accessed at http://www.pina.com.fj/index.php?p=pacnews&m=read&o=1975932573593f622d83eb753e83c5

II. Inadequate safeguards for FIC industries

Trade remedies are important policy tools for FICs to be able to respond to any damage that happens to domestic producers on account of low or no tariffs on imports from Australia and/or New Zealand due to PACER-Plus.

Policy space to nurture and support their domestic industries is an essential right for FIC governments. This right is unconditional and should not be linked with market access offers – that would be a feature of a true 'development agreement' that PACER-plus is supposed to be.

Australia had suggested that the 'strength' of safeguards should correspond to the level of tariff commitments to be undertaken by FICs. This suggestion is flawed. PACER-Plus goes far beyond what any WTO FIC member agreed to at WTO. Non-WTO FIC Members have complete freedom. FICs should have much stronger safeguards than what is available at the WTO. It also follows that in principle the maximum remedy in the form of additional tariff should be able to go up to the WTO bound tariff (if applicable) not the 'base rate'(current applied tariff) or 'suspension of tariff reduction'.

Further to this is ensuring that the FICs are matching the global calls for supporting of their industries by actions from Australia and New Zealand. In the current text on PACER-Plus this means ensuring that any proposals on *Global Safeguard Measures* support those of the G-90 (which includes the African Group, ACP and LDC Group) at the WTO. The proposal is stronger than what is currently worded in PACER-Plus and states:

> Parties shall not apply safeguard measures against a product originating in a developing country Party as long as its share of imports of the product concerned in the importing Party does not exceed 3 per cent or 10 per cent in the case of a least developed country Party.

It is also worth noting the approach that Australia has taken to negotiation PACER-Plus. Australia states that:

> "in keeping with Australia's (and New Zealand's) commitment to provide special and differential treatment to developing Parties, PICs will have right of recourse to transitional safeguards, industry development measures and compensated modification or withdrawal of commitments"[27]

Whilst these are framed as an extension of Australia's generosity in factoring in the unique conditions of the FICs, it fails to mention that many of these 'concessions' merely uphold existing WTO commitments and the fact that compensation is required if FICs modify or withdraw commitments means that there is little incentive for FICs to undertake either activity.

Transitional Safeguard Measures too narrow and weak

The finalised '*Transitional Safeguard Measures*' raise serious concerns about their effectiveness for FICs to support their industries.

Firstly it needs to be made clear why it is a 'transitional' measure, that the measures are not permanent and only available for the duration of tariff cuts (Art 8.1(e)[28]). These measures should

[27] Australia Department of Foreign Affairs and Trade, 2017, National Interest Analysis Pacific Agreement on Closer Economic Relations Plus, https://dfat.gov.au/trade/agreements/not-yet-in-force/pacer/Documents/pacer-plus-national-interest-analysis.pdf

[28] 'transition period' means, in relation to a particular good, the three-year period beginning on the date of entry into

have been made permanent to allow the FICs the ongoing adequate protection in the outcome that PACER-Plus causes serious damage to FIC industries.

For Developing country Parties, Article 8.2, in relation to the *Transitional Safeguard Mechanism*, states:

> If, as a result of the reduction or elimination of a customs duty pursuant to this Agreement:
>
> (a) an originating good of one other Party is being imported into Party's territory in such increased quantities, in absolute terms or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces a like or directly competitive good; or
>
> (b) an originating good of two or more Parties, collectively, is being imported into the Party's territory in such increased quantities, in absolute terms or relative to domestic production, and under such conditions, as to cause or threaten to cause serious injury to the domestic industry that produces a like or directly competitive good, provided that the Party applying the transitional safeguard measure demonstrates, with respect to the imports from each such Party against which the transitional safeguard measure is applied, that imports of the originating good from each of those Parties have increased, in absolute terms or relative to domestic production, since the date of entry into force of this Agreement for those Parties
>
> In such cases then under Art8.3 a Party may: "to the extent necessary to prevent or remedy serious injury and facilitate adjustment:
>
> (a) suspend the further reduction of any rate of customs duty provided for under this Agreement on the good; or
>
> (b) increase the rate of customs duty on the good to a level not to exceed the lesser of:
>
> *(i)* (A) in the case of a WTO Member, the most-favoured-nation (MFN) applied rate of customs duty, or
>
> (B) in the case of a Party that is not a WTO Member, the general non-preferential applied rate of customs duty;
>
> at the time the measure is applied; and
>
> (ii) (A) in the case of a WTO Member, the most-favoured-nation applied rate of customs duty; or
>
> (B) in the case of a Party that is not a WTO Member, the general non-preferential applied rate of customs duty;
>
> in effect on the day immediately preceding the date of entry into force of this Agreement for that Party.

The provisions for the transitional safeguard measures are problematic for a number of reasons.

1) The measures as currently proposed limits the grounds for use to conditions that "cause or threaten to cause serious injury" to a domestic industry producing like products. Limiting the

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force of this Agreement, except where the tariff elimination for the good occurs over a longer period of time, in which case the transition period shall be the period of the staged tariff elimination for that good.

scope of the measures used undermines the ability of the FICs to utilise the measure and can lead to it not being of most benefit to FICs.

There is no reason why PACER-Plus didn't accommodate a broader scope in relation to safeguard measures. New Zealand highlighted that the transitional safeguards measures within PACER-Plus are consistent with those in New Zealand's other FTAs (with the exception that Australia and New Zealand are unable to utilise it).[29] Many EPAs signed with the European Union have added the following conditions to allowing their use:

- disturbances in a sector of the economy, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party, or
- disturbances in the markets of agricultural like or directly competitive products or in the mechanisms regulating those markets.[30]

The interim EPAs, signed and ratified by Papua New Guinea and Fiji, contained a similar scope and as such FICs should have demanded such flexibilities in PACER-Plus with two countries that are major exporters to the region.

2) Further it is worth paying attention to the condition that states "'as a result of the reduction or elimination of a customs duty pursuant to this Agreement" (Art8.2). This condition, which is derived from Article XIX GATT is in practice not used in the WTO context. In the context of a bilateral safeguard, Australia/New Zealand can argue in the future that any damage by their exports has no causal link with reduction or elimination of customs duties which took place several years ago. This language should have been redrafted; it is noted that similar language does not appear in many other FTAs.

3) As can be seen from above, Article 8.3 outlines the actions that may be taken under measures yet is weaker than necessary. The remedy under 8.3 should be the customs duty to a level that does not exceed the customs duty applied to other WTO Members. Remedies should also include quotas not only tariff quotas (Art8.4). For instance 'limit imports by means of quantitative restrictions to a rate not less than the rate of such imports during any period of twelve months which ended within twelve months of the date on which the restrictions come into force' (from Article 22 'Difficulties in Particular Sectors', Agreement Establishing the Caribbean Free Trade Association (CARIFTA)

4) The FIC proposal agreed to in Article 8.12 *Investigation Procedures and Transparency Requirements* reiterates Article 3 and 4.2(c) of the WTO Agreement on Safeguards. The proposal states that a Party may only apply or extend a transitional safeguard measure following an investigation by a Parties competent authority to examine the impacts of imports of the domestic industry. The proposal also includes mandated public hearings from all interested parties. Following the investigation the competent authorities will publish their findings and conclusions.

Such a proposal opens the door for exporters, government officials and others from Australia and New Zealand to intervene in the process of a FIC administering their safeguard measures and determine "whether or not the application of a safeguard measure would be in the public interest".

[29] New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/PACER-Plus-National-Interest-Analysis.pdf

[30] CARIFORUM-EC Economic Partnership Agreement, accessed http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf

Further the proposals under Article 8.15 *Notification and Consultation* add an additional burden of proof on the FICs to justify any safeguard measure. Such a burden not only will make it hard for FIC bureaucracies but it remains unclear as to the justification of such a proposal.

5) The *Transitional Safeguard Measures* are still bound by the narrow scope of the safeguard measures and reliant upon the findings of the proposals for an investigation under 8.12. Such restrictions undermine the effectiveness and willingness to deploy such a measure as the narrowness may not be sufficient to protect the domestic industry and the requirements for an investigation will be an administrative burden. Provisional measures are aimed to be easy to use and effective, the FICs proposal falls short on both accounts.

6) It will be discussed in more detail below but Article 8.19 that deals with compensation should have been deleted from the text as it does not provide any developmental interest for the FICs and isn't necessary to be included in such a proposal.

Lack of protection for agricultural producers

Most FICs feature strong agricultural sectors with many Pacific Islanders engaging in some form of agrarian activity. As such ensuring that domestic producers are not overrun by the enormous agricultural export capacity of Australia and New Zealand is crucial. Events in Papua New Guinea over the last few years have shown the importance of being able to protect local farmers[31].

New Zealand had proposed a *Special Agricultural Safeguard Measures* however the final outcome fails to include any specific protections for farmers. PACER-Plus could have borrowed from the EU-South Korea FTA which does not include such measures in a temporary form. As Developing and Least-Developed Countries, FICs must have the permanent right to support their farmers as essential to any proposal on safeguards.

With all agricultural safeguards there is a delay between the knowledge of and taking action against an import surge and the actual import surge. This is due to the compilation of trade statistics, the monitoring of import surges and the bureaucratic process that accompany the many phases of such. This being the case, the only way to retroactively apply duties is to release goods and delay the definitive assessment of customs duty (under a security), and if a safeguard becomes applicable the additional safeguard could be applied to ALL imports except those that have not been cleared yet (as they are en-route).

These time delays mean that ensuring there is an adequate response to import surges is crucial, this may mean being able to take provisional measures and to ban imports.

Concluding remarks

Safeguards and protections are meant to be used when things are going wrong, it is in those times when you need to ensure you have the best response possible. The proposals in PACER-Plus will leave FICs short when they need it most.

It's worth once again noting Australia's argument that safeguards are justified only by extensive commitments on market access. This not only shows a worrying lack of understanding about the developmental complexities and realities of the FICs but also undermines any notion from Australia that PACER-Plus is a 'development agreement' for the FICs.

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31 "Ten imported fruit and veg banned in PNG", Radio New Zealand International, posted 17 August 2015, available at http://www.radionz.co.nz/international/pacific-news/281606/ten-imported-fruit-and-veg-banned-in-png

III. Reduced ability to support domestic industries

National treatment – the end of local content policies

Article 6 on Internal Taxation and Regulation states that "In respect of internal taxes, other internal charges and laws, regulations and requirements affecting matters within the scope of Article III of GATT 1994, each Party shall accord to the goods most-favoured-nation treatment and national treatment---" This means that local content policies that directly or indirectly favour domestic products are outlawed by the PACER-Plus.

For instance, Fiji has a local-content scheme which requires foreign investors manufacturing cigarettes to use at least 50% locally grown and processed tobacco (Foreign Investment Regulations 2008, Schedule 1). Australia/New Zealand could force Fiji to let go of this scheme based on Article 6. It is to be noted that Pacific countries do export zero dollar worth of tobacco and tobacco products from Australia/New Zealand.

Targeted local content policies can be beneficial in other sectors. For instance, the import of (frozen) fish could be limited and/or conditioned on the requirement of investment in local processing capacity or other local investments – that will not be allowed under Article 6.

Inadequate infant industry protection

Given the importance of policy space for tariffs it is disappointing that the safeguard measures that would support infant industry development are so weak.

Initial proposals by the FICs expanded the scope of what was defined to be:

> "Infant industry means an industry which is about to be established or an industry that has been in existence for not more than [10?] years and which was established with a view to generating jobs and raising the general living standard of the people of a developing country Party"[32]

The proposals under PACER-Plus restrict any measures for infant industry development to being for industries that are "new" or have undergone "substantial expansion" (Art9.1 a-d). This curtailing of the scope of what constitutes an infant industry will only result in fewer opportunities for FICs to support and nurture those industries. For a development agreement that is aiming to foster the expansion of the private sector such restrictions ignore the realities of the region yet ironically call upon those as justification for the inclusion of such measures.

Under Article 9 an Industry Development Measure:

(a) shall consist of:

(i) a delay in the scheduled reductions in the requesting Party's rate of customs duty for one or more specified goods; or

(ii) an increase in its rate of customs duty for one or more specified goods to no more than:

(A) in the case of a WTO Member, the most-favoured-nation applied rate of customs duty; or

(B) in the case of a non-WTO Member, the general non-preferential applied rate of customs duty;

effective at the time of the request;

[32] See draft Trade in Goods Chapter dated 03122015

(b) can be applied:

(i) for an initial period of seven years, which may be extended for a further three years by the Joint Committee; and

(ii) only during the period of the requesting Party's scheduled reductions in a rate of customs duty on the affected product;

(c) shall be eligible for approval if the tariff lines subject to the requested Industry Development Measure(s) and all Industry Development Measures of a Party in force at the time of such request(s) together account for not more than eight per cent of the total exports of the affected Party to the requesting Party6 and account for not more than three per cent of tariff lines.

New Zealand has highlighted how the provisions contain "stronger limitations" than those in similar provisions in the iEPAs signed between Fiji, Papua New Guinea and the European Union[33].

Under PACER-Plus an *Industry Development Measure* may:

- Only be taken with Joint Committee approval (as the committee operates by consensus and includes Australia and New Zealand a measure cannot be taken without Australian and New Zealand Agreement);
- Only be taken during the period of the requesting Party's scheduled reductions in the rate of Customs duty for the affected product; and
- Not, across all such measures taken by the requesting Party, account for more than eight percent of the total exports, and not more than three percent of tariff lines, of the affected Party to the requesting Party.
- Compensation will be provided in the form of equivalent concessions, or, as otherwise agreed between the Parties, after the first three years of application of the measure.

As mentioned above, the provisions under *Article 8* and 9 fail to be sufficiently wide in scope to be of most benefit to FICs. The limiting of the measures to only the suspension of tariff reductions or the base rate limits the options for FICs in supporting their infant industries plus the addition of the burden of proof will undermine that ability to support FIC emerging industries.

There are times when FICs will need to apply a higher duty than is currently being applied. For example, since 1963, the United States has a relatively high tariff of 35% on imports of light trucks which has remained until today in order to protect U.S. domestic automakers from foreign competition (e.g., from Japan and Thailand).

Concluding Remarks

FICs need to retain the maximum amount of flexibility to protect their domestic industries. The proposals contained within the current text, whilst allowing some options for protection, does so with significant rigidity. This rigidity ignores the complex economic circumstances that face the FICs and undermines their ability to follow the path that almost all other countries have used to industrialise.

For the proposed protections to have a meaningful impact they must be strengthened and made to work for the FICs. Instead of approaching such protections as aberrations on the free trade landscape they should be seen as legitimate policy tools to achieve the development aims that are supposed to be at the heart of PACER-Plus.

[33] New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/PACER-Plus-National-Interest-Analysis.pdf

IV. Trade Facilitation Agreement and other WTO commitments through the backdoor

Despite there being no mention of the WTO's Trade Facilitation Agreement (TFA) in the Trade in Goods chapter under PACER-Plus, FICs are going to be bound by the commitments it contains without the flexibilities it currently offers.

For instance, *Article 10: Fee and Charges Connected with Importation and Exportation* covers the issues associated with any charges attached to export and imports. The Article states that all fees and charges on or in connection with importation or exportation:

(α) are limited in amount to the approximate cost of the services rendered;

(β) do not represent an indirect protection to domestic products or a taxation on imports or exports for fiscal purposed; and

(χ) **are otherwise in conformity with the WTO Agreement**, including ***inter alia*** Articles I and VIII of GATT 1994.

It is the clause in Article 10.1 (c) referenced above that introduces the TFA into PACER-Plus. The TFA came into force on February 22, 2017[34] and is now part of the WTO Agreement thus ensuring that its commitments are now part of the commitments included under PACER-Plus.

With regards to fees and charges related to importation and exportation the Trade Facilitation Agreement adds certain requirements which aim to reduce fees and charges (Article 6 of the TFA):

- Information on fees and charges shall be published, the information to be published shall include the fees and charges that will be applied, the reason for such fees and charges, the responsible authority and when and how payment is to be made.
- Fees and charges shall not be applied until information on them has been published.
- An adequate time period shall be accorded between the publication of new or amended fees and charges and their entry into force, except in urgent circumstances.
- Fees and charges are to be periodically reviewed with a view to reducing their number and diversity, where practicable.

Another example through which the Trade Facilitation Agreement is imported into the PACER-Plus is Article 13 on Publication and Administration of Trade Regulations. Para 6 states that '.. Article X of GATT **and other provisions of the WTO Agreement** relating to the publication and administration of trade regulations are incorporated into and shall form part of this Agreement, *mutatis mutandis'.* This makes Article 1 of the TFA (publication and availability of information) applicable to FICs.

It is important to note the manner in which the TFA has been oversold. The International Chamber of Commerce prior to the Bali WTO Ministerial released a report stating that the TFA would contribute US$1 trillion to the global economy, a figure that was widely touted and repeated by proponents of the TFA. The figure however appears to be a gross inflation of the impacts of the TFA with Joseph Capaldo of the Global Development and Environment Institute at Tufts University examining the modelling that lead to the ICC's figure and finding that the gains are largely over stated as they are "based on a set of unjustifiable assumptions; its initial costs are substantial; its destabilizing potential is ignored in most discussions"[35]. The inclusion of the TFA in PACER-Plus is a serious concern as there are very real and substantial costs associated with its compliance.

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[34] https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm

[35] For a more thorough critique see Capaldo, J. The uncertain gains from Trade Facilitation Published in the South-North Development Monitor (SUNS) #7713 dated 9 December 2013

In recognition of the costs of compliance, TFA contains scope for Developing and Least-Developed Countries to schedule their level of commitment. This scheduling comprises of three categories:

- Category A – commitments implemented upon entry into force;
- Category B – commitments implemented after a transitional period.
- Category C – indicates commitments that require implementation capacity and technical assistance to implement provisions to be implemented after a transitional period.

FICs who are currently WTO Members are undergoing their own decision making processes regarding the ratification of the TFA[36], yet PACER-Plus may go beyond their initial commitments.

For the FIC WTO Members who have ratified, Samoa, Papua New Guinea and Fiji, they are bound by the TFA now that is has come into effect. Those FIC WTO Members who have not ratified are currently not bound by the TFA commitments. The inclusion of the TFA commitments within PACER-Plus creates a problematic area for FIC WTO Members.

If PACER-Plus comes into force then those commitments within the TFA that have been incorporated will apply to all PACER-Plus parties regardless of ratification or not. The FIC WTO Members who have ratified and scheduled their commitments will still be bound by that schedule but for PACER-Plus Parties that are WTO members who haven't ratified or aren't WTO members, they will be required to implement the relevant aspects of the TFA immediately to comply with PACER-Plus.

If FICs did not ratify the TFA, or if ratified did not list TFA provisions on fees and charges in the TFA as Category A/B (i.e. Category C - need for implementation capacity and technical assistance to implement provisions), it would still be bound to implement these provisions through the PACER-Plus.

Fiji, Samoa, Papua New Guinea, Australia and New Zealand have ratified the TFA. Vanuatu and Solomon Islands, as Parties to PACER-Plus that haven't ratified the TFA are in danger of losing any of the limited flexibilities that were granted it under the TFA once PACER-Plus enters into force.

	Tonga	Samoa	Solomon Islands	Papua New Guinea	Fiji	Vanuatu
General Disciplines of Fees and Charges	B	A	B	Not yet notified	B	B
Specific Disciplines on Fees and Charges	A	A	B	A	A	A

According to the WTO Secretariat, fees and charges provide revenue for the government and protection to domestic production' and 'the removal of fees and charges entail a loss of revenue for the government'.[37] The WTO Trade Policy Review found that for Tonga "the fees for customs processing, attendance fees, wharfage charges, and bond rent generated approximately T$1.1

[36] Samoa, Papua New Guinea and Fiji are the only FICs who have ratified the TFA as of October 2018.

[37] http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c5s2p6_e.htm

million in government revenue during the financial year 2011/12[38]". Whilst the entirety of this revenue wouldn't be lost, it is indicative of the valuable contribution to government revenue that such fees can provide.

This analysis of the text doesn't have the scope to go through each FICs level of fees and charges and how they contribute to government revenue. Rather it wants to highlight how in the context of tariff reductions they can play an important role in generating government revenue. Further the additional costs that will come with the additional commitments of the TFA, commitments that it appears are not specifically mentioned (nor the associated assistance through the scheduling process in the WTO).

Concluding remarks

The inclusion by stealth of the TFA and other WTO Agreements into the commitments under PACER-Plus is highly problematic. Non-WTO FICs will be bound by the TFA and other WTO Agreements, without formally being a WTO Member. For WTO FICs, the Scheduling process of the TFA is short-circuited. WTO Member FICs possibility of scheduling such commitments into Categories A, B or C as agreed upon by WTO Members is constrained. It goes beyond existing WTO commitments and leaves FICs without recourse to transition and access to additional assistance in order implements these commitments. PACER-Plus, the so called 'development agreement' for the FICs is unwinding the minimal, yet hard fought for, flexibilities that exist in the TFA.

[38] See WTO Trade Policy Review for Tonga in 2014, available at https://www.wto.org/english/tratop_e/tpr_e/s291_e.pdf

V. Clauses that would oblige Forum Island Countries to give more to Australia and New Zealand in the future

Despite the rhetoric of PACER-Plus being a "development agreement", Australia and New Zealand have ensured that their interests are protected under the Trade in Goods chapter. In addition to having the FICs shoulder the burden of commitments in the chapter, Australia and New Zealand will ensure that they have multiple avenues that would force FICs to give more to them in the future.

Most Favoured Nation (MFN) Clause

In *Article 3: Commitments on Tariffs* Art 3.2 is a Most Favoured Nation clause, aimed to ensure that any benefits that Parties offer to non-Parties that are better than provided for under PACER-Plus are passed on PACER-Plus Parties. Given that FICs already enjoy duty free and quota free access to Australia and New Zealand under SPARTECA, this proposal is about ensuring that Australia and New Zealand maintain the best access to FIC markets. As New Zealand explained, the "most-favoured-nation provisions in the Agreement including, unusually, in the goods chapter" represented a "significant achievement".[39] It's worth highlighting that not all Free Trade Agreements have an MFN clause. In fact such clauses are relatively rare in the area of goods. The Australia-US FTA as well as the recently agreed Trans-Pacific Partnership do not contain an MFN clause in the Trade in Goods chapters, yet Australia and New Zealand succeeded in including one in PACER-Plus.

New Zealand has also added that the flexibilities in the coverage of PACER-Plus for FIC commitments are only "made possible by a most-favoured-nation provision which will ensure that New Zealand is treated no less favourably than other significant competitors in the future".[40] Again we see that despite all the rhetoric about the extended flexibilities for FICs it has come at the expense of an MFN provision that is about ensuring Australia and New Zealand are not disadvantaged.

Under the Chapter, Article 3.2 states that:

"With respect to the levels of all duties and charges referred to in paragraph 1, any advantage granted to any good of any country or territory, other than in respect of a preference in force under a regional trade agreement on the date referred to in Article 8.1 of Chapter 15 (Final Provisions), shall be accorded immediately and unconditionally..."

To clarify further Art 3.2(c):

(c) the advantage granted is in respect of a preference in force pursuant to a regional trade agreement[2] exclusively involving developing countries to which at least one Party is a party and other parties are non-Parties, where:

(i) each such non-Party accounts for not more than 1 per cent of world merchandise exports; and

(ii) all non-Parties that are party to the regional trade agreement together account for not more than 4 per cent of world merchandise exports;

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[39] New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/PACER-Plus-National-Interest-Analysis.pdf

[40] New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/PACER-Plus-National-Interest-Analysis.pdf

> measured as of the date of entry into force of the regional trade agreement for each such Party and as of the date of accession of a new party to it.

New Zealand argues that despite the unusual nature of the MFN applying to the Trade in Goods chapter, it is consistent with an MFN in the iEPA signed between the EU and Papua New Guinea and Fiji. Whilst New Zealand may say that this "mirrors the approach taken by other developed countries in their development agreements" it ignores a number of important issues. Firstly, the signature of the interim EPAs by Fiji and Papua New Guinea were done somewhat under duress as they needed to ensure continued market access to Europe for their key industries. This MFN condition is still considered, among others, a "contentious issue" for further negotiation for a Comprehensive EPA. So whilst it may be a part of the iEPAs, it is far from something that the FICs are happy about.

Secondly, the threshold values used in other EPAs are in fact much higher than that proposed in PACER-Plus. Threshold values of 1.5-2% have been utilised in the EU's EPAs yet PACER-Plus only offers 1% threshold values. This is a poor concession as countries of interest to some FICs like Malaysia or Indonesia sits around 1-1.5% of world trade, thus rendering any flexibility to the FICs in effect meaningless.

This MFN aims to ensure that any other agreement that FICs enter into passes on any preferential treatment to Australia and New Zealand. As Developing and Least-Developed Countries this would add an enormous disincentive to any FIC undertaking a pro-development South-South agreement. Thus PACER-Plus becomes a tool to inhibit development activities in order to ensure that Australian and New Zealand exporters are protected. As New Zealand states "This is the first time this outcome has been secured in a New Zealand Free Trade Agreement and means that New Zealand businesses will remain competitive in the region if Forum Island Countries Parties move to conclude free trade agreements with any of our significant commercial competitors in the region".[41]

Further tipping the scales in favour of Australia and New Zealand is the proposed review of the MFN provision. Article 16.3 states that:

> "The Parties, through the Joint Committee or a relevant subsidiary body, shall review the operation of Articles 3.2(c) and 3.3 and Annex 2-B two years from the date of initial application of Annex 2-B, and thereafter at ten-year intervals unless otherwise agreed by the Parties, and shall submit a report to the Joint Committee, including any recommendations, within six months of the date of commencement of each review."

The implications of this have been made clear by New Zealand who see the review not as a way to ensure that it is working to support South-South development but rather "this ensures that the provision remains fit for purpose, for example by providing for the thresholds to be lowered to cater for significant changes in the trade profiles of our competitors."[42] What was already a provision that wasn't pro-development appears to intended to be weakened further for the FICs.

Use of safeguards are subject to paying compensation to Australia/New Zealand

Under *Article 8 Transitional Safeguard Measures* the issue of compensation is raised in conjunction with the use of any such measure. Initially and sadly it was the FICs that proposed this paragraph, yet the final outcome in PACER-Plus is worse for the FICs. Under the heading of *Compensation*

[41] New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/PACER-Plus-National-Interest-Analysis.pdf

[42] New Zealand Ministry of Foreign Affairs and Trade, 2017, Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Assessment, https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/PACER-Plus-National-Interest-Analysis.pdf

Article 8.19 states:

> 19. A Party applying a transitional safeguard measure shall, after consultations with each Party against whose good the transitional safeguard measure is applied, provide mutually agreed trade liberalising compensation in the form of concessions that have substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the transitional safeguard measure. The Party shall provide an opportunity for those consultations no later than 30 days after the application of the transitional safeguard measure.

This language allows for compensation in regard to the use of safeguard measures, an allowance that is not contained in the EPAs. Even in the EU-South Korea FTA, which has language on compensation and the right of suspension of equivalent concessions, it states that such rights should not exist in the first two years of application of the bilateral safeguard – this was also proposed at one stage by the FICs but didn't end up in the final text. The text now ensures that Australia and New Zealand will be able to maintain their interests above what would be a more development friendly proposal of allowing the FICs to utilise their bilateral safeguard measures without fear of reprisal.

Modification of Schedules

The adoption of proposals regarding any Modification of Schedules sees Australia and New Zealand attempting to ensure that any modification of schedules by the FICs would see them compensated in an equivalent way. If this cannot be obtained through commitments on tariffs then such a "compensatory adjustment" would be made in either FIC Investment or Services schedules. Such a proposal highlights the desire by Australia and New Zealand for greater access in the services/investment markets of the FICs, potentially allowing them to gain through this mechanism what they couldn't gain in other negotiations.

The Article however also goes beyond what is seen as most development friendly. The EU CARIFORUM EPA contains a similar article on the modification on schedules but the linkage for "compensatory adjustment" isn't made. The article states:

1. In the light of the special development needs of Antigua and Barbuda, Belize, the Commonwealth of Dominica, Grenada, the Republic of Guyana, the Republic of Haiti, Saint Christopher and Nevis, Saint Lucia, and Saint Vincent and the Grenadines, the Parties may decide in the CARIFORUM-EC Trade and Development Committee to modify the level of customs duties stipulated in Annex III, which may be applied to a product originating in the EC Party upon its importation into the CARIFORUM States.
2. The Parties shall ensure that any such modification does not result in an incompatibility of this Agreement with the requirements of Article XXIV of the GATT 1994. The Parties may also decide simultaneously to adjust the customs duty commitments stipulated in Annex III and relating to other products imported from the EC Party, as appropriate (Article 17 CARIFORUM EPA)

By not containing such a commitment the CARIFORUM countries are not required to offer such compensation specifically due to their developing country nature. FICs should have insisted upon the flexibilities that have been given to the CARIFORUM countries and not include such proposals that would provide a disincentive for them to respond to their development needs and modify their schedules if need be.

The final outcome in PACER-Plus effectively gives Australia and New Zealand a veto on any modifications or withdrawal of concessions. By requiring the agreement of all interested Parties (and later the Joint Committee if initial consultations aren't successful) FICs will be forced to decide whether or not the modification or withdrawal is worth the compensation that will be demanded.

Such a mechanism again reinforces the interests of Australia and New Zealand and avoids the incorporation of existing development-orientated texts.

Concluding Remarks

Australia and New Zealand have gone to great lengths to stress that PACER-Plus in a development agreement and in the interests of the FICs. At the time that the decision to launch negotiations was being made Australia's then Parliamentary Secretary for International Development Assistance Bob McMullan stated that “there is nothing in it for us”. Yet we have seen that Australia has made proposals to ensure that there most definitely is something in it for them and that they are in no way disadvantaged. Whilst it is not surprising that a Party would take such a position the problem arises when such a position will directly disadvantage the Parties this agreement was supposed to benefit, undermining the very purpose of such an agreement.

Conclusions

The rhetoric surrounding PACER Plus was that it was meant to be development agreement that would foster economic integration. The PACER Plus text is concerning both for what it includes and what it omits. FICs are shouldering the burden with regards to commitments and the loss of the policy space that has been enjoyed by countries like Australia and New Zealand to protect and nurture their domestic industries and to reflect their development aspirations. The extensive coverage of the market access commitments by FICs, the impractical safeguards, the weak protections for infant industries and the implications for policy space all show the lopsided nature of this agreement. Economic integration under PACER Plus is nothing more than greater integration of exports from Australia and New Zealand into the FICs.

The ongoing issues FIC exporters face in gaining access to the markets of Australia and New Zealand haven't been meaningfully addressed. This coupled with the erosion of any such preference within a year of PACER Plus coming into effect again shows how it is the FICs who in fact have 'nothing in it' for them and Australia and New Zealand have everything to gain.

Annex - Australia/New Zealand share in FIC exports (by product category)

Product code	Product label	export to AUSNZ	export to world	AUSNZ export share (%)
71	Pearls, precious stones, metals, coins, etc	2057666	2139376	96%
86	Railway, tramway locomotives, rolling stock, equipment	5261	5541	95%
08	Edible fruit, nuts, peel of citrus fruit, melons	3355	3975	84%
62	Articles of apparel, accessories, not knit or crochet	38693	46314	84%
07	Edible vegetables and certain roots and tubers	19601	24069	81%
61	Articles of apparel, accessories, knit or crochet	13321	16551	80%
73	Articles of iron or steel	18091	26123	69%
63	Other made textile articles, sets, worn clothing etc	4780	7232	66%
30	Pharmaceutical products	4936	9167	54%
23	Residues, wastes of food industry, animal fodder	8989	16962	53%
95	Toys, games, sports requisites	1184	3032	39%
25	Salt, sulphur, earth, stone, plaster, lime and cement	13634	38034	36%
19	Cereal, flour, starch, milk preparations and products	16266	47421	34%
85	Electrical, electronic equipment	37360	119976	31%
82	Tools, implements, cutlery, etc of base metal	633	2046	31%
24	Tobacco and manufactured tobacco substitutes	504	1658	30%
74	Copper and articles thereof	4319	14875	29%
TOTAL	**All products**	**3693237**	**13068419**	**28%**
27	Mineral fuels, oils, distillation products, etc	1284243	4748681	27%
42	Articles of leather, animal gut, harness, travel goods	295	1183	25%
39	Plastics and articles thereof	2299	9288	25%
99	Commodities not elsewhere specified	4631	19439	24%
76	Aluminium and articles thereof	2363	10741	22%
21	Miscellaneous edible preparations	1139	5476	21%
20	Vegetable, fruit, nut, etc food preparations	1190	5960	20%
84	Machinery, nuclear reactors, boilers, etc	12197	61792	20%
09	Coffee, tea, mate and spices	39467	206803	19%
52	Cotton	384	2170	18%
49	Printed books, newspapers, pictures etc	575	3681	16%
33	Essential oils, perfumes, cosmetics, toileteries	1121	7219	16%
87	Vehicles other than railway, tramway	5431	36666	15%
94	Furniture, lighting, signs, prefabricated buildings	727	4980	15%
97	Works of art, collectors pieces and antiques	1199	8452	14%
90	Optical, photo, technical, medical, etc apparatus	2405	17079	14%
04	Dairy products, eggs, honey, edible animal product nes	932	7105	13%
88	Aircraft, spacecraft, and parts thereof	3030	23616	13%

Product code	Product label	export to AUSNZ	export to world	AUSNZ export share (%)
83	Miscellaneous articles of base metal	126	1140	11%
02	Meat and edible meat offal	501	4597	11%
64	Footwear, gaiters and the like, parts thereof	217	2210	10%
75	Nickel and articles thereof	28829	313075	9%
72	Iron and steel	2355	28580	8%
40	Rubber and articles thereof	848	11079	8%
34	Soaps, lubricants, waxes, candles, modelling pastes	358	6273	6%
11	Milling products, malt, starches, inulin, wheat gluten	873	17501	5%
96	Miscellaneous manufactured articles	123	2633	5%
12	Oil seed, oleagic fruits, grain, seed, fruit, etc, nes	2845	62749	5%
41	Raw hides and skins (other than furskins) and leather	456	11459	4%
38	Miscellaneous chemical products	106	3342	3%
48	Paper and paperboard, articles of pulp, paper and board	410	13325	3%
32	Tanning, dyeing extracts, tannins, derivs,pigments etc	176	8794	2%
22	Beverages, spirits and vinegar	2438	130928	2%
10	Cereals	21	1165	2%
44	Wood and articles of wood, wood charcoal	18746	1320368	1%
05	Products of animal origin, nes	67	5203	1%
16	Meat, fish and seafood food preparations nes	2213	172314	1%
03	Fish, crustaceans, molluscs, aquatic invertebrates nes	9271	745617	1%
43	Furskins and artiPICial fur, manufactures thereof	15	1355	1%
15	Animal,vegetable fats and oils, cleavage products, etc	5684	625338	1%
89	Ships, boats and other floating structures	1959	749205	0%
18	Cocoa and cocoa preparations	321	146591	0%
68	Stone, plaster, cement, asbestos, mica, etc articles	1	2487	0%
17	Sugars and sugar confectionery	25	116019	0%
26	Ores, slag and ash	9	851395	0%