Post Cotonou Negotiation – Foundation Document Analysis of Title IV: Inclusive Sustainable Economic Growth and Development

February 2023

This analysis of the Foundation document, like the Post Cotonou documents, needs to be read in conjunction with the Pacific Regional Protocol. Both documents are seeing the PACP Parties undertake extensive commitments across the areas of trade and development and are driven by the unrealistic assumption that liberalisation of trade will automatically result in economic development. While trade liberalisation has a role to play the commitments contained in these documents are undermining the regulatory sovereignty of the PACP to shape and determine that development. This is a living document and will be updated as negotiations progress.

Below are comments on Title IV: Inclusive Sustainable Economic Growth and Development.

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Chapter 1: Investment

Article 41: Mobilisation of Sustainable and Responsible Investment

- ***Article 41.1*** fails to define what an 'investment' is leaving it open to including a wide range of problematic investments including portfolio investments etc. The article mentions that investment must be “responsible” without providing a definition to contextualise the commitment that PACP states are undertaking. Parties are then committing to “establish a conducive investment climate” that attracts investment. What a conducive investment

climate includes isn't specified but is often associated in free trade agreements and bilateral investment treaties with reducing the regulatory space of governments and prioritising the needs of investors over all labour conditions, environmental and social protections, and Indigenous rights.

The Article includes a reference to the "right to regulate" however there is little qualification given to that. As is often the case in the WTO, free trade agreements and investment treaties, it is the reaffirmation of a states right to regulate provided it doesn't contravene the agreement. Such an agreement is a false provision of rights as it doesn't allow the state to undertake any regulation if it breaches the parameters of the agreement, giving primacy to the agreement over regulatory rights.

The inclusion of "through transparent, predictable and efficient regulatory administrative and policy frameworks" should be interpreted as a reference to international investment treaties and the many problematic ways that such agreements have been used to over-turn government regulation. As mentioned more below, such language undermines the ability of governments to regulate in their interests.

The use of "predictable" is problematic as often this term can be interpreted to mean that the regulations and policies in PACP members don't change an investors legitimate expectations even if governments find that they need to make changes in response to external factors or domestic impacts. This in effect would be a standstill on current levels of policy regarding investment as many PACP parties are still developing their regulatory capacities.

Regulatory frameworks that are "transparent" can imply that there is a greater role for foreign private sector operators to have a say on any proposed policy changes that a government may be interested in. Such an avenue is later mentioned in Chapter 2 Article 3 Private Sector Development.

Suggested end of paragraph text: "...the diaspora, and respects the sovereign right to regulate in the national interest".

- ***Article 41.2*** promotes the need for economic and institutional reform with Parties. It is important to note the asymmetry in these obligations as it realistically is only the PACP parties who will be undergoing reform in line with their development strategies whilst other parties (but predominantly the EU) are able to take advantage of any economic liberalisation.

  The language has PACP agreeing to support reform and policies that are grounded in the country's overall development strategy and "coherent and synergistic" with national, regional and international level. Such economic and institutional reform in trade agreements often means the liberalisation of markets (services and trade) and the changes, usually reducing, in the regulatory processes of government. Whilst it is encouraging that the article links such reforms to any national development strategy however by connecting it to other policies at the regional and international level can result in a lowest-common denominator approach to regulatory space.

  Finally the Parties agree to support the "necessary" reforms for development. The raises the question as to whom is to determine what is necessary and what isn't, presumably the donor country will have the decisive say.

  Suggested text: remove "necessary" from the first sentence.

- ***Article 41.3*** involves the shaping of the financial systems of PACP governments to support investment. The text should be changed to be "shall endeavour" style commitments.

- ***Article 41.4*** has Parties agreeing to "improve the regulatory environment" as well as the access to financial and non-financial services for MSMEs. It is important to clarify what improvement will look like in this agreement as it is most likely to be interpreted as reducing the regulatory role of governments. This is critical as not only are MSMEs being used by the EU and other demandeurs at the WTO to justify their demands for greater market access into developing countries but also because in many instances the nurturing of small businesses in key industries through protections and safeguards are often considered part of the problem needing to be 'improved'.

  Suggested text would remove "The Parties agree to improve ~~the regulatory environment as well as~~ the quality, availability and accessibility of financial and non-financial services, to support the development of Micro, Small and Medium Enterprises in the context of domestic investment mobilisation.

- ***Article 41.5*** contains language on corporate social responsibility and responsible business conduct however wants to include international guidelines into national laws. PACP governments shouldn't agree to promote outcomes that they are currently not party to.

  The following language proposal could have been made in this regard: "Each Party shall implement relevant internationally agreed instruments on corporate social responsibility that have been adopted by that Member, such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Guiding Principles on Business and Human Rights and the SDGs."

Article 42: Investment Facilitation

- ***Article 42.1*** commits PACP governments to facilitate investment through "legislation, regulations and policies aimed at reducing regulatory and administrative barriers". It is crucial to note that what some investors may see as a barrier (like customary land control systems) are seen by communities and governments as integral parts of their society and economy. The language in this article is broad and general allowing it to apply to the full range of investment sectors with the only focus of such action to facilitate investors being the reduction in the ability of governments to regulate those industries (for example requiring use of local content, hiring local workers in senior positions etc).

  The inclusion of language regarding "regulatory and administrative barriers" can be seen as a reference to the administrative procedures and requirements of PACP countries. This inclusion, like in the Pacific Regional Protocol, leaves the PACP countries open to undertaking commitments that many have not even negotiated. Commitments on these issues are currently being negotiated by a subset of WTO Members (including EU and Vanuatu) in the 'Investment Facilitation' plurilateral negotiations. I.e. such language would almost force them to accept this agreement without having been part of the negotiations.

  The final sentence in the Article commits PACP governments to undertaking the reforms in a "transparent manner" which includes public-private dialogue and opportunity for all stakeholders to participate. This is committing PACP governments to giving EU investors a seat at the table for domestic policy decision making and invites their influence over such decisions. While "all stakeholders" are able to participate there is a disproportionate power

imbalance between EU corporations and local community groups.

PACP governments can adjust their legislation, regulations and policies to support investment when, how and as they see fit currently, there is no need to make that a binding liberalisation commitment under a Post-Cotonou outcome.

Suggested text: This article should be on a best-endeavour basis.

- ***Article 42.2*** The commitment to cooperate to promote the utilisation of "digital tools" to facilitate investment raises similar concerns about Art 2.1 and the Investment Facilitation negotiations in the WTO. Similar rules are being discussed at the WTO and as such should not be included in the Post-Cotonou negotiations without there being greater clarity and certainty as to what they encompass. The adoption of online tools will require expensive digital facilitation of investment applications.

- ***Article 42.3*** has Parties agreeing on the importance of providing legal protection for investors however their treatment "shall be non-discriminatory in nature" with "effective dispute prevention". This is committing the PACP states to non-discriminatory treatment for investors which is highly problematic. This language is broad and the term "non-discrimination" is not defined – it could be interpreted as applying 'National Treatment' or Most-Favoured-Nation' commitments to investments. If this is the case then the text commits PACP countries to granting "National Treatment" and MFN across all sectors as there is no schedule of commitments, that is the inability of PACP governments to favour domestic investors in areas that are nationally sensitive or deemed important. Another interpretation of "non-discrimination" is the application of the same treatment between the types and sectors of investment, so investment in the mining sector is to be treated the same as investment in education or manufacturing or tourism etc. The removal of generalised commitments on non-discrimination for investors was a welcome change in the Pacific Regional Protocol however it is concerning that it is contained in this document.
  In regard to the above Parties reaffirm the importance of concluding international investment agreements which preserve the sovereign right to regulate investment "for legitimate public purposes". It is important to note that "legitimate" is not defined and would only be determined on a case-by-case basis under any dispute process. In a WTO dispute 'legitimate' has been interpreted to mean widely recognised state practice.[1] If this interpretation is followed in an international investment agreements dispute, this would mean that best practice regulations that have not yet been widely adopted such as plain packaging for tobacco or large health warnings for alcohol may not be able to use this exception.

  It is concerning that this article may be used by the EU to pressure PACP states to negotiate a bilateral or regional international investment agreement or be used to justify the expansive commitments that apply to the PACP under the *Investment* article in the Pacific Regional Protocol.

  Suggested text:
  Remove "...whose treatment shall be non-discriminatory in nature and shall include effective dispute prevention and resolution mechanisms".
  "...which fully preserve their sovereign right to regulate investment ~~for legitimate public policy purposes~~".

1DS 114, Panel Report dated 17 March, 2000 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm>

Chapter 2: Economic growth, diversification, and industrialisation

Article 43: Inclusive and Sustainable Growth

- ***Article 43.1*** has PACP Parties agreeing to promote full and productive employment and decent work for all through a long list of activities with no real detail about what these commitments include or the relevance to domestic circumstances. Some of the actions to meet the required promotion like "enhanced competitiveness", "innovation", "digitalisation" could be used to liberalise sectors or reduce regulatory space. The lack of clarity in the article leaves PACP Parties open to further pressure to liberalise even if that was not their intention.

- ***Article 41.3*** has PACP states respecting the conventions and protocols of the ILO. Whilst it is welcome that all PACP states do so not all PACP are parties to the ILO Members and as such shouldn't be bound to undertake commitments in fora that they are not involved in through Post Cotonou negotiations. PACP are welcome to become ILO members as they see fit.

Article 44: Economic Transformation and Industrialisation

- ***Article 44.3*** has Parties committing to pursue 'stability-orientated' macroeconomic frameworks to improve macroeconomic stability. The term 'stability-orientated' is left poorly defined and open to interpretation. As mentioned above, terms like "predictable" are often interpreted as preventing governments from making changes to policies and regulations that relate to investments. The attempt to provide more description of what such stability-orientated framework might look like are also led by generic terms such as "sound" and "appropriate". The lack of definition in these commitments should make PACPs reluctant to commit when there is no clarity about the extent of the commitment.
- ***Article 44.5*** outlines the commitment for PACP and the EU to commit to develop "efficient and sustainable infrastructure" including in transport, energy, water and digital connectivity. The commitment to cooperate is further detailed in the language of the Pacific Regional Protocol in regards to the commitments on connectivity (Title II, Chapter 3, Article 26). In the PRP the PACP are undertaking a range of commitments that would effectively liberalise the transport sector and impact on digital industrialisation. Any cooperation should be "where appropriate".

Article 45: Private Sector Development

- ***Article 45.2*** – The inclusion of mechanisms to support public-private sector dialogue is welcome but these should also be accompanied by similar mechanisms for gaining input from civil society actors. This will be addressed in later articles below.
- ***Article 45.4*** has the PACP and EU agreeing to develop "transparent and predictable frameworks and strategies" for the use of Public-Private Partnerships. This includes strengthening the institutional capacities of the PACP to "negotiate, implement and monitor" projects. PPPs are a complex undertaking, containing many risks and there have been many examples that have resulted in poorer service provision and greater expense than public provision[2]. It is concerning that this may be used to push PACP countries to

2 See the report "What Lies Beneath: A critical assessment of PPPs and their impact on sustainable development by Maria Romero, available at https://eurodad.org/whatliesbeneath

undertake PPPs

Chapter 3: Science, Technology Innovation and Research

Article 46: Science, Technology and Innovation

- ***Article 1.2*** has Parties agreeing to work towards developing "knowledge societies". It is unclear what this means specifically however would most likely build off of the previous article. While it is important to PACP countries to incorporate new knowledges and innovation it shouldn't be done at the expense of the vast and crucial existing traditional knowledges held within the PACP.

  The article also commits Parties to promoting "the adoption of coherent and comprehensive policy and regulatory frameworks" and "develop infrastructure connectivity". Coherent and comprehensive regulatory frameworks are welcomed provided that is not interpreted as being a liberalised approach as advocated by the EU. It is important to ensure that the implementation of this language guarantees the right and ability of governments to enact robust administrative, regulatory and legal mechanisms, including in areas relating to digital consumer protection, data privacy, competition, taxation, cybersecurity and national security.

  Suggested Text: "The Parties agree to invest in human capital, promote the adoption of coherent and comprehensive policy and regulatory frameworks, and develop infrastructure connectivity while ensuring the sovereign right to regulate and enact robust administrative, regulatory and legal mechanisms, including in areas of consumer protection, data privacy, competition, taxation, cybersecurity and national security".

- ***Article 46.3*** ties any enhancement of cooperation of new paths of funding for STI "subject to appropriate and effective protection of intellectual property rights". It is unclear what this means and whether it will result in non-WTO PACP members needing to enforce intellectual property agreements they are not parties to, such as TRIPS, in order to receive funding from the EU.

  Suggested text: The Parties shall enhance cooperation on the basis of mutual benefit, building on existing mechanisms where appropriate while exploring new paths in funding STI, ~~subject to appropriate and effective protection of intellectual property rights~~. They shall promote and protect indigenous and local knowledge as a tool for bridging knowledge and technology gaps in relevant sectors.

Article 47: Research and Development

- ***Article 47.3*** contains language that creates an obligation of action – i.e. "shall promote investments" in research and development and "shall endeavour to address societal challenges" – but does not specify how. As such, this maintains a certain level of policy flexibility for the parties, including Pacific states. There should be a corresponding obligation of action and of result on the EU to provide concrete amounts of finance, technology and capacity building support to Pacific states.

  Suggested text: "The Parties shall promote investments in research and development especially in high added-value segments of value chains and shall endeavour to address societal challenges especially in the areas of environment, climate change, energy, food safety and security, and health. The European Union shall provide support to the developing country Parties in the form of finance, technology transfer, and capacity building, consistent

with the needs and priorities of the latter, to assist them in their actions to implement this paragraph."

Article 48: ICT and Digital Economy

- It is important that in ***Article 48.1*** the language that Parties "shall support measures that enable easy access to ICT" is not interpreted as mandatory liberalisation of digital trade and e-commerce or used as a backdoor way to pressure such an outcome.
- ***Article 48.2*** sees Parties agreeing on the importance of the digital economy and its potential for development however caution should be used when referring to "leapfrog growth" as it often relies on existing infrastructure and industrialisation being in existence domestically. PACP nations must have in place their digital industrialisation plans in order to be able to access the benefits of digital trade and not suffer from being excluded by existing market dominant players.

  The reference to "reducing transaction costs" can also be used to refer to regulatory systems so any language that agrees to advance digitalisation with a view to reducing such costs should be avoided. It is not necessary to specify the exact method of advancing digitalisation however it would benefit from clarifying the desired outcomes of such digitalisation.

  Suggested text: "They agree to advance digitalisation ~~with a view to reducing transaction costs and lessening information asymmetries with the aim of improving productivity and sustainability~~ that is sustainable, equitable, accessible and in line with the digital development and industrialisation policies of Parties.
- ***Article 48.3*** includes commitments by PACP to "encourage" the development of e-commerce to "revamp supply chains and expand markets". While PACP governments are only committed to 'encouraging' others to undertake the activities to action this commitment they are still mandatory commitments that the PACP governments must do. The encouragement of such digitalisation isn't benign and should be approached with caution and in regard to the domestic realities and development plans of each PACP Party.
- ***Article 48.4*** contains problematic language regarding Parties undertaking to "promote measures to facilitate data flows" and "support regulatory framework to promote the production, sale and delivery of digital products". Such measures and frameworks are currently being discussed in the Joint Statement Initiative in the WTO on e-commerce, a work program that runs counter to the WTO's mandated work programme on e-commerce.

  The promotion of measures that "facilitate data flows" should be concerning for PACP governments. The issue of data flows is a highly controversial one with many developing countries wanting to ensure that any data collected on their constituents is retained locally to ensure that value addition can happen domestically but also to provide greater accountability for the holders of that data. Data is now seen as a resource of enormous value and the decision to allow it to flow freely out of PACP countries to be housed and processed in offshore data centers would undermine the ability of PACP to maximise its return on that resource.

  The prioritisation of regulatory frameworks that promote "production, sale and delivery" of digital products is a broad and all encompassing commitment. This needs to be qualified as one interpretation could be inline with the EU's proposals at the WTO which advocate a reduced role of government regulation in digital trade, right when these sectors of the economy are becoming increasingly critical. Any proposed language on the regulatory role should also reflect the dynamic nature of digital trade and promote not only the movement digital products but the development that is desired.

  Alternative text: "The Parties shall cooperate on developing and managing privacy and data

protection policies~~, promote measures to facilitate data flows,~~ and support robust administrative, regulatory and legal mechanisms, including in areas of consumer protection, data privacy, competition, taxation, cybersecurity and national security.

Chapter 4: Trade Cooperation

Article 49: Trade and Sustainable Development

- ***Article 49.1*** does not require the final sentence regarding environmental and social measures being used for protectionist purposes. With the Parties agreeing to such an outcome it must be asked who and how such an decision can be determined? The lack of clarity regarding this, coupled with other references to investment agreements it is concerning that such mechanisms could be used to determine whether or not a measure implemented by a sovereign government is able to be deemed to be done for a protectionist purpose.

  Suggest text: Remove "The Parties further agree that environmental and social measures should not be used for protectionist purposes"

- ***Article 49.3*** is the usual problematic reference for governments being free to regulate provided that it is not inconsistent with international agreements. This again prioritises enforceable trade agreements over the right of the Parties to regulate in their development or environmental interest.

  Suggested text: Remove "provided that the adopted laws and policies are not inconsistent with their commitments to internationally recognised protection standards and relevant agreements".

- ***Article 49.4*** commits Parties to "promote trade and investment in goods and services of particular relevance for climate change mitigation...". This is an obligation of action and could limit PACP states ability to control imports of EU products, goods and services in order to promote and protect PACP domestic industries. There is also no corresponding requirement for provision of support from the EU.

  There have previously been negotiations in the WTO regarding "Environmental Goods and Services" and there is currently a free trade agreement being negotiated between a number of countries however currently the only Post-Cotonou Party is Fiji.

  Suggested text: Parties shall promote trade and investment in such goods and services should be "where appropriate" alternatively the paragraph should include the addition "The European Union shall provide support to the developing country Parties in the form of finance, technology transfer, and capacity building, consistent with the needs and priorities of the latter, to assist them in their actions to implement this paragraph."

- ***Article 49.5*** and ***Article 49.6*** should also include the text "The European Union shall provide support to the developing country Parties in the form of finance, technology transfer, and capacity building, consistent with the needs and priorities of the latter, to assist them in their actions to implement this paragraph."

Article 50: Trade Arrangements

- There are a number of instances in this article that refer to agreements and obligations that not all PACP are party to – the WTO and iEPAs. Those PACP states that are not party to these agreements should be wary of their reference and whether or not it impacts them either through ensuring that cooperation is about compliance with obligations assumed (***Article 50.2***) or as the primary focus of trade cooperation (***Article 50.4***).

- ***Article 50.3*** has parties acknowledging the "importance of concluding trade arrangements" however content should drive conclusion, not merely the aim to complete negotiations.
- For Parties to the iEPAs ***Article 50.4*** centres the EPAs and their potential expansion as the central aspect of trade cooperation and shapes that cooperation as being primarily strengthened to support the implementation of the existing instruments, namely the EPAs. There are more innovative and expansive ways to consider the trade relationship between the PACP and the EU.
- ***Article 50.5*** is a further extrapolation on Article 50.4 with greater emphasis on how the EPAs will act as the vehicle for trade cooperation. Not only that, Article 50.5 should also be read alongside recent developments in the EPAs and the EU's new mandate from the rendezvous clause. The Article 50.5 language "Parties recognize the importance of broadening the scope of EPAs" isn't a legally binding commitment but could be used by the EU as a tacit endorsement in later discussions regarding expansion of the iEPAs to trade in services and investment.
- ***Article 50.9 –*** This article needs to be approached with some caution as the commitments to cooperate to develop the "necessary and appropriate capacity" to "effectively" implement their WTO obligations needs some clarity. As a donor the EU has great interest in ensuring that ACP countries implement their commitments as this will facilitate the market access for European exports (as well as others). The definitions of necessary, appropriate and effectively are all left open which makes it unclear whom will determine when those levels have been achieved.
- ***Article 50.10 –*** It is important to compare the difference between the access granted to the private sector in regards to the discussions on development and that granted to civil society organisations. Chapter 2, Article 3.2 includes language for parties to promote public private sector dialogue and give direction for a mechanism for that to take place through such as "Private Sector business fora". The commitments in Article 50.10 contain no such directions and instead offer little concrete commitments from governments to actively include CSOs in the process for making decisions regarding the trade and economic development of their communities.

Article 51: Trade in Services

- ***Article 51.1*** is based initially around any WTO members GATS commitments with Parties reaffirming those commitments.
- Following on from the ***Article 51.2*** has Parties "commit to cooperating and enhancing trade in services" in modes of interest to them. Only 6 PACP Parties are signatories to the GATS and it is unclear how this paragraph would apply to them. It is also important to clarify what "enhancing" means in this context as a range of service sectors are listed and could be interpreted as expanding liberalisation in those sectors. This should also be read in connection to the language in the Pacific Regional Protocol on services which has PACP parties committing to cooperate with the EU to "address barriers in trade in services", giving the donor Party the mandate to fund the liberalisation of PACP service sectors.

The list of services of mutual interest (according to Article 51.2) identified for being enhanced needs to be treated carefully. The PACP should reconsider this list given the current global pandemic and not be locked into a list of sectors for the next two decades that will change dramatically. Also given the different modes of interest it is important to ensure that any "enhancing" does not take place through broad commitments as currently contained in the Pacific Regional Protocol.

The inclusion of Information and communication technologies sector is incredibly broad and

would see the application of the EU's 'Understanding on Computer and Related Services'. This “Understanding” has been promoted in the WTO by the EU and subtly expands the classification of 'computer and related services' in trade in service agreements. Agreeing to text within the Foundation Agreement that includes reference to the EU's open-ended definition of Computer and Related Services would guarantee digital infrastructure firms have virtually unrestricted access to countries with very little right of governments to regulate them.

The article should remove the reference to “business people” and focus instead on the movement of people in a broader sense as this can include non-skilled and semi-skilled workers.

Suggested Text: The final sentence should read “Parties shall encourage cooperation where appropriate to enhance services trade in modes and sectors of mutual interest”

- ***Article 51.4*** contains an opaque commitment to “address” barriers to trade in services but aiming to facilitate market access. If the view is to facilitate market access then “addressing” can be interpreted as eliminating barriers to trade in services something that PACP governments may not want to commit to cooperating on given the broad nature of the commitment as well as the lack of specificity that it should prioritise PACP service exports.

  The commitment to “strengthen their cooperation” to support the development of domestic regulation frameworks should be interpreted as a reference to the activities in the WTO on Domestic Regulation and the Joint Statement Initiative. In late 2021 67 WTO Members adopted a declaration announcing the conclusion of negotiations on Domestic Regulation. There are a number of problems that arise from this initiative as not only will the outcomes impact the ability of governments to regulate services – fees, time frames, licensing procedures, qualification requirements etc, but it will be used to advance those modes of interest to the EU and not the ACP. There has been support in the WTO on Domestic Regulation for multilateral discussions and proposals from India that preference an outcome on Mode 4, something the ACP has supported. The path down a plurilateral will see rules set on modes of interest to the EU and other service exporters against those of interest to the ACP. Any outcome on domestic regulation under Post Cotonou should be best endeavour and allow the WTO processes to run their course.

  The inclusion of “mutual recognition agreements” in sectors listed in Article 51.2 links to the Pacific Regional Protocol and the language agreeing to establish MRAs which positively has been diminished by being “where appropriate”. This is still an asymmetrical push to have PACP Parties comply with EU regulatory frameworks more than the other way around, such an outcome would facilitate the export of EU services to the Pacific region, disadvantaging domestic service suppliers. The Foundation document language should reinforce the development flexibilities that exist under the GATS.

  Suggested text: “The Parties shall cooperate to address barriers to trade in services with a view of supporting local capacity in ACP countries. They further agree to strengthen their cooperation, where appropriate, to support the development of domestic regulatory frameworks and capacities, improve the ability of service providers to comply with the EU and ACP regulations and standards at continental, regional, national, and sub-national levels, and encourage the establishment of mutual recognition agreements where appropriate and consistent with the development flexibilities of GATS in any identified service sectors of mutual interest in paragraph 1.”

- ***Article 51.5*** is largely carry-over text from the Cotonou Agreement but still contains extensive commitments for PACP governments. The maritime sector is an important economic sector for the Pacific Islands. The comprehensive national treatment obligations which are proposed means that local suppliers cannot be preferred. It goes beyond Pacific

WTO GATS commitments. Furthermore, the MFN obligation under the GATS seems to imply that other WTO Members could claim the same treatment from Pacific States. This could include preventing PACP from providing cheaper fees or preferences in using ports etc for their own ships compared to EU ships.

Article 52: Trade-related Areas

- ***Article 52.2*** has Parties enhancing cooperation to "prevent, identify and eliminate" unnecessary technical barriers to trade within the scope of the WTO TBT agreement. The inclusion of "eliminate" in the first sentence makes the language into a hard commitment on those regulatory issues identified as a barrier to trade. It is important to clarify that there is no definition on what is an "un-necessary" barrier to trade, this is potentially a reference to the highly problematic 'necessity test' under WTO law. This mush be read in conjunction with the Pacific Regional Protocol which contains more direct language (agree to cooperate) on removing technical barriers to trade which would apply to both trade in goods and services but should be directed more to supporting PACP exports. For non-WTO PACP Parties this is binding them to the commitments of the WTO's TBT Agreement, an agreement that many are not currently a Party to and as such are not bound by.

  The WTO TBT cooperation is accompanied by non-binding language to have it become "WTO-Plus" on transparency issues. Again non-WTO PACP members should not agree to such language as they are being bound by an Agreement that they are not a party to.

  Alternative text:"The Parties agree to enhance cooperation in the field of standardization and certification of goods to prevent, identify and eliminate unnecessary technical barriers to trade. Those Parties who are party to the WTO Agreement on Technical Barriers to Trade will do so within the scope of that Agreement. The Parties further agree to cooperate to establish and enhance technical capacities and institutional infrastructure on matters concerning technical barriers to trade.

- ***Article 52.3*** again should have non-WTO member PACP governments not undertaking commitments pursuant to WTO Agreements on SPS measures.

- ***Article 52.4*** within the context of a global pandemic it is unhelpful to have PACP parties who are not WTO members agreeing to the importance of adhering to the TRIPS Agreement, especially in light of the inadequate IP waiver on COVID vaccines at the 12th WTO Ministerial. Intellectual property, especially in medicine, diagnostics and therapeutics is of crucial importance at the moment and as such PACP states should be wary of their inclusion in a Post-Cotonou outcome. All references in this article should apply to PACP parties "in line with their level of development".

- ***Article 52.5*** has PACP governments undertaking broad ranging commitments to tackle anti-competitive business practices. This begins with subsidies that have the potential to distort markets and to negatively affect the trade interests of other Parties. This is a very general commitment and applies to policies that have not even impacted the market or other Party trade interests. The commitment to a "level playing field" between private and public participants will impact how PACP governments can support state-owned enterprises who at times provide services that are essential or need to be done in a manner that prioritises access not profit. PACP governments should not undertake such broad ranging binding commitments and instead have such language on a "shall endeavour" basis.

- ***Article 52.7*** has Parties commit to the principles of "transparency, competitiveness and predictability of procurement systems" and to cooperate on them. The commitments to the principles and cooperation open the door for the EU to use its donor status to fund programmes that push the core aspects of the WTO Government Procurement Agreement.

This is problematic as it undermines the ability of developing countries to use their government procurement policies and practices to support and develop domestic industries. PACP governments are free to determine their own government procurement policies as they see fit and do not require a binding agreement like Post-Cotonou to do so.

Suggested text: “The Parties acknowledge that a sound system of public procurement is instrumental in saving public money and preventing corrupt practices. The Parties shall endeavour, where appropriate, to establish effective, impartial, transparent and competitive public procurement systems. The Parties agree to cooperate towards achieving the objectives of this paragraph.”

Article 53: Trade Facilitation

- ***Article 53.1*** commits PACP WTO Members to go beyond their existing Trade Facilitation Agreement commitments. It is unclear if these new commitments will only extend to the EU or all members of the WTO through updated TFA schedules.

  For the non-WTO Member PACP's it appears that any assistance available under this article will not be made available to them as they are not parties to nor have TFA notifications on implementation needs.