



A Brief Analysis of Trade in Services and Investment under Pacific Agreement on Closer Economic Relations Plus (PACER-Plus)

Pacific Agreement on Closer Economic Relations 'Plus' (PACER-Plus) is re-writing the rules and conditions on how Australia and New Zealand investors and corporations invest in Pacific Island Countries (PICs) and how those countries are able to ensure that it meets their needs.

There are big dollars involved in investments and services trade between the Pacific and Australia and New Zealand. In 2016 New Zealand sold NZD\$278million of services to PACER-Plus countries (excluding Australia) and describes the new commitments made by the Pacific Island Countries in Services as “commercially significant” and importantly protected against any future deals the Pacific signs with other nations.

It's important to remember that agreements like PACER-Plus, especially as they relate to investment, are highly controversial and a growing number of countries, including Brazil, India and South Africa are withdrawing from them and developing substitutes that balance commercial interests with regulatory sovereignty and social rights.

Pacific taking on the burden of commitments

The inclusion of Trade in Services and Investment commitments in PACER-Plus brings with it a whole suite of challenges for Pacific Island governments and needs to be considered carefully. The usual reasons given for small developing country governments to agree to services and investment chapters in regional agreements are problematic.

These reasons include to attract investors who wouldn't come otherwise; build capacity for long-term development; to secure better treatment for their service providers and investors offshore; and as a bargaining chip to get better concessions in other parts of the trade agreement.

Such arguments are disingenuous. Any PIC could choose to liberalise their services sectors when they want, they don't need a free trade agreement such as PACER-Plus to do that. What PACER-Plus does however is lock in that liberalisation and makes it practically impossible for them to alter or revoke those commitments if they prove damaging or alternative approaches would have better outcomes. Furthermore whilst the 'commercially significant' interests of Australia and New Zealand have been secured through binding commitments by the PICs, yet in the key areas of interest for the PICs – namely labour mobility and development assistance – the commitments are not enforceable.

Many PICs are not members of the World Trade Organization (WTO) - the global trade body - and for good reason: it is not relevant to their realities, the

rules are lopsided in benefiting larger and richer countries, the obligations are too onerous. Yet PACER-Plus will see imposed on PICs obligations that go beyond the WTO levels. This is unconscionable by Australia and New Zealand and should at least be unenforceable through dispute settlement mechanisms.

Countries must list the sectors that they are committing to be bound by PACER-Plus rules, these are called a schedule of commitments. The WTO, under its current Doha Round of negotiations has made some acknowledgement of the need to ensure that 'appropriate flexibility to open fewer sectors' is given to developing countries to make fewer commitments and for Least Developed Countries to make none. But under PACER-Plus, even if the PICs make fewer commitments than Australia and New Zealand, they currently have few commitments in trade agreements so anything under PACER-Plus will involve a heavy burden to implement regardless of any difference in the levels of commitments between the developed and developing countries.

In the future there will be more negotiations with the view to seeing countries open up even more service sectors under PACER-Plus. Whilst there is some recognition about recognising 'appropriate flexibility' in reviews to extend each country's services commitments, the investment chapter just says parties will 'take into account' the limited capacities of developing countries but can still pressure them for greater commitments.

Fetters on State Sovereignty

The services chapter aims to give firms from PACER-Plus countries the right to sell services to customers in each other's territory on the same terms as locals and not face restrictions on how big they grow or how much foreign ownership they have.

The core rules of the services and investment chapters put handcuffs on what governments can do to provide opportunities for locals providing services such as shops, tourism ventures, media, health care facilities, education, professions, or transport, and protect them from being overwhelmed by big well-resourced foreign firms.

For example some PACER-Plus rules mean governments can't:

- * Give better treatment to locals (aside from subsidies and grants);
- * Restrict foreign investment generally, or in specific sectors, or require investment through a joint venture with someone local;
- * Limit the number of firms or people who can supply a particular service to prevent over-supply, something that makes it difficult for small local firms, especially, to survive;
- * Limit the number of clients of a firm, or its total output, which is a way of ensuring that one or more big businesses do not dominate the market.

Obligations in the services and investment chapters are not limited to central government, or even regional or local government, it can go all the way to the level of Chiefs. PACER-Plus could see a decision by a village council as a matter of customary law not to allow certain activity in its area challenged by another state or one of its investors on the grounds that its authority was authorised by central government.

PACER-Plus also contains commitments that relate to 'domestic regulation', that is the regulations that the government has in place or wants to introduce.

Under PACER-Plus the general laws and policies that apply to the services in a country's schedule of

commitments must be administered in a reasonable, objective and impartial manner. That may sound perfectly rational, but it opens up decisions to challenge for being 'unreasonable', 'subjective', and based on partisan considerations, such as giving priority to community concerns or indigenous rights.

Further, every PACER-Plus government must set up tribunals or other procedures for aggrieved service firms to have decisions reviewed and receive 'appropriate' remedies. This is not limited to services sectors that a country has committed in its schedule. In addition to the burden this imposes on governments with limited capacity and budgets, the potential for a challenge may have a chilling effect on those who make the original decisions – an effect that is increasingly recognised but very hard to document.

Finally the choice of domestic regulations for licensing and qualification requirements or technical standards must reflect narrow considerations like the technical quality of a service, rather than social or cultural factors, and must be the option that has the least impact on the rights of the service supplier under the chapter. This only applies to the services in a schedule, but it covers a lot. Technical standards, for example, include water quality standards, toxic discharge levels from mining operations, environment and health and safety rules for logging, eco-tourism accreditation, supermarket size and trading hours, zoning for town planning purposes, mandated school curriculum, etc.

For a country like Solomon Islands, PACER-Plus will dramatically expand its services commitments. Currently Solomon Islands services commitments in the WTO are limited to only 9 sub-sectors but under PACER-Plus this expands to almost 70 sub-sectors and includes sectors like telecommunications, courier services, travel agencies and tour operator services as well as a host of services associated with maritime and air travel. The expansion in the level of commitments that the Solomon Islands has made extends the regulator limits over more sectors of Solomon Islander society.

PACER-Plus limits what the development options are for Pacific Island governments. Having the space to do any of the tools mentioned above allows the PICs the greatest ability to ensure that the investment and services



that come into their countries are best placed to have the benefits maximised.

Special protections for investors

Under PACER-Plus investors are granted 'fair and equitable treatment', a term that has been argued by corporations and investors to entitle them to a stable regulatory environment, which means that the rules don't change in ways that significantly erode their investment's value or profits, even when they cause social or environmental problems. Whilst PACER-Plus incorporates some language to try and mitigate the worst impacts of this, such language has proven to be ineffective when challenged.

Most Favoured Nation

The inclusion of a most-favoured-nation (MFN) clause means that any better conditions given to investors in another trade deal must be given to Australia and New Zealand. The effect is to

constantly ratchet up the investor protections and liberalisation commitments that governments make and undermine any more pro-development deals with other developing countries.

New Zealand has described the MFN provision in PACER-Plus as "strong", going on to claim that "Parties provide most-favoured-nation commitments across virtually all service sectors" except for those limited exemptions listed by FICs.

Other options were available however. The Economic Partnership Agreement between Caribbean countries and the European Union only applies MFN treatment to future deals with major exporting countries. New model investment agreements from countries like Brazil and India however don't include the MFN provision at all.

Losing the Right To Regulate

Despite the denials by proponents of the agreement, PACER-Plus contains little protections for the right of government's to regulate. The Services chapter recognises the right of parties to regulate and introduce new regulations, provided that regulation is not inconsistent with the chapter. In other words, it confirms that governments can do what the chapter allows them to do anyway, but can't do anything that would breach the chapter.

Similarly the Investment chapter acknowledges that investors are subject to the laws of the country they are investing in however any measure that doesn't comply with PACER-Plus can be challenged. This again means that FIC governments can implement any law they want to provided that they don't break the rules of the agreement.

PACER-Plus also borrows the general exceptions from the World Trade Organization that are meant to allow countries to adopt measures to protect public order and morals, human health, environmental and conservation. However, they look more effective than they are in practice because there are many layers of conditions that have to be satisfied before they apply. In the WTO the general exception has only provided an effective defence once in the forty-four times it has been relied on. The very restrictive circumstances in which the national security exception can be invoked in the WTO is broadened to include threats to public infrastructure, but does not apply to situations such as climate change or cybercrime by private actors.

The weak protections in PACER-Plus mean that the scheduling of commitments by FICs are technical, high-risk undertakings. Mistakes are made even by countries like the US and technological change can mean that things that previously weren't possible or considered a service suddenly become so.

PACER-Plus doesn't allow any changes to countries schedules for 3 years, after which a country can tell others it wants to make a change. Making such a change however relies on there being no opposition from other parties, and if there is so, there can be no changes until compensation is agreed upon (usually in the form of alternative commitments).

Compliance and ensuring Pacific implementation

PACER-Plus comes with real teeth to make sure any commitments made by the Pacific Island Countries are enforced. PACER-Plus provides multiple pressure points for Australia and NZ to demand compliance, culminating in actual enforcement, in addition to leverage through their aid budgets. While the Pacific Island Country Trade Agreement Trade in Services (PICTA TiS) also has some of these obligations, it seems unlikely that they have been implemented, monitored or enforced.

There is a long list of measures that PIC governments will have to publish in print or post online, including licensing requirements and procedures, qualification requirements and procedures and technical standards for services and this extends all the way down to sub-central government and non-government decision makers. The objective is to remove discretion from decision makers as far as possible and empowers commercial interests to intervene with government to advance their interests. Although it only applies 'to the extent of the government's capacity', this can be contested by the other parties.

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

An actual dispute is not the only problem. The bigger danger is the 'chilling effect' of potential disputes on domestic decisions, where governments decide not to implement legislation for fear that it will be challenged. We have seen this in New Zealand with the plain packaging law after the tobacco companies threatened an investment dispute. The possibility of litigation can also cast a more general shadow over decisions, so that governments become super-cautious when making policy decisions that foreign investors don't support. The United Nations Committee on Trade And Development has recognised this is a growing concern.

This brief was compiled by the Pacific Network on Globalisation (PANG). PANG is a Pacific regional network promoting economic self-determination and justice in the Pacific Islands.

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