Post Cotonou Pacific Regional Protocol: Commentary

February 2023

This updated paper is produced by PANG and builds on the paper produced on behalf of the Pacific Civil Society Collective on Post-Cotonou and is a commentary on the final Pacific-EU Regional Protocol and can be read side-by-side with it. In some instances, proposals or ideas for language are presented to highlight ways to have made the outcome stronger for Pacific Island Countries development.

In general, the final outcome should be consistent with Pacific national and regional strategies, and should also build upon outcomes of major international conferences, including but not limited to SAMOA pathway and Addis Ababa Action Agenda (AAAA)/Third International Conference on Finance for Development and former proposals made by Pacific States.[1] It should build upon and not dilute principles in international law, such as those contained in UNCLOS.

Below follow some comments on Title II "Inclusive and Sustainable Economic Development" and Title III "Oceans, Seas and Fisheries":

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1 E.g. the Nadi Outcome Document: "Accelerating Integrated Approach to Sustainable Development", https://sustainabledevelopment.un.org/content/documents/5249233Pacific%20Outcome%20Chairs%20Revised%20Final%20Version.pdf

Title II - Inclusive and Sustainable Economic Development

Chapter 1 - Economic Growth and Diversification

Article 14: Enablers of economic development

- Article 1 draws the incorrect link between increased liberalisation of economies with economic development. It is interesting to note that whilst the Article title is “Enablers of Economic Development” the aim is articulated as “economic productivity”, two distinct goals with the former able to encompass broader social, cultural, and environmental aims compared to the latter which is limited to economic output.

- ***Article 14.1*** commits Parties to pursing measures that “simplify and harmonise business regulations and processes”. This language commits all sectors as it doesn't reference a schedule of commitments including controversial and complex areas such as mining. The goal of 'simplifying' business regulations and policies gives the priority to their simplification even if there are adverse impacts in other ways. This is similar to the push by the EU and others on Domestic Regulations negotiations in the WTO aiming for regulations to be 'as simple as possible' however in that case it would only apply to the scheduled commitments. It is also worth understanding what harmonisation is being undertaken. If it is PACP Parties with EU regulations than any extensive liberalised approach to simplifying regulations that the EU has committed in other fora may end up being adopted by the PACP.

- ***Article 14.1*** contains reference to Parties ensuring the protection of land and property rights as well as intellectual property rights. The language is broad and inclusive, making no mention of specific areas of commitment or the flexibilities contained with them. Many PACP members who are not WTO members have little obligations when it comes to intellectual property rights and the language contained in this article threatens to undermine that. Those PACP WTO Members already offer the protection of intellectual property under their WTO commitments. It is recommended that the references to intellectual property rights, including the interpretation that “innovation” is implied as TRIPS+ commitments, be removed. PACP governments should also ensure that any commitments that relate to land and property rights should not apply to customary land systems.

- Under ***Article 14.2*** Parties agree to promote, among other things "regulations and policies aimed at reducing regulatory and administrative barriers". Again we are seeing the framing of economic growth and diversification as being solely about the reducing of government involvement in the economy. This one-size-fits-all approach doesn't suit the Pacific or most developing countries and in fact ignores the body of evidence that has shown strong government intervention is crucial to building up national industries and withdrawing support when they are able to compete internationally or against global competitors.

- ***Article 14.4*** promotes language on labour mobility but this will only be limited to the Pacific region as it is defined as "intra-regional" in its scope.

Article 15: Investment

- ***Article 15.1.*** The EU's addition of the word "responsible" before investment has been accepted however is not defined raising questions about what it is that parties are committing to.

  Instead the article could have said: "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 15.1*** contains a number of strong obligations for PACP countries. The first sentence has Parties commit to "encouraging, creating and maintaining a conducive environment for responsible investment for mutual benefit". Thankfully the previous commitments on "non-discrimination" have been removed.

  Further in ***Article 15.1*** the commitment 'to streamline and accelerate administrative procedures and requirements' requires the PACP countries to undertake 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 commitments contained in this article would apply to all sectors of PACP economies and would apply to investors from all countries, not just the EU. Again this prioritises and mandates deregulation regardless of any other laws or requirements in place.

  The commitments to support measures that create a "predictable and secure investment climate" raises many issues. The term "predictable" can be interpreted to mean that the regulations and policies in PACP members don't change on investors 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. The term "secure" should also be reconsidered as it needs to define what such measures are – they could be interpreted as a mechanism for private companies to sue governments over changes in the regulatory regime that governs investment.

  One option would have been to tone down this language: e.g. "The Parties reaffirm their sovereign right to regulate investment for legitimate public policy purposes. In line with their respective strategies, they endeavour to undertake to provide legal certainty and adequate protection to established investment."

- ***Article 15.2*** commits the PACP members to boosting investor confidence through a range of incentives or guarantees. Binding this into an agreement like Post-Cotonou is completely unnecessary and is a problematic undertaking by the PACP.

  Suggested text to have Parties to agree "where appropriate".

- ***Article 15.3*** must be considered with caution as Parties are committing to cooperate in "facilitating investments through appropriate intervention mix". There must be greater clarity on what this means as it could be referring to the Investment Facilitation discussions happening in the WTO as mentioned above. Further it is unclear whom is to determine what is an "appropriate" mix of interventions, most likely this could be the EU as a donor funding programmes to achieve the outcome.

Article 16: Private Sector Development

- ***Article 16.1*** 'Private sector development' begins by having parties "support the development of a dynamic, competitive and responsible private sector, including through the adoption of the necessary legislative economic and institutional reforms and policies at a national and/or regional level". Such language again seeks deregulatory reforms in PACP countries that undermine the ability of governments to intervene in the economy to ensure that other goals like sustainability are being achieved.

  The adoption of the EU's proposed text commits PACP governments to take measures to "strengthen and improve private sector productivity and efficiency". It is unfortunate that the PACP proposal wasn't adopted as it proposed a variable approach to achieving such outcomes as opposed the striving to achieve them without any specific definition.

  Alternative language for Article 16.1 could have been: "The Parties, recognising the importance of private sector development for economic transformation and job creation, shall aim at promoting entrepreneurship and developing and improving the competitiveness of enterprises. Particular attention shall be paid to the informal sector and to upgrading informal economic activities into formal ones and to encouraging the integration of sustainability-related objectives in business models."

Article 17: Science, technology, innovation and research

- In ***Article 17.1*** the reference to "computing and scientific data" aspects is language that relates to the EU's Understanding on Computer and Related Services. The "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 Pacific Regional Protocol that includes 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 phrase "computing and scientific data infrastructures and services" should have been removed from the text in Article 17.1

  Instead of the language included in Article 17, an alternative article could look like:
  Article 4 ***Digital Development and Industrialisation***
  The Parties recognise that electronic commerce and data are emerging as key enablers and critical determinants of countries' growth and economic development and commit to support Pacific

countries to enhance their capabilities and realise the development potential of digital technologies, at national and regional levels.

The Parties commit to support the inclusive development and implementation of national and regional digital development and industrialisation strategies in the Pacific, which take into account the interests of all stakeholders, including local and foreign investors, manufacturers, domestic producers, MSMEs, traders, retailers, start-ups, consumers and citizens.

These digital development and industrialisation strategies shall aim to: create a facilitative regulatory environment for growth of a sustainable e-commerce sector; foster national and regional production and digital innovation, and empower domestic entrepreneurs by establishing a vibrant start-up culture; enhance equitable access to affordable and reliable digital services, especially in disadvantaged, vulnerable or remote communities; effectively safeguard the interests of consumers; leverage access to data for local benefits; and enhance employment opportunities.

Such strategies must be supported by robust administrative, regulatory and legal mechanisms, including in areas of consumer protection, data privacy, competition, taxation, cybersecurity and national security. The parties recognise that data is a valuable national asset and agree that governments have an intrinsic right to regulate its location and use for the purposes of public policy and digital development.

Article 18: Remittances

- ***Article 18*** Remittances, an area of much greater interest to PACP countries, contains only 'best endeavour' language, with no commitments from the EU to actually take action on this issue. There is also a question about whether or not the Protocol can in fact install a requirement regarding the elimination of corridors with costs higher than 5 percent in regards to the commitments under *Article 15.1* on Investment and the commitments regarding non-discrimination. Any such commitment must also be cross-checked with any other FTAs or investment treaties that may include the liberalisation of remittances. If so potential text to target costs include " Shall set progressive targets to achieve transaction costs for remittances of less than 3%."

  Building upon para 40 of the AAAA, the agreement could've stated: "Parties shall ensure that adequate and affordable financial services are available to migrants and their families in both home and host countries. Parties shall support national authorities to address the most significant obstacles to the continued flow of remittances, such as the trend of banks withdrawing services, to work towards access to remittance transfer services across borders and promote conditions for cheaper, faster and safer transfer of remittances in both source and recipient countries.[2]

Chapter 2 - Trade Cooperation

Article 19: Trade Integration

2 Para 40 in part reads (..) "We will support national authorities to address the most significant obstacles to the continued flow of remittances, such as the trend of banks withdrawing services, to work towards access to remittance transfer services across borders. We will increase coordination among national regulatory authorities to remove obstacles to non-bank remittance service providers accessing payment system infrastructure, and promote conditions for cheaper, faster and safer transfer of remittances in both source and recipient countries, including by promoting competitive and transparent market conditions. We will exploit new technologies, promote financial literacy and inclusion, and improve data collection.)

- ***Article 19.2*** has Parties supporting the implementation of the Economic Partnership Agreements, encouraging others to accede and 'where appropriate broadening its scope'. The consideration of broadening the scope of the iEPA establishes a problematic avenue for the EU to pressure PACP iEPA countries to expand from beyond the current 'Goods only' agreement. The EU has triggered the rendezvous clauses in other EPAs which will see those expand to include negotiations on services and other areas (e.g. the ESA EPA with Zimbabwe, Madagascar, Comoros, Mauritius and Seychelles) and is already discussing the expansion of the iEPAs into services and investment. Previously PACP governments have not been keen to negotiate this.

  The rendezvous clause of the Pacific EPA (Article 69 – Continuation of the negotiations), compared to the other EPAs, is not very specific about future negotiation areas but stresses the importance of development cooperation: "1. The EC Party and the Pacific States covered by this Agreement are committed to the continuation and successful conclusion of the currently ongoing negotiations for a comprehensive Economic Partnership Agreement (EPA) in line with the Cotonou Agreement and previous Ministerial Declarations and Conclusions, including all components and involving all interested countries in the Pacific region. They confirm their commitment to the objective of concluding those negotiations by 31 December 2008"

  Paragraph 2 of Article 69 Pacific EPA stresses the importance of development cooperation: "The Parties recognise that development cooperation will be a crucial element of the comprehensive EPA and an essential factor for the realisation of its objectives. They reaffirm their commitment to supporting the objective that development cooperation for regional economic cooperation and integration as provided for in the Cotonou Agreement shall be carried out so as to maximise the expected benefits of the comprehensive EPA."[3]

Article 20: Trade Capacity

- Article 20 'Trade capacity' again focuses on reshaping the trade and economic environment in PACP countries. Under the ***Article 20.1***, Parties will "ensure that the framework conditions and the right domestic policies are in place to facilitate greater trade flows'. Again there is a prioritisation of increased trade flows opposed to ensuring that trade flows result in actual meaningful development. It is also worth questioning the inclusion of the phrase "right domestic policies", this is a subjective term and could be used to argue for policies that only result in increased trade flows instead of development. There could have been language to ensure that the increase in trade flows result in social, cultural, human and environment development.

- ***Article 20.2*** sees PACP WTO members agreeing to build on "their respective commitments" under the WTO's Trade Facilitation Agreement (TFA). In other words, this appears to indicate a broadening of TF commitments. Alternative language could refer to technical assistance and capacity building due for Category C commitments.

- ***Article 20.3*** has Parties cooperating to "prevent, identify and eliminate" unnecessary technical barriers to trade and non-tariff barriers restricting their exports. 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 'necessity test' under WTO law, and would apply to trade in goods and services. This will most likely be interpreted as any measure or barrier that is 'un-necessarily trade restrictive' leading to potential challenge, or in this case pressure to remove such measures that the EU considers an impediment to their exports. The PACP initially proposed language that specified that this should promote PACP

3 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2009:272:FULL&from=EN

exports especially, this should be reinserted into the final text to ensure that any review of technical barriers or non-tariff barriers are only focussed as support PACP exports and not the other way.

The acceptance final sentence in the article will burden PACP Parties with onerous and expensive burdens as the language requires the PACP to improve their quality control mechanisms and certification laboratories with no reference to financial assistance. Furthermore there should be a mutual recognition of standards to help facilitate exports from the PACP to the EU.

Alternative text could have read: "The Parties shall cooperate to prevent, identify and eliminate un-necessary technical barriers to trade as well as unnecessary non-tariff barriers restricting Pacific exports. In particular, through appropriate capacity building support, they shall cooperate to ensure compliance with international standards including establishing quality infrastructure systems, appropriate competent authorities, and certification laboratories as well as the mutual recognition of standards"

- ***Article 20.4*** on Sanitary and Phyto-Sanitary does not refer to the WTO however it is referred to in the Post-Cotonou Foundation Agreement. The Foundation Agreement binds countries to not adopt or enforce SPS measures consistent with the WTO Agreement on SPS measures, something that many PACP Parties are not currently signatories to. It is important that non-WTO members are not required to implement any agreement they are not party to. Similarly with the above article, the adoption of the EU proposal will contain onerous burdens with no reference to financial assistance and does not support the mutual recognition of standards.

  Possible language: "Parties reaffirm their commitments under the Agreement on the Application of Sanitary and Phytosanitary Measures of the World Trade Organisation (SPS Agreement), as the basis for their trade taking into account potential adverse effect of a proposed or final sanitary or phytosanitary measure on the exports of a Party."

Article 21: Services

- ***Article 21.1*** relies on the misunderstanding that the liberalisation of services sectors automatically will result in "competition", improved "quality of service", "reduce price", "create employment" and "encourage growth and development". It is this belief that sees PACP government's agreeing to "eliminate regulatory barriers and offer non-discrimination treatment to service suppliers" - such a broad and general commitment would appear to apply to all service sectors as there is no inclusion of a schedule to which 'National Treatment' will no longer apply. This undermines the policy space of PACP governments and their policy space to shape the services economy for the benefits of PACP communities.

- ***Article 21.2*** 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.

  Alternative text: "The Parties shall cooperate to strengthen capacity in the supply of services. Particular attention shall be paid to services related to movement of people and in support of local capacity for financial and other business services, tourism, cultural and creative industries, construction and related engineering services."

- ***Article 21.3*** contains an inherent asymmetry in the aim as it is more to have the EU accept PACP qualifications/certifications as opposed to the other way around. Further the commitment to cooperate on addressing barriers to trade in services paves the way for the EU to pressure the PACP

to liberalise their service sectors through such cooperation. The PACP can liberalise their service sectors when they see fit as they don't require including this in an agreement like Post-Cotonou, as such cooperation should be "where appropriate".

Alternate language for ***paragraph 3*** (Mutual Recognition Agreements): "Parties recognize the importance of MRAs and reaffirm the applicable WTO provisions consistent with the development flexibilities of GATS and in manners that enhance achievement of SDGs in this regard. Parties agree on the need for adequate procedures for assessment and verification of qualifications of service suppliers from the other Party."

Chapter 3 - Key Sectors

Traditional knowledge
A new Article on Traditional Knowledge could be considered:

"The Parties agree to commit to [, subject to national legislation,] respecting, preserving and maintaining the knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promoting the wider application with the approval and the involvement of the holders of such knowledge, innovation and practices, and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

Article 22: Blue Economy

- ***Article 22.1*** should have retained the PACP language regarding "fair returns to resource owners" as the alternative "fair economic benefits" doesn't prioritise PACP communities who hold the resources.

- ***Article 22.2*** on aquaculture has Parties cooperating through the "effective spatial planning, an ecosystem based approach, and enhanced level playing field for investors". It is welcomed that the previous reference to licensing procedures is removed however there are still concerns regarding the level playing field for investors. This would see the removal of preferential treatment for domestic investors in an attempt to ensure the foreign investors are treated equally despite any difference in existing capital etc. More clarity is needed on what the terms mean in this Article.

- Under ***Article 22.4*** Parties agree to "reducing technical bottlenecks to facilitate access for investors whilst avoiding risks to the marine environment". It is important for PACP governments to determine what specifically the 'technical bottlenecks' are – and this will include important regulatory measures - before making determinations as to whether or not they are needed solely for the purpose of facilitating investment. Committing to the removal of such 'bottlenecks', even with the caveat on avoiding risks in the environment, opens up the necessity of such regulatory requirements being challenged as being too cautious.

Article 23: Agriculture

- ***Article 23.3*** should promote "food sovereignty" instead of "food security" as the former is a more comprehensive understanding of food systems and is met through strong domestic capacity.

Alternative text: “The Parties shall promote food sovereignty through self sufficiency and developing inclusive and biodiverse nutrition sensitive value chains, including through local value addition and processing.”

- ***Article 23.3*** commits Parties to engage in the registration and protection of Geographical Indications (GIs) for Pacific and European agricultural and food products. Protecting GIs is burdensome and raises costs for consumers because they can no longer buy ‘generic’ versions of those goods (like 'feta' or 'parmisen' cheese etc) and costs for the government associated with monitoring and enforcement. Further to this is the asymmetrical number of GIs between the EU and the Pacific, the EU already has over 500 GIs which would need enforcing in PACP states. The proposal also applies WTO rules on GIs to all PACP members with no flexibilities.

  Alternative text: “They shall also examine issues and opportunities relating to the registration of GI, noting the sensitivity of Indigenous products for the Pacific.”

Article 24 Tourism

- ***Article 24.4*** relates to the rules regarding digital trade through by the inclusion of “tourism products and services” which can include the use of applications that interface directly with consumers often without benefits flowing to in-country travel service providers (for example online sites that allow tourists to book accommodation and travel services directly).

  Alternative text for the first sentence in Article 24.4: The Parties shall bolster investment in the promotion and development of domestic tourism capacity.

Article 25: Sustainable energy

- ***Article 25.3*** will require some definition about what “open, transparent and functioning energy markets” means in practice. Given the complex energy markets in the PACP which can be defined by small-size, geographically dispersed and vulnerable to natural disaster, PACP governments should make decisions grounded in their reality not the unwavering belief that a liberalised utility market will automatically deliver cheaper and/or more reliable energy.

Article 26: Connectivity

- Article 26 'Connectivity' includes a range of commitments for PACP governments which would effectively liberalise their transport sectors as well as impact on digital industrialisation. ***Article 26.1*** requires PACP governments to ensure that connectivity is “sustainable, comprehensive, and rules-based, and that fosters investment and a level playing field for businesses”. These requirements, particularly the latter two, will be used to push PACP governments to liberalise their transport sectors and ensure that EU investors aren't treated any worse than domestic businesses.

  Alternative text: “The Parties, recognizing the geographical constraints faced by Pacific Islands states and the importance of their digital industrialisation and national capacity, commit to strengthen connectivity across the Pacific region ensuring it is comprehensive, efficient, affordable and sustainable. They shall endeavour to build resilient transport links, by air, land and sea, and digital networks, from mobile to fixed, from the internet backbone to the last mile, from cable to

satellites. They undertake to work towards energy connectivity, with the aim of fostering modern, efficient and clean solutions and to promote people-to-people contacts."

- Under ***Article 26.2*** the EU is aiming to include multimodal infrastructure and logistics, this would allow EU firms to cover the entirety of a transport service, from pick up all the way to final delivery. This would allow these EU firms to exclude local transport and distribution services from benefiting from the trade. It is also worth noting the inclusion of the creation of regulations that will "harmonization across the Pacific-region" as this would include countries and territories outside of the PACP, does this include other states like Australia, the US etc or does it apply to harmonisation with the OCTs?

  Alternative text: "The Parties undertake to strengthen and improve transport and related infrastructure systems, facilitating and improving the movement of passengers, including those with reduced mobility, and of goods and providing cost-effective and sustainable access to reliable and effective urban, air, maritime, inland-waterway, rail and road- transport services."

- ***Article 26.3*** on liberalisation of marine transport is quite substantial and should be of concern for PACP governments. The marine sector is an important economic sector for the Pacific Islands. The comprehensive national treatment obligation which is 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.

  The same language is also reflected in Article 42 of the Cotonou Agreement ('Maritime Transport'). However negotiations on market access in services seems to be more appropriate in the context of the EPA, rather than the regional protocol of the post-Cotonou Agreement?

  Another option is the suggested text in Article 26.2 would already cover maritime transport so can remove Article 26.3.

- ***Article 26.5*** concerns ICT, reflecting some of the contents also under Article 43 of the Cotonou Agreement ("Information and Communication Technologies, and Information Society"). Here the text on local content appears Cotonou-minus. Para 43.4 CA states that "The Parties will take the following measures: (..) "— the development and encouragement of the use of local content for Information and Communication Technologies." I.e. it recommended to insert the text "they shall take measures-… "to develop and encourage the use of local content"

  It is also imperative that the PACP retain the ability to develop a robust regulatory system for digital trade. As such the language on "shall endeavour" to establishing regulatory institutions should be strengthened.

  Replacement text proposal for the last sentence in Article 26.5: "They shall cooperate to establish regulatory frameworks to promote competitive behaviour and ensure consumer welfare and protection, strengthening regional cooperation and taking into account the Pacific Regional ICT Strategic Action Plan."

Article 27: Extractive industries

- Article 27 'Extractive Industries' appears to be a push by the EU to access the natural resources of the PACP. ***Article 27.1*** has Parties facilitating "sustainable and responsible investment through appropriate legislation, policies and regulatory frameworks consistent with international best practice". Again there is little articulation on what is appropriate and who would determine that, whilst the reference to best practice could also discourage PACP governments from undertaking additional protections for Indigenous custodians of resources both on land and the sea floor. As such the text should not be "consistent with" but rather "taking into account" international law.

  The acceptance of the EU's language on "undistorted" access to extractive resources needs clarification as it is unclear what is being distorted. Whilst this may be considered to relate to ensuring non-discriminatory access to the resources of the PACP that is not the language that has been used. Another possibility is that it relates to the imposition of export taxes on raw materials, something used by Vanuatu (earning VT21.5million in 2017), Papua New Guinea on round logs and for a range of products in Solomon Islands (contributing almost 16% of government revenue in 2015). The EU needs to provide more detail on what is currently distorting access to raw materials to contextualise their proposal

  The change in language from "mineral resources" to "extractive resources" requires clarification regarding what is classified as an extractive resource and what is not. Timber and gas are often referred to as an extractive resource but that could also extend to any natural resource that can be extracted (including fish etc). If it is a reference to mineral resources only then it must be stated as such.

  In addition the language in ***Article 27.1*** stating "They shall aim to ensure fair and undistorted access" should be removed replaced with "They shall aim to enable access to mineral.resources where appropriate."

- ***Article 27.3*** should be removed if there is an addition of the Digital Development and Industrialisation article earlier in this Title.

Article 28: Forestry

- ***Article 28.2*** can have been strengthened to ensure that local production and value chains are incorporated into the agenda on forestry and respect the sovereign right of countries over their resources. This should also be accompanied by the removal of "appropriate technology and methods" in the text as it again invites in the EU's understanding and agenda on digital trade.

  On the issue of free prior and informed consent as well as fair and equitable benefit sharing, the language that the ACP group proposed in the WTO (TN/C/W/59) which includes possible criminal sanctions, fines, revocation of patents etc for failure to provide prior informed consent & fair and equitable benefit sharing for genetic resources/traditional knowledge would have been a good option in this agreement.

  The addition of the text in the final sentence "that access to medicinal products is not hindered" is problematic as it is a broad commitment relating to access to natural resources. This could apply to a wide range of circumstances including the need for free, prior and informed consent from traditional knowledge and resource holders. This should have be accompanied by "...consistent with the Convention on Biological Diversity and the Nagoya Protocol'.

Alternative text: The Parties shall promote the sustainability of local production and value chains of agro-industries and forest commodities and respect the sovereign right of countries over their resources. In doing so they shall prioritize the creation of jobs and other economic opportunities in the conservation of ecosystems. They shall cooperate in the sustainable management of forest products for commercial gains, in full respect of international best practices and standards and the commercialization of other forest flora and fauna, including orchard and horticulture farming. They agree to collaborate ~~in applying appropriate technology and methods~~ to identify and develop herbs and other forest-based materials that would contribute to medicinal products, including in research and development, while ensuring that no loss of biodiversity is incurred and no ecosystem imbalance is created.

- ***Article 28.3*** includes a number of agreements that PACP are committing to support the implementation of despite them not being a party to or involved in negotiating. PACP should not have accepted commitments on agreements they are not already parties to. There should have also included the provision of providing equity share to traditional owners of the resources or a similar language as proposed by the ACP in the WTO (TN/C/W/59) which includes possible criminal sanctions, fines, revocation of patents etc for failure to provide prior informed consent & fair and equitable benefit sharing for genetic resources/traditional knowledge.

Title III "Oceans, Seas and Fisheries"

- Under this Title, basic principles from the Law of the Sea should be reaffirmed. These include the following:[4]
  - the ability of developing countries to develop their own fisheries as well as to participate in high seas fisheries should be enhanced,
  - there should be no disproportionate burden on developing countries resulting from implementation,
  - the economic needs of coastal fishing communities and the special requirements of developing countries are to be taken into account.
  - States are to promote the development of the marine scientific and technological capacity of developing countries, which may need technical assistance in this field.

Chapter 1 - Ocean governance

Article 30 Sustainable oceans

- Many of the articles contained in ***Article 30*** should have their ambition lowered with Parties committing on best-endeavour terms, particularly Articles 30.3, 30.4, 30.5 and 30.8.

- ***Article 30.6*** and ***30.7***: The issue 'best available science' vs the formulation in UNCLOS.[5] ***Article 30.7*** could be reformulated as follows:

  "The Parties agree to take their decisions based on the best ~~available~~ science **available to it**, to give due regard to the principles of the ecosystems-based approach and the precautionary principle, and taking into account ~~the importance of~~ traditional and indigenous knowledge".

- ***Article 30.8*** contains language on the transfer of marine technology however it is not strong enough. Proposed language to strengthen includes:
  - 'Parties shall promote the development of the marine scientific and technological capacity of Pacific States'
  - 'Parties shall develop research capacity and transfer marine technology, taking into account the Criteria and Guidelines on the Transfer of Marine Technology adopted by the Intergovernmental Oceanographic Commission, in order to improve ocean health and to enhance the contribution of marine biodiversity to the development of Pacific States' (language from the Addis Ababa Action Agenda, para 121)[6]

- ***Article 30.10*** raises the issue of seabed mining. Deep sea mining (DSM) including seabed mining remains a highly contentious and contested issue in the Pacific including in countries that have issued exploration licenses. Pacific civil society maintain a strong call for a ban within the EEZ's based on the scientific known impacts of DSM on biodiversity, ecology and livelihoods of Pacific peoples and communities. Some Pacific island governments publicly announced support for a 10 year moratorium in 2019 such as Fiji, Vanuatu, and PNG while the European Parliament has also called for a 10 year moratorium on DSM. Fiji and France have publicly supported a ban on DSM.

4 https://us5.campaign-archive.com/?u=fa9cf38799136b5660f367ba6&id=28509de678
5 https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
6 https://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf

This Article should have been removed from the Samoa Agreement as there is no regional consensus nor is their a regional mandate to pursue this within this legally binding frameworks.

Article 31: Biodiversity of areas beyond national jurisdiction

- ***Article 31.1*** has Parties committing to cooperate on the conservation of biological diversity in areas beyond national jurisdictions. The previous text contained proposed language from the PACP that made it clear what that cooperation could look like centering PACP interests. The loss of that text and subsequent adoption of the EU's language undermines the PACP interests in the Article. Given this, cooperation in this article should be “where appropriate” and based on the best scientific advice available to members.

  Suggested text should have read: "...based on the best available science available to Parties, the precautionary approach and an ecosystem approach and the relevant indigenous knowledge of indigenous peoples and local communities".

Chapter 2: Fisheries

Article 32: Sustainable conservation and management of fisheries resources

- ***Articles 32.2*** should have softened the language to be “shall endeavour” as such cooperation between the EU and PACP on management measures is a tricky negotiation and as such the PACP shouldn't be bound to cooperate.

- ***Article 32.4*** should have contained a reference to the special requirements of the PACP Parties when ensuring sustainable development.

Article 33: Illegal unreported and unregulated fishing activities

- ***Article 33.1*** contains a reference to Parties maintaining or adopting initiatives to combat IUU in “accordance with international obligations”. This needs to be clarified as the current wording implies that Parties will adopt initiatives inline with international obligations that they currently do not have. The recently agreed WTO Fisheries Subsidies Agreement contains a number of prohibitions on fisheries subsidies in a members EEZ and on the high seas which could be argued would need to be adopted by non-WTO PACP Parties.

  The inclusion of “in other jurisdictions” needs to be clarified. Every Party has the right to manage their EEZ and not to regulate other members EEZ, by adding 'other jurisdictions' this will give the EU the rights to manage PACP EEZs implicitly and contract existing PACP rights under the UNCLOS. This should not have been included.

- ***Article 33.2*** should have parties committing “based on their capacity” to implement policies and measures to remove IUU products from trade.

- ***Article 33.3*** has PACP states agreeing to a range of activities relating to IUU fishing vessels. It is unclear how this will be operationalised – who will determine the lists and historical records, does the inclusion of other jurisdictions imply the use of the EU's red/yellow card system etc. If the aim of the article is to restate existing obligations on these matters then it can be stated as such.

- ***Article 33.4*** asks PACP Parties to endeavour to ratify international agreements related to IUU notably the Agreement on Port States Measures. It is worth considering if there is any implementation assistance available as the commitments contained in such agreements include considerable costs for PACP states.

Article 34: Harmful fisheries subsidies

- ***Article 34.1*** contains commitments for PACP countries regardless of whether or not they are a Member of the WTO and ratify the Agreement on Fisheries Subsidies. Rather than reiterate the goal of SDG14.6, or agree where appropriate, the text is establishing what the Parties will do as it relates to subsidies that contribute to overcapacity and over-fishing as well as IUU fishing. Like other broad language on services and investment, PACP parties are making commitments without any broader definition or schedule of commitments.

  The second part of ***Article 34.1*** consigns the application of the special and differential component to the outcome the ongoing WTO negotiations as opposed to the binding application of the first part of the article. This is highly problematic for PACP countries, both those involved in the WTO negotiation but those who are non-WTO members and have no ability to participate in the negotiations and instead are being forced to adopt any potential outcome.