



Land and Trade Briefing Paper:

POLICY SPACE

For many Pacific nations, achieving Independence allowed them to take control in shaping their futures. Gaining political independence gave these countries the right to legislate and determine the regulations that would support the national interest. It is this very ability to determine what level of regulation is best for the Pacific, including governing the use of land, that is directly under challenge by binding free trade agreements.

Free Trade Agreements (FTA) and bodies like the World Trade Organization (WTO) aim to remove barriers to trade such as subsidies, import taxes and preference for local producers amongst many others. For both FTAs and the WTO, customary control of land is seen as a barrier to trade, something that raises the costs of investing and doing business. In response to many protests by civil society against pushes to remove customary or communal control of land, such agreements and bodies have pulled back from such direct demands, however there are threats to land that can creep in through other avenues.

Whilst trade is normally considered in terms of physical goods like food and manufactured products trade in services and investment are key components for many rich countries in any agreement on trade. Trade in services is considered to happen in a number of ways, these being understood best by using an example like education. For example the four ways that services are traded are: 1) You study remotely in your country from an institution based overseas; 2) You travel overseas to study; 3) A foreign education institution sets up a campus in your country; and 4) Education employees travel to your country to teach.

Trade in services and investment are very heavily tied together as the ability for a foreign

company to establish themselves in a country (example number 3 from above) is both trade in the service but also a type of foreign investment.

It's important to understand what the aims of trade in services commitments are in trade agreements and what that means. Trade in services is premised on two core components: Market Access and National Treatment. Market Access "proscribes the policy tools that a government can legitimately use to shape its services market"(1). In practice this affects the ability of governments to apply regulations that restrict the number and size of firms, promote joint ventures, or limit the level of foreign shareholders amongst others. For example this means governments can't ensure that any new legal firms must be partnered with local firms. National Treatment "prohibits discrimination between foreign and domestic suppliers of 'like' services and suppliers"(2), meaning that when governments make commitments on this they can't provide support or preference to local producers without extending that to foreign providers also. An example of this would mean that if a government had made commitments on shipping it couldn't encourage domestic businesses by providing benefits to small scale local operators without offering the same to foreign owned operators. These problems are not just in the service delivery, Market Access and National Treatment commitments have flow on effects to how land is utilised and how local populations can be prioritised to meet their specific realities.

The commitments made in service sectors under trade agreements (known as a schedule of commitments) by many Pacific countries ensure that customary control of land is given a 'horizontal' exception - meaning that the rights of only Pacific Islanders as reflected in their

constitutions around land cannot be over-ruled by any commitments. Whilst that may be the case, the scheduling of services has a long and sordid history with many mistakes being made around the globe(3).

To see what this may actually mean in the Pacific context we can look at the example of Vanuatu. Vanuatu recently acceded to the WTO under highly controversial conditions(4).

Vanuatu carved out a horizontal exclusion prohibiting the freehold ownership of land and stating that under the constitution only ni-Vanuatu can own land under customary law provisions. Whilst this ensures that land ownership remains the realm of ni-Vanuatu, the usage of such land (and who effectively controls it) raises many questions from Vanuatu's services commitments.

Vanuatu's commitments for WTO membership expose the grey areas about what was intended in their commitments and what may be the reality. The commitments have meant that Vanuatu may not be able to make restrictions on the foreign use of land such as:

- * to limit activities that threaten livelihoods, lifestyle, culture or the environment (such as a ban on certain tourism developments in ecologically sensitive areas, because the environment exception in the WTO Services agreement is likely to find that a less trade restrictive measure should have been found to deal with the environmental concerns);

- * to provide subsidies only to indigenous burree or other tourism and tourism accommodation operators (without providing them to foreign companies in Vanuatu);

- * restrictions on the amount of Vanuatu land that foreigners can lease for agriculture, forestry and hunting;

- * restrictions on the number and location of rubbish and toxic waste dumps (including for waste from other countries – this is a live issue as countries like Japan have been accused of wanting to dump their rubbish in the Philippines).

As can be seen from the above, whilst land ownership may still be technically under customary control, the decisions about usage of that land is now intersecting with the global trading system. Sadly if Vanuatu decides to undertake some of these restricted activities and is successfully challenged at the WTO it will have to comply, pay compensation, or have retaliatory trade barriers imposed against it.

All Pacific nations need to be wary of the legal commitments that are made in trade agreements as there are far-reaching and sometimes unexpected consequences. This is more so when those commitments extend to issues as sensitive and vital as land. Governments across the region are free to liberalise services and investment anytime they choose but by making such commitments in binding trade agreements they are losing their ability to adapt to changing circumstances as they pursue development.

Land is too important to be subject to the rules of the global trading system. Instead there should be a focus on pursuing Pacific development with land, and all its cultural, spiritual, and sustaining qualities for Pacific life, at its heart.

**This brief was compiled by the Pacific Network on Globalisation (PANG).
For more information email campaigner@pang.org.fj or visit
www.pang.org.fj.**

References:

1. Kelsey, J. 2008, *Serving Whose Interests? The Political Economy of Trade in Services Agreements*, Routledge-Cavendish
2. Ibid
3. The most high profile case being the Gambling case at the WTO where the USA accidentally liberalized internet gambling by making a mistake in its schedule, see for example http://web.me.com/jane_kelsey/Jane/Pacific_Trade_EPA_files/RP31%20Jane%20Kelsey%2019%20July%202010.pdf.
4. Accession was criticised by a wide range of organisations in Vanuatu and beyond including the Pentecostal Church of Vanuatu, Members of Parliament, and the Vanuatu Chamber of Commerce and Industry.