

Pacific CSO response to the Draft Pacific-EU Protocol

May 3rd 2019 Submission

INTRODUCTION

The Pacific-EU Protocol presented by the EU puts the entire Pacific African Caribbean (PACP) Group in reactive mode. PACPs have been striving to frame their positions on the basis of the Pacific priorities they have agreed on. They nonetheless must pay close attention to what the EU has put ‘on the table’ and the interests behind what the EU wants from this binding agreement, bearing in mind that, as with trade agreements, corporate interests are usually the driving force behind binding agreements sought by developed countries.

PACP states must endeavour to ensure that, above all else, they protect long-term Pacific interests in the process of negotiating with the EU on this very loaded, and self-interested proposed binding agreement.

We present the following summary of Pacific CSO key positions which we urge PACP to consider carefully. These positions were agreed on at a meeting of the Core – Post Cotonou CSO working group¹. Many of the issues which we raise in this summary paper are new areas of emphasis based on the *Blue Pacific Theme (TBC) Pacific-EU Protocol (Version 170419)*. We also append a matrix summarising relevant text from the document we submitted to all PACP governments in Samoa, titled *Pacific CSO Position on Post Cotonou Agreement* aligning it to the Pacific-EU Protocol.

SUMMARY OF ISSUES OF MOST CONCERN

1) THE POST COTONOU PROCESS

(A) The PCA Schedule and Processes.

Pacific CSOs reiterate again our concerns about the unrealistic timeframes for concluding an expanded binding treaty with the European Union by October of this year without due process and in the absence of a regional and national consultative framework.

New modalities for fast-tracking negotiations far from capitals and regions (Central Negotiating Team in Brussels, decisions to launch taken at the margins of the UNGA meetings, the signing of bilateral agreements between individual PACP member countries and the emergence of new means of multilateral implementation mechanisms) puts this process beyond citizens’ and parliaments’ ability to participate and scrutinise and signals a serious democratic deficit. This is potentially dangerous as well as counterproductive as the proposed Post Cotonou Agreement is far reaching and could potentially undermine prospects for sustainable and equitable development in our region.

We call on PACP leaders to ensure due national processes of consultation including with parliamentarians, local councils, media, academia, trade unions, indigenous peoples, local communities, and civil society actors to guide negotiations. We welcome Fiji Government’s initiation of a national consultation process as well as the recent inclusion of CSO organisations as observers at the Samoa EU-PACP High Level Political Dialogue as first steps.

¹ With continuing consultations from 2018 through to 2019, this Paper has been prepared by a collective of Pacific Civil Society Organisations (DAWN, Diva, FCOSS, Oxfam Regional, PANG, PIANGO, PICAN, PDF, PYC, SEEP, SSVN).

2) PROPOSED RESTRUCTURE OF REGIONAL ARCHITECTURE

This is evident in:

(A) The Proposed Inclusion of Overseas Countries and Territories (OCTs) as PACP Parties to the PCA

We urge that the EU's inclusion of OCTs in this agreement in its current form be rejected - it is not in the interests of our Pacific people in the remaining colonial territories in the Pacific who have been left in political limbo, denied their right to full independence by European colonial powers.

The EU is seeking the complicity of Pacific Island states in accepting the existing status of OCTs. Affording them second-class status in an agreement between fully independent Pacific Island states and the EU is not about inclusion, it is about legitimating the status quo of the colonising powers. The EU has a moral obligation to commit itself in this agreement to work with its member states and the UN to expedite the unfinished business of decolonisation in the Pacific region. In our opinion the only grounds for PACP to consider the inclusion of OCTs is as truly independent states, making them equal parties to the treaty.

The process for decolonisation includes addressing outstanding historical obligations by the two nuclear states (United Kingdom and France) in relation to nuclear testing and its impacts, as well as initiating the process towards political self-determination. We are mindful that the Pacific region has been historically used as a nuclear testing ground by American, British and French governments. The consequences for the health and safety of Pacific island people and their environment are still being felt today. There is serious on-going threats of leakage from nuclear wastes stored in a dome in Marshall Islands, and buried in Tahiti.

PACPs should seek from the EU a commitment in the Protocol to expedite the process of decolonisation in its remaining colonial territories namely French Polynesia, New Caledonia and Wallis and Futuna.

In addition to outlining steps towards independence, the process of decolonisation should include European member states making reparations for historical wrongs, namely, in the case of France, for exposing the people and environment in French Polynesia to nuclear testing; and in the case of the Netherlands, for denying West Papuans the right to political independence through an unconscionable Cold War political deal with Indonesia, thereby subjecting them to decades of genocidal human rights abuse.

(B) The Proposed Mechanism of Third Countries Acceding To the Post-Cotonou Agreement

This proposed provision in the PCA would open the door to Australia and New Zealand and other OECD states and we have to question why. This appears to be an EU agenda of creating a new regional and potentially multilateral architecture of its design and for its own interests. We urge Pacific states to reject this attempted external interference in the Pacific's autonomously established regional architecture. It completely undermines the original political objective of forming the intergovernmental body of independent Pacific states known today as the Pacific Islands Forum (PIF), which was to enable independent states in the Pacific to be free to discuss and take positions on political matters without the dominating presence and influence of colonial powers. What is now known as PIF is the proud legacy of our early political leaders, principally Ratu Sir Kamisese Mara (Fiji), Tupua Tamasese Lealofi IV (Samoa) and Sir Albert Henry (Cook Islands).

We propose that further analysis is undertaken to understand the implications of the proposed new EU institutional arrangements including the inclusion of OCTs and third countries' right to accede to the treaty, for Pacific island countries' rights to political and economic self-determination.

PIF's independence in determining political and economic policies has over the years been seriously compromised by the membership of Australia and, to a lesser extent, New Zealand, and their predominant

funding of PIF and its secretariat. We view the EU's proposal to effectively restructure the regional intergovernmental architecture that has been in place for decades as arrogant and an affront to the self-determination of Pacific Island states.

3) NATURAL RESOURCES

The EU seeks equitable access to natural resources in PACPs. To protect our environment and the livelihoods and long-term food security of Pacific people, it is critical that the position of PACPs be absolutely firm on the following:

(A) Deep Sea Mining

The EU has strong interests in accessing minerals and other resources from the Ocean floor or seabed. This includes the seabed within the national jurisdictions (i.e. EEZs) of Pacific states.

This is made explicit in the EU's Negotiating Mandate. It was also evident in the EU's early work in 'reaching' Pacific Island states for DSM, by supporting the development of Regional and National Legislative Frameworks to Regulate DSM, through the SPC-EU EDF 10 Deep Sea Minerals Project, which began in 2011.

Mining the Ocean floor is experimental, and the serious risks of its long-term and possibly irreversible impacts on the Ocean, on marine ecosystems, marine biodiversity and marine-based food supply, on which Oceanic people are dependent, are largely unknown. What is indicated by the findings of scientists who have been researching the intricate ecosystems and diverse life forms in these areas of the Ocean is that the precautionary principle should be applied.

At the very minimum, PACP states should agree on a moratorium on DSM. As noted, European legislators have already voted overwhelmingly for a resolution to halt mining the seabed for minerals until the environmental consequences of industrializing the high seas can be determined.²

There has not been much progress at the International Seabed Authority (ISA), as a lot remains outstanding including financial benefit sharing, royalties, liabilities and environmental impact issues. The international framework on regulation and exploitation is far from reaching a resolution as matters in BBNJ and ISA also remain outstanding.

Furthermore, right across the Pacific, communities³ are pushing heavily for a total ban on deepsea mining and leveraging the precautionary principle based on the emerging scientific evidence of potentially irreversible ecological damage.

We believe it is incumbent upon Oceanic states, which assert a special ocean identity based on historical and spiritual connections to the Pacific Ocean and claim primary custodianship or stewardship of it, to support a moratorium on DSM, at a minimum. Such a position coheres with the Pacific States' priorities in respect to Ocean governance and safeguarding the region's resources and security.

It may be difficult to secure support from all Pacific Island states for the moratorium position as PNG, Nauru, Tonga, Kiribati and Cook Islands are keen to mine the ocean floor within their national jurisdictions or in the

² http://www.europarl.europa.eu/doceo/document/TA-8-2018-0004_EN.pdf?redirect

³ <http://actnowpng.org/content/pacific-voices-must-be-heard-seabed-mining>
<http://actnowpng.org/content/stop-experimental-seabed-mining-campaign-goes-regional-launch-20000-signatures-initiative>
<https://www.thenational.com.pg/council-of-churches-wants-ban-on-seabed-mining/>
<https://www.theguardian.com/world/2017/dec/12/troubled-papua-new-guinea-deep-sea-mine-faces-environmental-challenge>

Area beyond national jurisdiction in partnership with DSM mining companies. We commend Fiji's recently announced decision to ban deep sea mining and urge Vanuatu and Samoa to push for a moratorium on DSM within the PACP group.

(B) Fisheries

PACP leaders have "identified that ensuring the long term sustainability and viability of the region's fisheries resources is a priority". While the EU interest in ensuring access to Pacific fisheries is openly declared, it may involve an agenda to interfere with regional fisheries arrangements, including through the WTO, where they want countries of the three regions to jointly adopt common positions. Negotiators should insist on the principles of mutual respect for countries to determine their partners at their multilateral level. Any reference by the EU to extending its fisheries agreement should be treated with great caution under Post-Cotonou Negotiations.

The EU's inclusion in its Negotiating Directives of clauses such as "ensure sustainable access and management of natural resources" and particularly "support the development of sustainable fisheries management" are strongly suggestive of seeking increased access to natural resources in the Pacific, and of interfering in the management of such resources. We are especially concerned about the potential interference by the EU in regional fisheries arrangements and management regimes such as the Parties to the Nauru Agreement (PNA) and caution strongly against agreeing to EU wording in relation to fisheries management.

PACP Members need to incorporate language on technical and financial assistance. Also an insertion that cooperation in the fisheries sector should not impinge on the rights of sovereign member states as per the UNCLOS over their EEZ. Further no Post-Cotonou outcome should override the RFMO or national management of fisheries in the PACP area, this also applies to the sharing of data, stock assessments, compliance and enforcement;

(C) Other Resources

The EU has interests in accessing other resources, including land. We have already alerted attention to the need to ensure that making commitments to enabling legal environments conducive to investment, such as the EU seeks from PACPs, does not leave PACP states open to being obliged to erode communal land ownership systems. This would be disastrous as it would dispossess and impoverish Pacific people.

No language on reforming customary land systems should be agreed to in the PCA. Nor should any language be agreed to that would open access to land in the larger PACPs by foreign investors aiming to grow agricultural crops for export.

(4) CLIMATE CHANGE

(A) EU Needs to reaffirm Commitment to reducing GHGs emissions and to support 1.5 C

Climate Change poses an existential threat to several Pacific Island states. As frontline victims of Climate Change, PACPs should insist on reiterating in the PCA the responsibilities of the EU under both the UNFCCC and the Paris Agreement, and require the EU to especially ensure that high emitting EU countries reduce their emissions.

The Pacific-EU Protocol must commit to Climate Change actions in a time bound manner (10 years) in line with Pacific priorities, and to lead the global community to move to limit global temperatures below 1.5C.

The Pacific-EU Protocol must be clear that Climate Change is a matter of survival for Pacific peoples, and that support (finance, capacity building and technology transfer) provided under the PCA over the next 20 years

must be in line with this Pacific reality. The Pacific-EU Protocol must situate its proposed climate change actions within the context of the IPCC's 10-year 1.5C warming mark. The vulnerabilities of Pacific ecosystems and economies to climate impacts is clearly indicated in the IPCC 1.5C report.

The Pacific must make it very clear to the EU, that adaptation and resilience building is our priority. The prioritization of mitigation activities in the Pacific through the NDCs framing (nationally determined contributions) is mitigation centric, and does not take into account support for adaptation and resilience building. The Pacific region's total emissions are less than 1%. Even if the region were to go Green, our contributions to reducing global emissions will be insignificant. It is EU member states that must reduce their emissions.

(B) Loss and Damage

While the EU Directives include text on adaptation and resilience, there is no mention of Loss and Damage, which Pacific Island states fought hard to have included in the Paris Agreement, as there is a limit to our adaptation and resilience capacities, and domestic resources cannot be stretched to cover the substantial loss and damage sustained as a result of rising sea levels and climate induced disasters.

PACP states must ensure that L&D is part of the final Post Cotonou text on Climate Change and features in both the Foundational Agreement and the Regional Protocol. L&D is a Pacific reality, and the EU must ensure that as the developed country party to the PCA, it provides financial support to Pacific Island countries already experiencing loss and damage. Currently L&D is missing from the ACP negotiation text and this is UNACCEPTABLE for Pacific Island peoples. PACP governments are first and foremost responsible for the protection of all its citizens. It is already a matter of urgency for PACPs, and it will become all the more urgent within the next 10 years.

(5) TRADE AND DEVELOPMENT

A) Investment

Proposed texts from both the EU and ACP appear to rely too heavily on the ability of commitments like those proposed on Investment to attract foreign capital. It is important to not take as an inherent article of faith that commitments relating to investment in binding agreements result in inflows of investment, as evidence suggests it is mixed at best but especially questionable for small island economies.⁴

Current proposals aim to reshape the economies of the PACP states to prioritise investor interests through commitments that allow EU consultation on domestic investment policy in the PACP. This is especially concerning given the EU's mandate to gain access to natural resources and lower the regulatory capacity of the PACP.

We also caution against agreeing to investment provisions that entail state guarantees of returns, no-competition clauses, or clauses on Investor-state dispute settlement, as these will deny PACP states the right to regulate in the national interest, and expose them to the risk of being sued by companies.

B) E-Commerce

Negotiations regarding the digital economy and E-Commerce must occur within the ongoing context of WTO discussions. The lack of mandate to negotiate on E-Commerce in the WTO means that PACP members will need to be vigilant in ensuring that any commitments in a Post-Cotonou agreement don't become a backdoor entry point for WTO negotiations. Given the increasing importance of these sectors it is important for PACP states to retain the full policy space to regulate these industries and ensure that data and privacy is maintained whilst also tailoring the investments to the domestic needs of communities.

⁴ Joachim Paul, *Societal Benefits and Costs of International Investment Agreements*, OECD Working Papers on International Investment, 2018/1, OECD Publishing, Paris.

There are several references in the EU's Directives to e-commerce – under technologies and innovation, and repeatedly under trade cooperation – aimed at fostering trade and investment opportunities. The primary beneficiaries of e-commerce will be large platform companies like Amazon, for whom global online trade enables penetration of exterritorial markets without a physical presence, facilitation of tax evasion, and undermining of local traders.

PACPs should not be swayed by the claimed benefits of e-Commerce for MSMEs within our countries or by arguments that e-Commerce will remove obstacles for our women entrepreneurs. MSMEs that mostly stand to benefit from liberalised e-Commerce are large SMEs from developed countries, rather than our typically much smaller SMEs in Pacific Island countries.

C) Industrialisation and Economic Growth

The EU's aim translates to demanding the reform of PACP trade regulations and policies to support Global Value Chains (GVC) and EU based transnational production processes. Such an approach fails to support the growth of MSMEs and instead PACPs should focus on making sure the appropriate framework is in place to support the building of domestic capacity and enable exporters to be able to truly benefit from exporting.

D) Trade Cooperation

Any language that requires all PACP members to meet the commitments of the Trade Facilitation Agreement, either within the agreement or in effect outside of it, need to be rejected. Likewise any commitments on regulatory, licensing, customs procedures and the like must first be met with implementation funding.

Trade in Services is an area that must also be treated with caution. Whilst the ACP's proposals argue mostly for cooperation and support in regulatory capacity, the EU's interests are explicit in its proposals. The EU has singled out maritime services and government procurement in its draft text and as key areas that they are wanting liberalised under Post-Cotonou – both key sectors in PACP states. Liberalising maritime services would open up domestic shipping to European shipping services and government procurement would enable EU companies to bid for all PACP government contracts.

As free trade agreements, the discredited Economic Partnership Agreements (EPA's) have no place in any future Post Cotonou relationship with Europe.

(6) FINANCING DEVELOPMENT

There is worrying language in the EU Directives in relation to facilitating Private Sector Investment including, evidently private foreign investment. Especially concerning are the inclusions of commitment to 'more strategic use of public finance to crowd in additional public and private investment'; and to "innovative financing mechanisms". Both could open up and expose to risk domestic financial markets including, where they exist, pension fund markets.

The EU Directives state that a crucial objective of the PCA is "substantially bolstering the opportunities for EU and ACP citizens and businesses" by creating an "enabling economic environment to significantly increase the level of sustainable and responsible investment flows to their mutual advantage" ... "especially through "guarantees for private investment." The last mentioned is especially concerning as its akin to protection for investors under Investment Agreements.

PACPs are advised to not commit to Public-Private partnerships (PPPs) or 'Blending Finance' as promoted in the EU Directives. A much promoted model of development financing that was affirmed at the 3rd International Conference on Financing for Development in Addis Ababa in 2015, PPPs and Blending Finance

investments are tricky as they are based on binding contracts that essentially guarantee investor profits. They often end up incurring massive costs for states in the partnership.

(7) ADHERENCE TO ESTABLISHED PRINCIPLES

We welcome the adoption in the PACP position, outlined in the Pacific-EU Skeleton proposal for Regional Protocol: Combining comments received 30th April 2019, PIF, of the following high level principles including: Respect and mutual interests; Recognising the special case and circumstances of PACP island states; Disproportionate burden of implementation; Samoa Pathway as well as key principles outlined in Titles 1 Ocean: Governance including jurisdictional rights and responsibilities as outlined in UNCLOS; Delineation of and respect for maritime boundaries; respect for RFMOs.

We urge PACPs to embed in the agreement, under the discussion of human rights, the Right of Self Determination (Common Art 1 in both ICCPR and ICESCR) and the Right to Development. We also suggest that adherence to the following three principles in international law be explicitly mentioned in the PCA: The Precautionary Principle (AGENDA 21, UNCED); the Principle of Free, Prior And Informed Consent (Declaration on the Rights of Indigenous People), and the Principle of Polluter Pays (Agenda 21, Rio Declaration on Environment and Development, The Paris Agreement).

We expect PACPs to continue to negotiate for text on gender perspectives and gender equality measures across the Titles and mainstreamed across all policy measures. PACP is further requested to include in the Pacific-EU Regional Protocol a specific reference that member states sign, ratify and implement the Convention on the Elimination of All Forms of Discrimination Against Women, Beijing Platform for Action, ICPD, the Pacific Plan, the 42nd Pacific Island Forum commitment to increase the representation of women in legislatures and decision-making, and the 40th Pacific Island Forum commitment to eradicate sexual and gender based violence and the Pacific Leaders' Gender Equality Declaration.

(8) BLUE PACIFIC LANGUAGE

The Pacific Ocean constitutes the largest area of the sovereign territories of Pacific Island States and has deep spiritual/cosmological significance for Oceanic peoples whose long history of voyaging and navigation was informed by intimate knowledge of this Ocean, as well as being central to their economic, social and cultural ways of life. Pacific Island states and peoples have a strong interest in Oceans governance and assert primary custodianship over the Pacific Ocean.

It is in relation to this custodianship responsibility that we raise concerns about the PACPs "Blue Pacific" narrative for these negotiations with the European Union. Such aspirational language reflecting noble intentions to ensure control and sustainable utilisation and management of our resources, is open to being captured and misused for agendas that are counter to our interests. There are already warning signs in the EU's mandate as well as mixed understandings within the PACP group itself about the meaning of Blue Pacific. Many have used the framing to present their own selfish political and economic motives, opened it up to other interpretations and translations, thus losing the true value of what it means to genuine Pacific partnerships and our development.

At the heart of the Blue Pacific identity is the recognition and acknowledgement of our role as Custodians - custodianship as a concept is not extractive or exploitive in nature but a longer term, systematised proactive care for the good of all in community and nature.

In recent years, the Oceans, and specifically the Pacific Ocean, have become the focus of industrial interest. Oceans represent the last frontier on Planet Earth, with resources to be plundered. For our 'Big Ocean

Stewardship States' the current external interest driven in part by the Blue Economy rhetoric, poses enormous challenges and risks that could be no less serious than the existential threat of climate change.

As NGOs in Oceania we need to ask pertinent questions about how this development framework of Blue Economy is unfolding within our region and globally. Under the "Basis for Cooperation", the EU states that one of the concrete measures that PACP states will take under a Post Cotonou Agreement is "ensure sustainable access and management of natural resources". Whilst this language may sound benign, the motivation to ensure EU investor's access to the region's ocean resources— fish, seabed minerals, etc. – may be interpreted as synching with the Blue Economy narrative. The language is further expanded under the section on "Blue Growth" which states that PACP will take concrete measures to "ensure fair, responsible and **undistorted access** to extractive sectors, including seabed mining for all economic players". Behind Blue Growth and Blue Economy rhetoric is a new race to carve up the Pacific, turning the Pacific Ocean, from surface to seafloor, into a crowded and contested space by powerful forces – it is the re-colonization of oceans.

There is a real danger that the warm fuzzy language of Blue Pacific may pave way to a new era of plundering Pacific resources, going against the spirit of an ocean identity and the custodianship responsibilities of Pacific island people to ensuring the health of our ocean for generations to come.