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*The Australian Council for International Development (ACFID)* is the peak council for Australian non-government organisations (NGOs) working in the field of international aid and development.

This report is intended to contribute to the debate about human rights and trade in the developing countries of the Pacific region.

ACFID has more than 70 members operating in over 100 developing countries. The Millennium Development Goals (MDGs) are central to our activities and goals. ACFID administers a rigorous Code of Conduct. The Code represents the active commitment of 118 overseas aid and development agencies to conduct their activities with integrity and accountability.

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In 2009 the Institute for Human Security co-hosted a very successful conference on the Millennium Development Goals with ACFID, supported by AusAID (The Australian Agency for International Development), and we are continuing this cooperation with the Development Network, an interdisciplinary network for academics, practitioners and policy makers interested in international development, of which this publication is one outcome.



## **Human rights and trade in the Pacific:**

A scoping study on designing a Human Rights Impact Assessment for PACER-Plus

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By Wesley Morgan, Roshni Sami, Claire Rowland and David Legge. See Annex I for further details about the researchers.

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## Introduction:

At the 2009 Pacific Islands Forum Leaders' Meeting, held in Cairns, Australia, Pacific leaders agreed to begin negotiations for a regional trade agreement between the Pacific island countries and Australia and New Zealand (PACER-Plus). The PACER-Plus negotiations are likely to result in a binding international agreement that will reshape the economic relationship between member states of the Pacific Islands Forum for decades to come. Any new agreement will replace the existing South Pacific Trade and Economic Cooperation Agreement (SPARTECA).<sup>1</sup>

Both the Australian and New Zealand governments have indicated they are interested in negotiating PACER-Plus as a free trade agreement that is compatible with the rules of the World Trade Organisation (WTO). Both governments argue that such a trade agreement will help the Forum Island Countries (FICs) integrate into the global economy, thereby improving export opportunities and encouraging new investment in the region.

The two larger country members of the Pacific Islands Forum are likely to gain considerable access to Pacific island markets through a new trade deal as well. The Australian government explains that 'Australia's primary motivation in supporting PACER-Plus is to help the Forum Island Countries to promote sustainable economic development. We nonetheless expect that improved market access may enhance some opportunities for Australian exporters, investors and service providers in Pacific markets'.<sup>2</sup> The former Australian Trade Minister Simon Crean described PACER-Plus as a 'trade-plus - free trade and economic integration agreement'.<sup>3</sup>

While regional free trade agreements like PACER-Plus are generally designed with the aim of increasing cross-border trade and contributing to economic growth, it is increasingly recognised that obligations contained in trade agreements can have implications for the ability of governments to realise, protect and fulfil a range of universal human rights, including for example the right to health and the right to food.

Currently there is a lack of coherence between international trade law on the one hand (as embodied by bilateral and multilateral trade agreements) and international human rights law on the other. Trade negotiators are often unaware of the obligations to which human rights give rise to, or feel that the nature of those obligations is vague and unclear.<sup>4</sup> However, States *do* have obligations to ensure that international agreements or treaties that they sign with other parties do not adversely affect the realisation of human rights –

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<sup>1</sup> The member states of the Pacific Islands Forum include Australia, the Cook Islands, Fed. States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

<sup>2</sup> 'Pacific trade negotiations commence'. See: <http://www.aei.gov.au/AEI/MIP/Activities/09Activity24.htm>

<sup>3</sup> Crean, S. McMullan, B. 2008. 'International engagement begins in own backyard'. *Canberra Times*. 26/8/08. Fairfax, Canberra

<sup>4</sup> For discussion see 3D. 2009. *Human rights impact assessments: A pertinent tool for informing and improving trade governance?*. 3D – Trade, Human Rights, Equitable Economy, Geneva. See: [http://www.3dthree.org/pdf\\_3D/3D\\_WTOPF2009\\_panelHRIAsummary.pdf](http://www.3dthree.org/pdf_3D/3D_WTOPF2009_panelHRIAsummary.pdf)

either for their 'home' population or for people within other countries that are party to the agreement (see discussion below).

In recent years, there have been growing calls worldwide for Human Rights Impact Assessments (HRIAs) to be undertaken in relation to new trade agreements, with the goal of measuring potential (and actual) human rights impacts, improving trade governance, and ensuring that human rights are protected. The Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Discrimination Against Women (CEDAW), and the Committee on the Rights of the Child (CRC) all call for impact assessments of trade agreements in their Concluding Observations on a range of different states which have reported to those committees.<sup>5</sup> In 2009, the United Nations Special Rapporteur on the Right to Health released a report highlighting the potential for free trade agreements to adversely affect human rights.<sup>6</sup> The Office of the High Commissioner for Human Rights (UNOHCHR), in all of its reports on the impact of new trade rules on human rights, stresses the need for HRIAs of trade agreements to be carried out. The current UNOHCHR Representative for the Pacific, Matilda Bogner, has expressed support for an HRIA to be undertaken in relation to PACER-Plus.<sup>7</sup>

In August 2010, a number of Pacific island non-government organisations, church groups and trade unions called for a *moratorium* on the PACER-Plus negotiations. A statement signed by the Pacific Conference of Churches, the Pacific Network on Globalisation, the Ecumenical Centre for Research Education and Advocacy (ECEA), the Fiji Women's Rights Movement, and supported by a range of other organisation (including the Australian Greens political party), called for a moratorium in part on the grounds that there has been no human rights assessment made to evaluate the risks posed by PACER-Plus to fundamental human rights such as the right to health and the right to food.<sup>8</sup>

Support clearly exists within a number of agencies at the UN, and among a number of non-state actors in the Pacific, for undertaking an effective HRIA for to PACER-Plus. Governments in the region have a history of undertaking economic and social impact assessments for trade agreements in the Pacific island countries, but it remains to be seen whether Pacific Islands Forum governments will be supportive of an assessment that focuses on the *human rights* implications of PACER-Plus.

Human rights are core principles of the Australian Agency for International Development (AusAID)'s regional development programs.<sup>9</sup> An HRIA process for PACER Plus would not only

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<sup>5</sup> See: pp 604, Harrison, J., Goller A, 2008. 'Trade and Human Rights: What Does Impact Assessment Have to Offer?', *Human Rights Law Review* 8 (4), 587 – 615.

<sup>6</sup> See: UN General Assembly, Human Rights Council. *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. March 31, 2009. A/HRC/12.

<sup>7</sup> In personal communication with the authors of this scoping study.

<sup>8</sup> Pacific island civil society organisations, 2010. *2010 Civil Society Statement to Pacific Island Forum Leaders regarding PACER-Plus negotiations*. See: [http://www.pang.org.fj/doc/Pacific\\_CS\\_O\\_PACER\\_Plus\\_Moratorium\\_Statement.pdf](http://www.pang.org.fj/doc/Pacific_CS_O_PACER_Plus_Moratorium_Statement.pdf)

<sup>9</sup> See for example: <http://www.aid.gov.au/keyaid/humanrights.cfm>

assist AusAID in integrating their Human Rights agenda internally into their regional and national economic growth programs, it would also promote coherence between Australia's aid programme and its *trade* policies. Similarly, the New Zealand Agency for International Development (NZAID) has a commitment to protecting and promoting human rights, with clear policies in relation to trade activities, as outlined in their 'Operating Principles for Trade and Development Assistance' under the policy document *Harnessing International Trade for Development*:

NZAID recognises that adherence to international human rights conventions, including those related to labour standards, and the promotion of gender equity, are integral concerns in the development of trading systems.<sup>10</sup>

Whilst an HRIA process is clearly aligned with Australian and New Zealand's human rights approach and development agenda, the timing of an HRIA in relation to PACER Plus is still under debate. Government officials contacted during this scoping study indicated a preference for undertaking a study later in the PACER plus negotiation cycle, raising concerns that it may be too early for any assessment to be made regarding the potential human rights impact of a new trade agreement. Their concern stems from the fact that the terms of the agreement and structure of the negotiation process are yet to be determined. However, an alternative viewpoint is that undertaking an HRIA at the outset of the negotiation process would provide negotiating countries with an evidence base and policy recommendations from which to *develop* effective and cohesive trade policy that is aligned with national human rights and development commitments and priorities. There are a number of previous examples of HRIAs undertaken *before the completion of negotiations*, and an assessment early in the PACER-Plus negotiations could draw on both the *likely* design of new trade rules, and the design of other Australian and New Zealand regional trade agreements (such as the Australian – ASEAN – New Zealand FTA).

Given the potential for PACER-Plus to impact on the realisation of a range of human rights, both positively and negatively, an HRIA would provide policy makers and trade officials from member states of the Pacific Islands Forum with information needed for those states to meet their human rights obligations. An HRIA should also provide specific policy recommendations that can be considered in relation to the design of PACER-Plus.

Building constructive engagement with *all* governments involved in the PACER-Plus negotiations would be very important for the success of an HRIA, regardless of the implementation timeframe. This is particularly the case if recommendations of the HRIA are to be taken seriously by trade negotiators and government officials and incorporated into the design of PACER-Plus. An HRIA for PACER-Plus would also provide information that civil society could use to hold Pacific Islands Forum governments accountable for their human rights obligations during the negotiation of a new agreement.

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<sup>10</sup> New Zealand Agency for International Development, 2008. *Harnessing International Trade for Development* – 'NZAID Policy Paper'. NZAID, Wellington.

### *Outline of this paper*

This scoping study provides necessary information for parties considering undertaking an HRIA in relation to PACER-Plus. This paper first explains what a HRIA *is*, and identifies some potential human rights issues that may arise with the implementation of the PACER-Plus agreement. The paper then explores some options for the design of a HRIA for PACER-Plus, looking at issues such as *who* might undertake a HRIA, what the *scope* and *timing* of a HRIA could be, and some of the methodological challenges involved in designing an impact assessment that will meaningfully identify the human rights impacts of new trade rules. The study draws together ‘lessons learned’ from HRIAs that have been conducted for other trade agreements – through analysis of those HRIAs, and through semi-formal interviews with a number of experts on HRIA. This paper also draws on semi-formal interviews and surveys completed by key stakeholders in the Pacific island countries. Finally, this paper provides some considered recommendations for designing and implementing an effective HRIA for PACER-Plus.

### **Research Method:**

This scoping study comprised a combination of desk research, including an extensive review of the existing literature relating to HRIAs and trade agreements in the Pacific, and semi-formal interviews with experts on HRIA and key stakeholders in the Pacific island countries.

A questionnaire was completed by a number of research participants (see Annex III). This questionnaire also formed the basis for face-to-face and telephone interviews.

Research participants were selected on the basis of their expertise with regards to HRIAs, or based on their involvement in the PACER-Plus negotiations. An attempt was made to select research participants from a wide range of intergovernmental organisations involved in the PACER-Plus discussions – including the Pacific Islands Forum Secretariat, the Office of the Chief Trade Advisor (based in Vanuatu), the Australian Department of Foreign Affairs and the New Zealand Ministry of Foreign Affairs and Trade. Individuals from a number of non-government organisations (NGOs) were also consulted, including from the South Centre, the Third World Network, Pacific Network on Globalisation, Pacific Institute of Public Policy and Oxfam New Zealand. Opinions were also sought from individuals based at UN agencies working in the Pacific, and from experts working at a number of Universities.

For a full list of individuals interviewed as part of this scoping study see Annex II.



## What is a Human Rights Impact Assessment (HRIA)?

An HRIA for a new trade agreement (in this case PACER-Plus) would aim to assess how the legal provisions of the proposed agreement are likely to impact on the realisation of clearly defined human rights. An HRIA for PACER-Plus should focus explicitly on the obligations of the member states of the Pacific Islands Forum, and should seek to *measure* the potential impacts of specific provisions on affected rights-holders in the Pacific. As James Harrison, from the University of Warwick, writes:

A HRIA of a trade agreement seeks to assess how the legal obligations of that agreement will affect (negatively and positively) the human rights of people in the States concerned... HRIAs of trade agreements should be based on an explicit evaluation of the impact of trade law obligations that apply to the actors (states and inter-governmental organisations) in question.<sup>11</sup>

Impact assessments (in a broader sense than *human rights* impact assessments) are increasingly being adopted as a means to measure the effects of policies, practices and programmes undertaken by governments, non-government organisations and businesses.

In the Pacific island countries for example, impact assessments regarding trade agreements have been undertaken in the past – with the stated intention of supporting governments to identify and mitigate potential negative social outcomes of trade policy. In 2007 for example, the Pacific Islands Forum Secretariat commissioned a Social Impact Assessment of the ‘Economic Partnership Agreement’ (EPA) between the Pacific island countries and the European Union.<sup>12</sup> In 2005, the Secretariat of the Pacific Community (SPC) completed a study, also commissioned by the Forum Secretariat, which sought to assess the potential effects of including alcohol and tobacco in an islands-only regional free trade agreement – the Pacific Island Countries Trade Agreement (PICTA).<sup>13</sup>

However, these impact assessments have not focussed specifically on the potential *human rights* implications of regional trade agreements in the Pacific. A *human rights* approach would add value to the existing assessment processes by enabling social impacts to be reviewed in light of state obligations under international human rights law.

HRIAs have increasingly been adopted as a tool to enhance governance and accountability across a range of sectoral areas in recent years, and *guides* for undertaking HRIAs have been developed as well. In 2001 for example, the Norwegian Agency for Development Cooperation developed a *Handbook in Human Rights Assessment* that outlines a set of

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<sup>11</sup> Harrison, J. 2010. *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*. A Paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, June 23-24, 2010. Geneva

<sup>12</sup> Secretariat of the Pacific Community. 2005. *Population Health Impacts of the inclusion or exclusion of tobacco and alcohol from the Pacific Island Countries Trade Agreement*. SPC, Noumea.

<sup>13</sup> Pacific Network on Globalisation. 2008. *Social Impact Assessment of the Economic Partnership Agreement (EPA) being negotiated between the European Community and Pacific ACP States*. PANG, Suva.

criteria for assessing the human rights impact of aid programmes on recipient countries.<sup>14</sup> As well as looking at government (or government-funded) activities abroad, HRIAs have been used to assess the human rights impacts of domestic policies as well. In the UK city of Aberdeen for example, local government has developed an *Equality and Human Rights Impact Assessment Guide* to help the Aberdeen City Council to undertake HRIAs during the development of policy.<sup>15</sup>

Impact assessments have not been restricted to assessing the human rights obligations of governments either, as HRIAs have been undertaken regarding the human rights impacts of the activities of transnational corporations<sup>16</sup> and the work of non-government development organisations as well.<sup>17</sup> Methodologies for undertaking HRIAs for the activities of corporations are relatively well developed.<sup>18</sup> HRIAs for *trade agreements* are a relatively new phenomena however, with the first having been completed in 2006. Resources regarding human rights impact assessments have been collated by the Dutch non-government organisation *Aim for Human Rights*, in a website entitled: *Human Rights Impact Resource Centre*<sup>19</sup>.

Despite the fact that a number of HRIAs have been completed, in a range of areas, there remains no universally accepted 'blueprint' for how an HRIA should be structured, and certainly none for how an HRIA for a *trade agreement* – which requires a unique set of methodological tools – should be undertaken.

#### *The aims of a Human Rights Impact Assessment for a trade agreement*

HRIAs for international trade agreements should offer guidance as to how states might better meet their *obligations* to realise human rights both at home and in other countries.

An HRIA for PACER-Plus should centre on the obligations of states to respect, protect and fulfil human rights not just 'at home' – for people living within their borders – but also 'abroad'. This is particularly the case where the state's activities are likely to affect the lives of people living in other countries; as for example following the signing of an international trade agreement. Explicit reference is made to the 'extraterritorial responsibilities' of states within international human rights law. Article 2 of the International Covenant on Economic Social and Cultural Rights (ICESCR) for example states that:

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<sup>14</sup> Norwegian Agency for Development Cooperation. 2001. *Handbook in Human Rights Assessment: State Obligations, Awareness and Empowerment*. NORAD, Oslo.

<sup>15</sup> Aberdeen City Council. 2008. *Equality and Human Rights Impact Assessment: The Guide*. Aberdeen City Council, UK.

<sup>16</sup> See for example: International Centre for Human Rights and Democratic Development, 2007. *Human Rights Impact Assessments for Foreign Investment Projects: Learning from community experiences in the Philippines, Tibet, the Democratic Republic of Congo, Argentina and Peru*. ICHRDD, Montreal.

<sup>17</sup> See for example: Ministry of Foreign Affairs, the Netherlands. 2004. *Evaluation of Nine Non-governmental Human Rights Organisations*. Ministry of Foreign Affairs, The Hague.

<sup>18</sup> See for example: Nomogaia Foundation. 2008. *A Methodology for Human Rights Impact Assessment*. Nomogaia Foundation, Denver.

<sup>19</sup> See: <http://www.humanrightsimpact.org/home/>

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The international dimension of human rights obligations is also stressed in relation to specific human rights. In relation to the right to health for example, State Parties are obliged to respect the right to health in other countries, to give due attention to the right to health in international agreements and to take steps to ensure those agreements do not adversely impact on the right to health (article 12 of the ICSECR, as interpreted by CESCR General Comment No. 14 (2000)).<sup>20</sup>

Existing HRIAs for trade agreements have *not* attempted to determine whether regional free trade agreements are an appropriate development strategy for developing countries, and nor have they sought to measure the *overall* pros and cons of trade liberalisation. An HRIA for PACER-plus should entail an empirical study of the actual or potential human rights impacts of the trade agreement itself – using quantitative and qualitative research, and a participatory approach – to collect that information. Ultimately, an HRIA is a technical process, not an ideological one. Whether or not the findings of an HRIA would be taken on board by governments negotiating PACER-Plus is likely to depend on the *quality* of research undertaken, and on the engagement of governments during the process of completing an impact assessment.

Given that PACER-Plus may have a range of human rights impacts, particularly on populations in the Pacific island countries, a well-designed HRIA should indicate potential positive and negative human rights impacts, and provide recommendations to enable parties to the agreement to avoid or mitigate any negative impacts and build on positive ones.

#### *Previous HRIAs for trade agreements*

While it is a very new field, there are currently three different examples of HRIAs that have been completed for trade agreements:

- An HRIA undertaken by the Thailand National Human Rights Commission (TNHRC) in 2006 produced a draft report into free trade negotiations between Thailand and the United States which covered a wide range of areas – agriculture, environment, intellectual property and services and investment – as well as the transparency (or lack thereof) involved in the process of negotiation itself. The TNHRC draft report is considered to be the first HRIA of an international trade agreement. A final report was never completed due to political instability in Thailand, as is the case with the Thai-US FTA negotiations, which remain suspended. The TNHRC report has received

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<sup>20</sup> Committee on Economic, Social and Cultural Rights (CESCR), *General Comments No.14 (2000), The right to the highest attainable standard of health*. E/C.12/2000/4, 11 August 2000.

criticism for a lack of consistent focus on legally binding human rights obligations.<sup>21</sup> The findings of the draft report were discussed at a seminar organised by the TNHRC and a number of UN agencies in Bangkok in January 2007. The report was important *politically* for raising concerns about the potential impact of a Thai-US FTA.

- A series of HRIAs have been undertaken by FIAN (Food-First Information and Action Network) in collaboration with a number of other civil society organisations. These HRIAs have focussed on the liberalisation of agriculture, and its impact on the right to food for small-scale agricultural producers in a number of countries (Ghana, Honduras, Indonesia, Uganda and Zambia). These HRIAs used case studies to analyse the human rights impacts of agricultural trade liberalisation in particular. Some of these studies looked at the effects of *past* liberalisation, and some investigated potential *future* impacts as well. These HRIAs, based on empirical findings, explicitly assessed violations of the right to food. In a number of cases, violations *were* identified. Investigations of the effects of European agricultural and trade policy on small tomato producers and chicken breeders in Ghana for example found that member states of the EU had violated their obligations to respect the right to food by allowing unfair export practices to continue while placing considerable pressure on Ghana to expose smallholder farmers to European competition.<sup>22</sup> In other cases, violations of the right to food were *not* identified.<sup>23</sup> To date, it is unclear how effective the FIAN HRIAs have been in influencing government policy (especially trade policy) but the assessments have made important research contributions – providing empirical evidence for the human rights impacts of trade policy.

The HRIAs undertaken by FIAN offer a potential guide for undertaking HRIAs regarding PACER-Plus, because they provide a useful *methodological* framework for undertaking impact assessments. An investigative mission undertaken by FIAN into the right to food of milk and maize farmers in Uganda for example, outlined a human-rights based methodology – one which aimed to assess the impact of trade policy measures on the realisation of the right to food in particular farming communities in Uganda. The study used a mixture of desk-based research (to get background data), focus group discussions (both gender-mixed and gender-separated), interviews with individual farmers, and interviews with experts (to cross-check interviews held with rights-holders). This framework for undertaking impact-assessment may be useful in the Pacific context as well – though the issues are likely to be quite different.

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<sup>21</sup> See: pp 604, Harrison, J. Goller, A, 2008. 'Trade and Human Rights: What Does Impact Assessment Have to Offer?', *Human Rights Law Review* 8 (4), 587 – 615.

<sup>22</sup> For an overview of the HRIAs for trade agreements undertaken by FIAN, see: Paasch, A. 2009. *World agricultural trade and human rights: Case studies on violations of the right to food of small farmers*. FoodFirst Information and Action Network (FIAN), Heidelberg.

<sup>23</sup> In a study of the effects of EU trade policy on farmers in Uganda for example, it was found that exports from the EU were not affecting the right to food in import-competing farming communities. See: FoodFirst Information and Action Network. 2009. *The right to food of milk and maize farmers: Report of an investigative mission to Uganda*. FIAN, Heidelberg.

- Simon Walker has undertaken an assessment of the impact of the Central American Free Trade Agreement (CAFTA) on the right to health in Costa Rica. This HRIA was conducted *after* the CAFTA was implemented, and Harrison argues that it represents the most rigorous and detailed blueprint for how to conduct an HRIA of a trade agreement to date<sup>24</sup> – having utilised economic modelling, causal-chain analysis and expert judgment to assess impacts on the right to health. Walker has developed recommendations for a series of steps to be undertaken as part of future HRIAs for trade agreements.<sup>25</sup>

A general assessment of HRIAs that have previously been undertaken regarding trade agreements underscores the fact that there is no standard ‘blueprint’ for undertaking HRIAs. What is also striking, is that the HRIAs undertaken by FIAN and by Simon Walker have focussed on assessing the impacts of *one set of provisions* of a trade agreement on *one human right* (the right to food, and the right to health respectively) in *one country*. Given the level of evidence required to measure actual and potential impacts, it could be difficult to assess the impacts of *all of the PACER-Plus provisions* on the realisation of *all human rights* in *all 16 Pacific Islands Forum countries*.

It is clear that past HRIAs for trade agreements provide a range of methods for assessing the human rights impacts of provisions for the liberalisation of trade in goods (in particular agriculture) and intellectual property provisions in trade agreements. These provisions have been assessed against the right to food, and the right to health, respectively. Previous HRIAs offer more limited guidance on how an HRIA might be undertaken regarding other provisions of a new trade agreement (such as new rules for trade in services or rules for investment for example).

To a large extent the impact of previous HRIAs on trade policy remain to be seen. This is partly because the use of HRIAs in regards to trade agreements is a relatively new phenomenon (the first assessment having been completed in 2006), and because most assessments have been *ex post* assessments – that is to say, they have been undertaken *after* negotiations for a new trade agreement have been completed, and have not influenced the design of new trade rules. There are no examples, to date, of governments using the results of an HRIA to design new trade rules, modify existing trade rules, or provide policy measures designed to mitigate potential and actual negative human rights impacts. This offers a unique opportunity in the context of the Pacific – for an HRIA to be completed *well before* negotiations for PACER-Plus are complete, and for the findings of an HRIA to be fed into the actual design of the final agreement.

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<sup>24</sup> See: Harrison, J. 2010. *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*. A Paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, June 23-24, 2010. Geneva

<sup>25</sup> See: Walker, S. 2009. *The Future of Human Rights Impact Assessments of Trade Agreements*. Intersentia, London.

## Which human rights issues should be assessed?

Negotiating a new regional trade agreement can involve negotiating new, legally binding, rules covering a wide range of trade – including trade in goods (both agricultural products and manufactured goods) and trade in services (such as tourism, banking services or even the provision of education and healthcare) – and ‘trade related’ areas such as investment, government procurement, competition law, and intellectual property rules. Trade agreements may also include provisions that affect labour standards and the environment. Potential human rights impacts of PACER-Plus will depend to a large degree on the scope and coverage of new trade rules that may be included in a new agreement.

In 2008 and 2009, Pacific trade officials met with their counterparts from Australia and New Zealand in a series of ‘informal meetings’ to discuss the potential scope of PACER-Plus negotiations and a possible timeline for the conclusion of negotiations. The outcome of these discussions was that ‘all issues remain on the table’ for negotiation. When Pacific Trade Ministers met with their Australian and New Zealand counterparts in October 2009, they agreed that PACER-Plus negotiating meetings between officials would take place up to three times a year (in addition to annual Pacific Islands Forum Trade Ministers’ Meetings). As yet, no timeline has been set for the *completion* of PACER-Plus negotiations. The Ministers agreed that over the first 12 months of negotiations, discussions would focus on ‘priority areas’ including investment and services, rules of origin for trade in goods, regional labour mobility, development assistance and trade facilitation. At this point then, ‘all issues are on the table’, and no timetable has been set for the completion of negotiations.

### *Measuring a full suite of human rights impacts?*

Given that PACER-Plus may yet encompass a wide range of new trade rules, with varied and overlapping effects for domestic legislature, and impacts for populations across 16 countries, assessing the human rights impacts of PACER-Plus will be a complex task. In fact, the experience of attempts to measure the human rights impacts of other trade agreements indicates that trying to measure *all* of the potential human rights impacts of PACER-Plus is likely to be an unproductive exercise. As James Harrison argues:

Attempting to measure the *overall* human rights impact of an agreement is a monumentally complex task, particularly given the potential for long, intermediate and short term impacts. Attempts to measure the overall ‘social’ impact across an entire trade agreement have tended to become superficial exercises.<sup>26</sup>

There is an inherent ‘trade-off’ that needs to be made between an HRIA that encompasses the full complexity of a new regional trade agreement, and one that is more meaningful in terms of measuring human rights impacts and making recommendations for policy changes. In an ideal world, researchers would have access to a range of case studies from other trade agreements, accurate economic modelling that indicates the impacts of a new trade agreement, well organised data on existing conditions affecting the realisation of human

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<sup>26</sup> Harrison, J. 2010. *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*. A Paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, June 23-24, 2010. Geneva

rights *before* the implementation of a trade agreement, time to undertake extensive qualitative analysis – including interviews with affected stakeholders across a range of countries, pre-defined *indicators* to measure human rights impacts etc. Unfortunately, it is likely that any HRIA for PACER-Plus will have to rely on imperfect data – drawing on economic modelling where it is available, the experience of limited case studies in similar contexts, the input of regional trade and development experts, and more limited consultations with affected communities.

In short, it is necessary to identify and select *key* human rights issues associated with PACER-Plus, that can be meaningfully measured by an HRIA. A ‘screening’ process is needed to identify key human rights issues that are to be subject to a full assessment study.<sup>27</sup>

### *Screening*

An HRIA for PACER-Plus could focus on a full range of human rights implications of a particular provision, or series of provisions, within the planned agreement. For example, a focus could be maintained on new investment provisions, attempting to measure the possible implications of those provisions for the right to health, the right to education, the right to food, the right to employment, the right to an adequate standard of living, the right to development etc.

Alternatively, an HRIA for PACER-Plus could focus on a *single* human right, and attempt to measure the impact of a provision (or series of provisions) under PACER-Plus on that human right. For example, a focus could be maintained on the right to health, and the potential impacts of provisions regarding trade in goods, trade in services, investment and trade-related intellectual property rights could all be measured against that human right.

As mentioned above, previous HRIAs for trade agreements have tended to focus on a limited range of new trade rules (rules affecting agricultural liberalisation in the FIAN studies, and intellectual property rules in the case of Simon Walker’s work on the Central American Free Trade Agreement) *and* on their impacts on *one* human right – looking most closely at the right to food and the right to health respectively. The fact that these HRIAs were of necessity (in order to establish meaningful conclusions) quite limited in their focus, indicates that an HRIA for PACER-Plus should, if it is to be effective, be selective in its focus as well.

After reviewing the literature around PACER-Plus, and consulting with a number of stakeholders in the Pacific, it is evident that PACER-Plus is likely to have impacts (both positive and negative) on the realisation of a range of human rights – including for example the right to an adequate standard of living, the right to employment, the right to food, the right to health, and the right to development.

The authors of this scoping study recommend that a focus should be made on *one* of these human rights as part of an HRIA for PACER-Plus. To select *which* human right should be a focus of an HRIA, an assessment was made based on the following criteria:

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<sup>27</sup> For a further discussion regarding the concept of ‘screening’ for a HRIA see: pp. 92. Walker, S. 2009. *The Future of Human Rights Impact Assessments of Trade Agreements*. Intersentia, London.

- *Does a focus on this human right address a key area of concern?*
- *Are previous methodologies and key indicators available?*
- *Would it be feasible to measure impacts of PACER-Plus on the realisation of this right?*
- *Do member states of the Pacific Islands Forum have a duty to protect this human right?*
- *Does a focus on this right link to other areas of concern?*
- *Would a focus on this right involve new stakeholders?*

This scoping study found overwhelmingly that a focus on the *right to health* would best meet the above criteria. The consultations, interviews and surveys undertaken as part of this scoping study also indicate that if an HRIA was to be undertaken for PACER-Plus, there is a strong preference for focussing on the potential impacts of a new agreement on the realisation of the *right to health*.

The authors of this scoping study therefore recommend that an HRIA should be undertaken to assess the potential impacts of PACER-Plus on the *right to health* in the Pacific island countries. Reasons for limiting an HRIA to one focussing on the right to health are as follows:

- *Addressing a key area of concern*  
Pacific trade ministers and health ministers have previously expressed concern about the potential for new regional trade agreements to add to, or exacerbate, existing health burdens in the Pacific island countries. For example, trade ministers commissioned an extensive study on the implications of including tobacco and alcohol in the Pacific Island Country Trade Agreement (PICTA) – including impacts on health. Pacific health ministers have also recognised the need for trade agreements (including PACER-Plus) to take account of the urgent need to reduce the non-communicable disease burden in the Pacific.<sup>28</sup> Just this year, Pacific island leaders endorsed a ‘Framework for Action on Food Security in the Pacific’ which expressed concern about an increasing reliance on imported foods, contributing to food insecurity and the incidence of non-communicable diseases (NCDs) in the Pacific. The Framework read in part:

*The increasing reliance on imported food, the decline in local food production, the failure to enact and enforce food safety regulations and standards and the shift in food preferences towards convenient, cheap, but nutritionally inferior foods are all placing Pacific populations at greater risk of non-communicable diseases (NCDs), vitamin and mineral deficiencies, malnutrition and food-borne diseases. Furthermore, a lack of food security impacts directly on lifestyle-related behaviours including tobacco and alcohol consumption, thus compounding the risks of NCDs, malnutrition and poor individual and community health.*<sup>29</sup>

<sup>28</sup> pp. 12. World Health Organisation. 2010. *Towards a food secure Pacific: Framework for Action on Food Security in the Pacific*. Food Secure Pacific (WHO). Available at: <http://www.foodsecurepacific.org>

<sup>29</sup> *Ibid.* pp. 9.



When asked what they felt were key potential human rights issues that may arise under PACER-Plus, the majority of stakeholders interviewed as part of this study mentioned the right to health as one of their key concerns.

- *Availability of previous methodology and key indicators:*

Previous HRIAs of trade agreements provide a guide for the work required to make an assessment of the potential impact of PACER-Plus on the right to health. Previous HRIAs have focussed on intellectual property rules and access to medicine, and on agricultural trade liberalisation and the right to food (a human right closely inter-related with the right to health).

The former UN Special Rapporteur on the Right to Health, Paul Hunt, has developed some key indicators for measuring the right to health in developing countries. These indicators could be used as a guide for measuring the potential impacts of PACER-Plus. The Office of the High Commissioner for Human Rights has also prepared a report setting out a series of structural, process and outcome indicators for a range of different human rights, including the right to health and the right to adequate food.<sup>30</sup>

Furthermore, a considerable amount of data exists regarding the ‘baseline situation’ in Pacific island countries (ie. data about key health issues, and the current availability of health services or other essential services that effect the realisation of the right to health in most countries). An extensive range of data sources, including sex disaggregated data, will be needed to draw any conclusions about the potential impacts of PACER-Plus.

- *Feasibility and ‘measurability’:*

Limiting an HRIA to the potential impacts of PACER-Plus on the right to health helps to ensure that such an assessment is manageable – that a researcher or team of researchers will be able to collect the information required (by combining qualitative analysis and quantitative data) to effectively measure potential human rights impacts.

- *Clear obligations of duty bearers:*

Member states of the Pacific Islands Forum have a clear duty to respect the right to health in the negotiation of new agreements. Australia and New Zealand are both party to the International Covenant on Social, Economic and Cultural Rights (ICESCR). Under article 12 of the ICSECR (as interpreted by CESCR General Comment No. 14), *State Parties are obliged to respect the right to health in other countries, to give due*

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<sup>30</sup> Hunt, P and MacNaughton, G. 2006. *Impact Assessments, Poverty and Human Rights: A case study using the right to the highest attainable standard of health*. UNESCO, New York

*attention to the right to health in international agreements and to take steps to ensure those agreements do not adversely impact on the right to health.*<sup>31</sup>

Obligations to realise the right to health in the Pacific island countries apply to national governments in the Pacific as well. Under the Convention on the Rights of the Child (CRC) for example, *State Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her access to such health care services.*<sup>32</sup> Furthermore, under the CRC, *State Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; ... (d) To ensure appropriate pre-natal and post-natal health care for mothers; ... (f) To develop preventative health care, guidance for parents and family planning education and services.* Most Pacific island states have ratified the CRC.<sup>33</sup>

Some Pacific island governments also have obligations to realise the right to health for women in particular, under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>34</sup> Finally, Papua New Guinea and the Solomon Islands have ratified the ICSECR, and also have obligations to realise the right to health under article 12 of the ICSECR.

- *Cross-cutting issues:*

An HRIA that focuses on the right to health has the advantage of focussing on cross cutting areas of concern as well. For example, an analysis of the impact of liberalisation of agriculture on food security, diet and the incidence of NCDs in the Pacific may also look at potential impacts on rural livelihoods. . The right to health also intersects with key gender issues in the region, such as violence against women, access to essential services, and access to family planning and sexual and reproductive health services.

- *Involving new stakeholders:*

Health is central to the programme work of many development organisations in the Pacific. For many of these organisations however, trade is unlikely to be a central area of consideration. By seeking to examine the impacts of new trade rules on the realisation of the right to health, a number of actors who might have otherwise not been involved in discussions about PACER-Plus (such as government ministries and

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<sup>31</sup> Committee on Economic, Social and Cultural Rights (CESCR), *General Comments No.14 (2000), The right to the highest attainable standard of health.* E/C.12/2000/4, 11 August 2000.

<sup>32</sup> Article 24.1 Convention on the Rights of the Child.

<sup>33</sup> Island states that have ratified the CRC include: Cook Islands, Fiji, Kiribati, Marshall Islands, Fed. States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

<sup>34</sup> Island states that have ratified the CEDAW include: the Cook Islands, Fiji, Kiribati, Marshall Islands, Fed. States of Micronesia, Papua New Guinea, Samoa, the Solomon Islands, Tuvalu and Vanuatu. See <http://www.unfpa.org/rights/language/right2.htm> for further details on obligations to realise the right to health under the CEDAW.

non-government organisations focussing explicitly on issues relating to public health) may be more likely to have a say. This can only help to ensure that PACER-Plus is designed as a high-quality trade and development agreement, tailored to meet the needs of people in the Pacific island countries.

Previous studies have explicitly recommended that health officials in Pacific island countries be involved in the development of new *trade* policy. A report into '*Legislative interventions to prevent and decrease obesity in the Pacific island countries*', prepared for the Western Pacific Regional Office of the World Health Organisation (WHO) in 2007 for example found that:

*Pacific countries [should] be encouraged to involve health officials in trade policy ... so that international trade obligations can be implemented in a manner consistent with public health goals.*<sup>35</sup>

That study also found that the WHO should:

*...provide technical assistance to Pacific nations, on a country-by-country basis, concerning their obligations under PICTA and PACER in relation to the removal of tariffs and domestic subsidies.*<sup>36</sup>

While the authors of this scoping study recommend that any HRIA for PACER-Plus should focus on the right to health, such an HRIA should also take into account human rights principles regarding the indivisibility of human rights, and where potential concerns regarding other human rights arise – such as the right to an adequate standard of living, the right to employment, the right to food etc. – those concerns should be included in the analysis and discussion of the HRIA.

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<sup>35</sup> Clarke, T and McKenzie A. 2007. *Legislative Interventions to prevent and decrease obesity in Pacific island countries*. Report prepared for WHO Western Pacific Regional Office. Allen and Clarke, Policy and Regulatory Specialists Limited. Suva.

<sup>36</sup> *Ibid.*

## How to proceed? – Methodology and timing

There is no standard blueprint for undertaking an HRIA for a trade agreement, and consequently, there are no standard *methodologies* for undertaking an HRIA. Nevertheless, after close analysis of the existing literature on HRIA for trade agreements, the authors of this scoping study recommend that an HRIA for PACER-Plus, focussing on the right to health, should include at least four stages. These stages are as follows:

- *Consultation - Identifying potential positive and negative human rights impacts*
- *Identifying plausible causality chains (establishing which provisions to focus on)*
- *Undertaking a series of 'sub-studies' (exploring impacts on 'rights holders')*
- *Analysis and conclusions*

Each of these stages is considered in turn below:

### *Consultation - Identifying potential positive and negative impacts on the right to health*

During the initial phase of an HRIA, widespread consultation should be undertaken, with a view to identifying *which* issues relating to health are felt to be most important to consider, and *which* provisions of PACER-Plus are likely to impact, positively and negatively, on the right to health.

The HRIA should, of itself, reflect basic human rights principles. This means taking an approach that is participatory and transparent. Consideration should be given to calling for submissions from a range of stakeholders, including the Australian and New Zealand governments, the Pacific Islands Forum Secretariat, the Office of the Chief Trade Advisor, Pacific island country trade and health ministries, trade officials, non-government organisations including representation of women's agencies, church groups, private sector organisations and trade unions.

Given women's poor representation in government and private sector organisations in the Pacific, as well as socio-economic contexts that disadvantage women, special measures should be considered to ensure that both women's and men's concerns are equally represented in submissions and during any consultation process.

Wide consultation, and allowing input from a wide range of actors early on, will help to ensure that the findings of an HRIA are acknowledged. It is especially important to engage those able to influence policy and regulatory change, and those able to influence the design of PACER-Plus itself. At the moment, many trade officials and negotiators question the relevance of human rights to debates about the design of trade agreements. Involving trade officials and representatives from the governments that are negotiating PACER-Plus will help to ensure that an HRIA does not simply 'preach to the converted' about potential negative impacts of PACER-Plus, by expressing concerns to NGOs and others who are not in a position to shape the final design of PACER-Plus. It is also important that an HRIA attempts to consult with a full range of *rights-holders* – individuals in the Pacific island countries who may be affected by the impacts of PACER-Plus.

*Identifying plausible causality chains (establishing which provisions to focus on)*

An HRIA that focuses on PACER-Plus and the right to health must attempt to measure the likely impacts of *provisions* of PACER-Plus on Pacific island people and communities. Such an HRIA might focus on just one or two provisions (such as proposed rules on intellectual property rights) or on all provisions of PACER-Plus.

The initial consultation phase will help to decide *which* potential provisions of PACER-Plus an HRIA should focus on, but a key issue is the need to effectively establish *causality*. It is very important that an attempt is made to identify potential human rights impacts as a *direct or indirect outcome* of particular provisions of PACER-Plus. This could prove to be very complex, but it is nevertheless important that particular provisions of PACER-Plus (such as provisions allowing the liberalisation of trade in tobacco) be effectively linked to potential impacts (such as increased rates of smoking) if an assessment is to be made of those provisions. To determine causality, an HRIA should also realistically consider *alternative* explanations (such as increases in personal income, or more readily accessible tobacco products) as potential causes of human rights impacts. Regardless of whether the human rights impacts of particular provisions are determined to be negative, positive, a combination, or negligible, the findings should be widely publicised.

The potential health impacts of PACER-Plus, across a number of different areas, are already a concern for some public health advocates in the region. These concerns provide a ‘guide’ for which provisions and potential trade rules of PACER-Plus are likely to *cause* impacts on the realisation of the right to health in the Pacific. For example, the Public Health Association of Australia (PHAA), along with the People’s Health Movement (Australia) produced a series of factsheets in 2010 that detailed potential implications of PACER-Plus for public health in the Pacific island countries. These factsheets identified key areas of concern – including a potential for PACER-Plus to contribute the prevalence of lifestyle diseases in the Pacific by making high-fat content foods, alcohol and tobacco more available<sup>37</sup>; a potential to undermine access to some patented medicines through new intellectual property rules<sup>38</sup>; and a potential to undermine access to health services if new rules allow private service providers to direct health resources towards wealthier ‘clients’ and attract the lion’s share of available health personnel in the island countries.<sup>39</sup> The factsheets also detail concern that PACER-Plus may include labour mobility provisions that affect the movement of health workers – a particularly acute concern for the island countries given that they already face very high levels of emigration of nurses and doctors to Australia and New Zealand.<sup>40</sup>

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<sup>37</sup> Public Health Association of Australia and the Peoples’ Health Movement (Australia). 2010. *Tackling lifestyle diseases? Potential implications of PACER-Plus for alcohol, tobacco and high-fat content foods in the Pacific Island Countries*. PHAA, Melbourne.

<sup>38</sup> Public Health Association of Australia and the Peoples’ Health Movement (Australia). 2010. *Improving access to medicine? The implications of including intellectual property rules under PACER-Plus*. PHAA, Melbourne.

<sup>39</sup> Public Health Association of Australia and the Peoples’ Health Movement (Australia). 2010. *Health services for all? Potential implications of PACER-Plus for access to health services in the Pacific island countries*. PHAA, Melbourne.

<sup>40</sup> Public Health Association of Australia and the Peoples’ Health Movement (Australia). 2010. *Sending health workers abroad? Potential implications of PACER-Plus for nursing and healthcare in the Pacific island countries*. PHAA, Melbourne.

The World Health Organisation has also undertaken a number of studies that have linked the high incidence of non-communicable diseases in the Pacific (like diabetes and heart disease) with the increased availability and decreased price of imported foods that are high in salt, fat and sugar – such as low quality meats and processed foods – and their gradual replacement of traditional foods like taro and fish.<sup>41</sup>

Written submissions regarding the potential health implications of PACER-Plus (by public health NGOs) have also been made to both the Australian and New Zealand governments. These submissions have identified specific areas of concern under PACER-Plus – such as the inclusion of provisions that would liberalise trade in alcohol and tobacco.<sup>42</sup>

After an initial examination of the existing literature, and consulting with a number of stakeholders in the Pacific, the authors of this scoping study found that the following potential provisions and trade rules of PACER-Plus are most likely to impact (positively and negatively) on the right to health:

- *Liberalisation of trade in goods (focussing on food, alcohol, tobacco and agricultural products)*
- *Liberalisation of trade in services (including health services and services essential for the right to health, such as water and sanitation services)*
- *Labour mobility (including rules enabling health workers and nurses to enter Australia and New Zealand to work)*
- *Intellectual property rules (focussing on rules pertaining to the use of patented medicines)*

During the initial phase of an HRIA, a decision might be made to limit the scope of the study to just one or two provisions, in order to *more fully* investigate the potential impacts of new trade rules. A decision will also need to be made as to which new trade rules are *most likely* to be included in the final PACER-Plus agreement (unless researchers are granted access to the negotiating texts, a scenario that is unlikely, they will have to make educated guesses on what will be included a final agreement). It may also be useful to use other negotiating texts used by Australia/New Zealand as a guide (such as the Australia/ASEAN/New Zealand FTA).

See Table 1 below for a short guide to the scope of an HRIA for PACER-Plus that focuses on the right to health.

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<sup>41</sup> See for example: Evans M, Sinclair R, Fusimalohi C, & Liava'a V. 2001. 'Globalisation, diet, and health: an example from Tonga'. *Bulletin of the World Health Organisation*: 79(9): 856-862. Available at: <http://www.who.int/docstore/bulletin/pdf/2001/issue9/bu1327.pdf>

<sup>42</sup> See for example: The New Zealand Drug Foundation. 2009. *Submission to the Ministry of Foreign Affairs and Trade (New Zealand) regarding the PACER-Plus negotiations*. Available at: <http://www.nzdf.org.nz/submission/pacific-agreement-on-closer-economic-relations-pacer-plus>

**Table 1: Potential scope for an HRIA for PACER Plus (with a focus on the right to health)**

HR covenants and legal protections	Key provisions of PACER-Plus	Key <i>potential</i> impacts of PACER-Plus provisions
<p>Article 12 of the ICSECR (and associated interpretations, including the extraterritorial obligations of states)</p> <p>UDHR Article 25</p> <p>CRC Articles 16, 24</p> <p>CEDAW Article 12</p>	<p>Trade in goods agreement (including tariff reductions for agricultural and non-agricultural products, rules affecting regulation of imports)</p>	<p><b>Positive:</b> Cheaper imports contribute to human health (such as cheaper foods). Cheaper food imports allowing greater expenditure on health items.</p> <p><b>Negative:</b> Competition from Australian and NZ produce undermining local food production (hence local livelihoods and food security); subsequent impacts for women’s status, role, and livelihoods as main food producers; Availability of cheaper, nutritionally inferior, imports adding to NCD burden; Poor services through govt. revenue losses.</p>
	<p>Trade in goods (focussing on the liberalisation of alcohol/tobacco imports);</p>	<p><b>Negative:</b> Increase in availability of tobacco and alcohol (cheaper); More intense advertising; Increases in smoking and increase in alcohol abuse, with associated health implications (including domestic violence)</p>
	<p>Trade in services agreement (including health and health-related services like water)</p>	<p><b>Positive:</b> Improved service delivery through competition.</p> <p><b>Negative:</b> Two-tiered provision of health services with gender implications (including women’s disproportionate access to health services, and increase in home based care giving responsibilities); Price increases for essential services (health and water);</p>
	<p>Labour mobility (which may be included as part of Mode 4 Trade-in-Services discussions, or as a ‘side letter’ attached to the agreement).</p>	<p><b>Positives:</b> Increase in remittances contributing to community incomes. Skill-sharing and training for returning workers.</p> <p><b>Negatives:</b> Potential exacerbation of existing ‘drain’ of Pacific health workers to Australia and New Zealand, with potential gendered impacts on availability of neo-natal and sexual health specialists.</p>
	<p>Intellectual property rules (potentially TRIPS-Plus)</p>	<p><b>Positive:</b> Potential for protection of ‘traditional knowledge’ in the Pacific.</p> <p><b>Negative:</b> Decrease in availability of some medicines (patented medicines more expensive). Loss of rights to use/create traditional medicines, impacting particularly on women as main producers.</p>

*Undertaking a series of ‘sub-studies’ (exploring impacts on ‘rights holders’)*

When it has been decided *which* key provisions of PACER-Plus should be focussed on, an HRIA should attempt to gather evidence about whether that provision will impact positively or negatively on the right to health in the Pacific island countries.

To gather this evidence, it is highly recommended (given the diversity of contexts in the Pacific island countries) that an HRIA should include a series of ‘sub studies’ or *case studies* that explore the potential impacts of provisions of PACER-Plus on the right to health in specific communities. It will be important to select case studies based on differing potential effects, and the ability to generalise findings to other contexts in the Pacific. Case studies

should focus on communities that share common characteristics with many other communities in the region (examples might be; a rural agricultural community in a Melanesian country, and an urban poor community in a Micronesian country).

These sub-studies could explore *projected estimates* – assessing the potential impacts of new trade rules under PACER-Plus – or the impact of a *previous* policy change (using the experience of previous policy changes to draw conclusions about possible future impacts under PACER-Plus). The authors of this scoping study note that research into the effects of recent trade liberalisation in Tonga could be especially useful – given that Tonga radically liberalised its tariff structure in 2007 and 2008 in line with commitments undertaken on joining the WTO, and introduced a consumption tax in an attempt to offset government revenue losses.

Gathering evidence about the positive or negative impact of a particular provision of PACER-Plus will require a combination of quantitative and qualitative research methods. It is highly recommended that any team undertaking an HRIA should include a researcher with extensive experience in participatory research. If the human rights impacts of particular provisions are to be revealed, then researchers should combine quantitative economic and background data with participatory qualitative approaches conducted at the level of the household/ community. It may also be necessary to undertake work in sex and age disaggregated groups, to determine the varied potential impacts of new trade provisions.

If assessing the potential impacts of liberalisation in agricultural products for example, it would be important to select appropriate quantitative data (such as data regarding recent goods trade liberalisation in the Pacific – as has happened on a unilateral basis in Samoa, Papua New Guinea and Vanuatu within the past decade and on a multilateral basis as part of Tonga's WTO accession, and existing studies regarding agricultural liberalisation in other contexts). Researchers could also consider economic modelling to assess the potential future impact of PACER-Plus provisions affecting trade in agriculture. This *quantitative* data should then be combined with *qualitative* research, undertaken through sub-studies at the local level which attempt to establish a clear narrative about women's and men's lived experiences. This qualitative research should attempt to determine how agricultural liberalisation will affect communities, gender groups, and individuals – who are the ultimate 'rights holders'. This qualitative research may include the use of focus groups, community-based interviews, and interviews with experts on agricultural policy and/or human rights.

#### *Analysis and conclusions*

In the final phase of an HRIA, an attempt should be made to draw conclusions from the 'sub-studies' about the potential impact of PACER-Plus rules on the right to health in Pacific communities. Evidence of potential positive and negative impacts should be compiled and an assessment of overall impacts made. Ultimately, these findings should inform the formulation of *policy oriented* conclusions and recommendations. If an HRIA is undertaken *before* the negotiations are completed the results of the assessment should feed into the negotiation process. Therefore, it is very important that every effort is made to establish findings that can be used by governments involved in the PACER-Plus negotiations.



Both Harrison and Walker argue that previous assessments of trade agreements have often provided recommendations that were insufficiently precise, or 'did not state who needed to take action in order to ensure that the change occurred'.<sup>43</sup> Harrison finds that there are five types of recommendations that can be reached in an HRIA for a new trade agreement. These 'possible findings', provide a template that researchers undertaking an HRIA for PACER-Plus should consider:

- 1.) Positive or at least no negative impact found (no change required);
- 2.) Change required to the trade measures in question (e.g. bring in safeguard measures, exception clauses, phase-in periods etc.);
- 3.) Additional measures required to mitigate the impact (e.g. funds to assist in transition to other types of production, retraining of workers, increased tariffs etc.);
- 4.) Negative impacts found, but no action taken; and
- 5.) Abandon the measures in question or the whole agreement

An HRIA that measures the impact of provisions of PACER-Plus on the right to health, should establish clear recommendations in relation to *each of the provisions (or series of provisions)* that have been analysed during the assessment. It should also be clear *who* should take steps to carry out the recommendations. If for example, it is recommended that Pacific trade negotiators exclude certain services from negotiations with Australia and New Zealand, or only list services for liberalisation under PACER-Plus if certain measures are met first, then recommendations should explicitly call upon Pacific island country negotiators to take those recommendations into account during the PACER-Plus negotiations.

As with undertaking the research for an HRIA, establishing recommendations should be a process that enables the input of a wide range of stakeholders. One option would be to circulate a draft report that would allow people to make suggestions regarding proposed recommendations. This may help to ensure that recommendations effectively 'feed in' to the PACER-Plus negotiating process itself.

### *Timing*

An HRIA can be undertaken in regards to a trade agreement before negotiations for a new agreement are completed (*ex ante*) or after a trade agreement has come into force (*ex post*). Among previous HRIAs, the assessments undertaken by FIAN have been both *ex ante* and *ex post*, while the HRIA undertaken by Simon Walker in relation to the intellectual property provisions of the Central American Free Trade Agreement (CAFTA) was an *ex post* assessment.

Perhaps unsurprisingly, the *ex post* assessments have tended to be more robust in their methodology and in their findings. It is less difficult to assess the impacts of new rules *that have come into force* than in it is to assess potential future impacts of trade agreements. Of course, *ex post* assessments also have the advantages of having access to the final text of a

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<sup>43</sup> See pp. 99. Walker, S. 2009. *The Future of Human Rights Impact Assessments of Trade Agreements*. Intersentia, London., and; pp. 13. Harrison, J. 2010. *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*. A Paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, June 23-24, 2010. Geneva

trade agreement. The secrecy that surrounds the negotiations of most trade agreements means that any *ex ante* assessment will have to investigate the *likely* content and form of a final agreement – taking into account details that are made public, and any leaks of negotiating documents.

Nevertheless, if an HRIA is to have any impact on the design of PACER-Plus – to mitigate potential negative human rights impacts – it is important that an attempt is made to complete an HRIA *well before* the negotiations are to be completed. As discussed above, no timeline has yet been set for the completion PACER-Plus negotiations, but they are likely to take at least three years.

The authors of this study recommend that an HRIA be undertaken in relation to PACER-Plus as soon as is practicable and that an HRIA should have two components – both *ex ante* and *ex post*. At least six months will need to be allocated for the completion an *ex ante* assessment focussing on the right to health. Such an assessment should be complemented (as much as is practicable) by an assessment after negotiations have been completed *but before an agreement is ratified*. This would allow a final assessment, based on the final design of PACER-Plus, before governments pass the agreement into law.

Finally, an HRIA for PACER-Plus should be complemented by monitoring an assessment *after the agreement is implemented*. This may include a subsequent *ex post* HRIA to be undertaken after an agreement has come into force (perhaps 3-5 years after implementation), with a view to re-assessing the impacts of PACER-Plus on the right to health.

## Who should undertake an assessment?

The authors of this study have attempted to identify which organisation/s or individuals might be best placed to undertake an HRIA for PACER-Plus – by reviewing the literature concerning the expertise required to undertake an HRIA for a trade agreement, analysing which organisations have previously undertaken and/or funded HRIAs in other contexts, looking closely at key regional organisations in the Pacific island countries that are involved in the PACER-Plus negotiations, and by asking a range of stakeholders *who* they felt might be best placed to undertake an HRIA.

Stakeholders consulted as part of this scoping study identified a wide range of possibilities for *who* they felt might be best placed to undertake an HRIA. Responses included:

- asking the governments of all Pacific Island Forum countries to fund an HRIA that is tendered out to independent consultants,
- asking for a UN agency to undertake an HRIA,
- asking independent NGOs to undertake an impact assessment, and;
- asking a regional agency (such as the Pacific Islands Forum Secretariat or the Secretariat of South Pacific Community) to undertake an HRIA

This range of responses highlights that there are a wide range of organisations that could potentially fund, sponsor, or undertake an HRIA for PACER-Plus. All respondents felt that consideration must be given to the *independence and credibility* of the party who could feasibly undertake an HRIA. Any office that administers an HRIA must have credibility among a wide-range of stakeholders, who must in turn feel that the impact assessment produced will be unbiased and to a high standard. This is especially important given the potentially contentious issues at stake.

### *Engaging with regional organisations*

In order for Pacific Island Forum country representatives to fully understand the potential impacts of PACER-Plus, each country would theoretically need to have its own HRIA. However it is far more likely (and feasible in light of funding requirements) that an HRIA would be undertaken on a regional basis – using case studies to identify human rights impacts that may be important at the national level. Regional technical and policy bodies in the Pacific play an especially important role given that capacity deficits often exist at the national level (in small, and very small, island states) as well.

The authors of this scoping study reviewed the role of key regional organisations (and interviewed individuals working in those organisations), including the Pacific Islands Forum Secretariat, the Secretariat of the South Pacific Community (SPC), the newly-established Office of the Chief Trade Advisor (OCTA), the Regional Rights Resource Team (RRRT) – based at the SPC, and a number UN agencies; including the United Nations Development Programme – Pacific Centre, the United Nations Children’s Programme (UNICEF), and the United Nations Office of the High Commissioner for Human Rights (UNOHCHR). A number of non-government organisations that have been prominent in discussions about trade policy in the Pacific in recent years – including the Pacific Network on Globalisation, the

Pacific Institute of Public Policy, Oxfam Australia and Oxfam New Zealand – were also consulted.

After reviewing these organisations, it is again clear that a number of organisations *could* potentially undertake, or be involved in, an HRIA for PACER-Plus.

#### *Sponsoring an HRIA*

What is clear is that any researchers undertaking an HRIA for PACER-Plus must be fully independent, and widely held to be a credible research team. Care should be taken that a research team is independent from the negotiating parties themselves (the Australian, New Zealand or Pacific island governments). Funding from any of the Pacific Island Forum governments would be welcome *but* the Terms of Reference for the HRIA should not be established by donor governments, and the research team undertaking an HRIA must be given full independence to complete its research, establish conclusions and make recommendations regarding policy changes.

In light of the need for an *independent and credible* HRIA for PACER-Plus, the authors of this scoping study recommend that the United Nations Office of the High Commissioner for Human Rights (Representative for the Pacific), should consider *sponsoring* an HRIA for PACER-Plus, and seeking funding from a range of sources. The HRIA could be tendered out to a team of researchers, but the UNOHCHR should establish a clear Terms of Reference for an assessment.

The findings of this scoping study can be used as a basis for sourcing funding for a full HRIA for PACER-Plus. The findings of this scoping study will be presented to a range of NGO and government stakeholders at meetings to be held in Sydney, Melbourne and Suva between October and December 2010.

#### *A team of researchers with wide expertise*

Another clear finding of this scoping study is that undertaking an effective HRIA for PACER-Plus would require a mix of expertise that is more likely to be found in a team of researchers, rather than in one individual. Harrison argues that previous impact assessments for trade agreements that have been undertaken by economists have tended to marginalize the *social* impacts of trade agreements. He argues that conversely, if previous assessments did not include sufficient economic expertise they tended to underplay future consequences of a trade agreement and simplify (or ignore) the causal relationship between the provisions of an agreement and its impacts<sup>44</sup>. An HRIA should therefore reflect a mixture of economic expertise and familiarity with broader social concerns about trade policy, and a familiarity with existing human rights frameworks. The need to undertake quantitative and qualitative research also necessitates that an HRIA should be undertaken by a research *team*. As Harrison writes:

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<sup>44</sup> See: pp. 14. Harrison, J. 2010. *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*. A Paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, June 23-24, 2010. Geneva

The creation of appropriate methodologies will require interdisciplinary teams of persons with complementary knowledge and skills including human rights and trade law and economics expertise coupled with social science expertise – particularly in participatory methodologies.<sup>45</sup>

In addition to the mixture of expertise Harrison identifies, any HRIA for PACER-Plus should include individuals with a keen understanding of gender issues, trade policy making and development issues *in the Pacific island countries*. Given the relatively small size of most Pacific island countries, and concomitant capacity constraints, there may be a ‘smaller pool’ of suitable researchers to choose from in the Pacific. However, a keen understanding of the Pacific island countries (including where possible, a professional appreciation for the unique and vulnerable nature of Pacific economies) is vital if an HRIA is to succeed. It should be noted that individuals may possess a number of areas of expertise required for an effective HRIA for PACER-Plus, so a research team needn’t be excessively large.

*‘Feed in’ to the negotiations is desirable*

Finally, if the findings of an HRIA are to influence the design of the PACER-Plus agreement itself, or contribute to the establishment of external measures that aim to mitigate negative human rights impacts or enhance positive ones, then linkages should be made with the OCTA and trade negotiators on all sides (at the national level in Australia, New Zealand and the Pacific island countries) during the research phase of an HRIA. Formal linkages with the regional technical agency SPC, may also be desirable in this regard.

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<sup>45</sup> *Ibid.*

## Recommendations

- A Human Rights Impact Assessment (HRIA) for PACER-Plus should focus on measuring *how* the legal provisions of a proposed new trade agreement are likely to impact on the realisation of clearly defined human rights (both positively and negatively) in member states of the Pacific Islands Forum.
- An HRIA should not attempt to measure *all* of the potential human rights impacts of *all* of the provisions of PACER-Plus in *all* of the member states of the Pacific Islands Forum. A ‘screening’ process is necessary. To be effective, an HRIA should focus on key provisions and/or limit research to issues concerning the realisation of a specific human right.
- There are a number of advantages to restricting an HRIA for PACER-Plus to a focus on the realisation of the *right to health*. Such a focus would address a key area of concern identified by regional stakeholders; previous studies offer methodologies and key indicators for measuring the impact of a trade agreement on the right to health; and member states of the Pacific Islands Forum have clear international obligations to realise, protect and fulfil the right to the highest attainable standard of health.
- Potential *provisions* of PACER-Plus that could affect the realisation of the right to health, and could be assessed as part of an HRIA, include new rules affecting:
  - Liberalisation of trade in goods (focussing on food and agricultural products)
  - Liberalisation of trade in goods (focussing on alcohol and tobacco)
  - Liberalisation of trade in services (focussing on essential services)
  - Labour mobility
  - Intellectual property rights
- An HRIA should be undertaken in relation to PACER-Plus as soon as is practicable and should have two components – both *ex ante* and *ex post*. At least six months will need to be allocated for the completion an *ex ante* assessment focussing on the right to health. Such an assessment should be complemented (as much as practicable) by a secondary assessment after negotiations have been completed *but before an agreement is ratified*. This would allow a final assessment, based on the final design of PACER-Plus, before governments pass the agreement into law.
- An HRIA for PACER-Plus should be complemented by ongoing monitoring *after the agreement is implemented*. This may include a subsequent *ex post* HRIA to be undertaken after an agreement has come into force (perhaps 3-5 years after implementation), with a view to re-assessing the impacts of PACER-Plus on the right to health.
- The United Nations Office of the High Commissioner for Human Rights (Representative for the Pacific), should consider *sponsoring* an HRIA for PACER-Plus,

and seeking funding from a range of sources. The HRIA could be tendered out to a team of researchers, but the UNOHCHR should establish a clear Terms of Reference for an assessment.

- An HRIA should be undertaken by an *independent and credible* team of researchers with multidisciplinary expertise. Such a team must include researchers with complementary skills in a range of areas, including human rights and trade law, economic expertise and social science expertise – particularly in participatory research methodologies.
- The findings of this scoping study should be used as a platform for sourcing funding for a full HRIA for PACER-Plus.

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## Annex I: Project researchers

This scoping study was undertaken by a team of researchers. See below for detail about each of the researchers.

### **David Legge**

David Legge is an associate professor in the School of Public Health at La Trobe University where he teaches international health policy. His research interests include health policy in China, globalisation and health and global health governance. David is active in the People's Health Movement, a global network of advocacy and community-based health organisations. In this capacity he is the global coordinator of the International People's Health University which runs a program of short courses for health activists in developing countries.

### **Claire Rowland**

Claire Rowland is a participatory research consultant and is currently employed on a 2 year regional research program that aims to develop mechanisms to measure the gender equality impacts of economic growth. Prior to this role Claire worked as the Fiji Program Manager for the International Women's Development Agency. Within IWDA, Claire was involved as a co-investigator on 2 ADRA-funded research projects with the Institute for Sustainable Futures (University of Technology, Sydney), the University of Western Sydney, Fiji National University and Macquarie University, and as a resource person for an ARC funded research project with the Australian National University. Claire has a Masters Degree in International Development and 8 years experience working in the sector, 3 of which she was located in Timor-Leste.

### **Wesley Morgan**

Wesley is currently undertaking a Masters by Research at Melbourne University, exploring options for a 'pro-development' trade agreement between members of the Pacific Islands Forum. He lived in Suva, Fiji – and worked on Pacific trade policy with the Pacific Network on Globalisation – from 2007 to 2009. Wesley has recently taken up a part-time position with Oxfam Australia as 'Pacific Trade Advocacy Coordinator'.

### **Roshni Sami**

An independent consultant, Roshni is the previous Coordinator of the Suva-based Pacific Network on Globalisation (PANG) from 2006 to 2008. Roshni completed a Masters degree in Development Studies with first class honours from the University of Auckland in 2006.

## Annex II: Interviews conducted

A number of semi-formal interviews and email discussions were conducted with experts on trade and human rights as part of the completion of this scoping study. See below for a list of key individuals contacted.

- Matilda Bogner, United Nations Office of the High Commissioner for Human Rights, Representative for the Pacific, Fiji Islands.
- Chakriya Bowman, Economic Governance Advisor, Pacific Islands Forum Secretariat
- Nick Braxton, Oxfam New Zealand. Auckland
- Derek Brien, Pacific Institute of Public Policy, Vanuatu
- Mereia Carling, Social Policy Specialist, UNICEF
- James Gathi, Consultant, UNOHCHR
- James Harrison, Associate Professor, University of Warwick, United Kingdom
- Gina Houg Lee, Senior Trainer, Regional Rights Resource Team (RRRT)
- Ahmed Moustafa, MDG Achievement and Poverty Reduction, UNDP Pacific Centre
- Seema Naidu, Trainer, RRRT
- Vijay Naidu, School of Government, Development and International Affairs, University of the South Pacific
- Chris Noonan, Office of the Chief Trade Advisor, Vanuatu
- Armin Paasch. FoodFirst Information and Action Network (FIAN), Germany.
- Deborah Panckhurst, Regional Trade Adviser, Pacific and acting Head of Polynesia/Micronesia Unit Ministry of Foreign Affairs and Trade NZ
- Sanya Reid-Smith, Third World Network, Geneva
- Charmaine Rodrigues, Democratic Governance, UNDP Pacific Centre
- Adam Wolfenden, Pacific Network on Globalisation (PANG), Fiji Islands.

## Annex III: Questionnaire

This questionnaire was completed by a number of individuals – both stakeholders within the Pacific, and experts on HRIAs – as part of this scoping study. This questionnaire was also used as a basis for semi-formal interviews.

### ***Scoping study for a Human Rights Impact Assessment for PACER-Plus Questionnaire***

#### ***Background:***

At the 2009 Pacific Islands Forum Leaders' Meeting, held in Cairns, Australia, Pacific leaders agreed to begin negotiations for a regional trade agreement between the Pacific island countries and Australia and New Zealand (PACER-Plus). The PACER-Plus negotiations are likely to result in a binding international agreement that will reshape the economic relationship between member states of the Pacific Islands Forum for decades to come. Any new agreement will replace the existing South Pacific Trade and Economic Cooperation Agreement (SPARTECA).

In recent years, there have been increasing calls for Human Rights Impact Assessments to measure the impact of new trade rules on the realisation of human rights, with a Human rights and trade in the Pacific: A scoping study on designing a Human Rights Impact Assessment for PACER-Plus

focus especially on the clearly defined legal obligations of governments to realise, protect and fulfil universal human rights within their country and in trade agreements affecting people in other countries.

The Australian Council for International Development (ACFID) has provided funding for an initial ‘scoping study’ to identify the appropriateness and potential structure of a gendered Human Rights Impact Assessment (HRIA) for the PACER-Plus trade agreement. This scoping study is being undertaken by a team of researchers (David Legge, Claire Rowland, Wesley Morgan and Roshni Sami). The questions below are intended for key stakeholders in relation to PACER-Plus in Australia, New Zealand and the Pacific island countries, and will inform the findings of this initial ‘scoping study’.

### **Questions for research participants:**

**Please provide your details:**

<b>Name</b>	
<b>Title, Organisation</b>	
<b>Email</b>	
<b>Phone</b>	

#### **Do you know what PACER-Plus is?**

- Have you heard of negotiations for a new trade agreement (PACER-Plus)? Do you know what some of the issues involved are? Do you have any concerns about PACER-Plus?

#### **What do you think are key human rights issues in PACER-Plus?**

- Do you feel that a new regional trade agreement (PACER-Plus) will have implications for human rights in the Pacific island countries? If so, which human rights do you think are most likely to be affected?

- Do you think PACER-Plus will have positive or negative impacts on human rights (or both)?

- Trade agreements tend to have far-reaching impacts in a wide range of areas. A Human Rights Impact Assessment will seek to measure some of the effects of PACER-Plus in relation to the realisation of human rights. It would be difficult to measure *all* of the effects of PACER-Plus. If you could focus on measuring the impacts of PACER-Plus on one or two human rights, which would you choose, and why?

#### **Which provisions of PACER-Plus do you think are likely to impact on human rights?**

- PACER-Plus is likely to contain many new, legally binding, rules covering a wide range of trade – including trade in goods (both agricultural products and manufactured goods) and trade in services (such as tourism, banking services or even the provision of education and healthcare) – and ‘trade related’ areas such as investment, government procurement, competition law, and intellectual property rules. Which of these new trade rules do you think would be most likely to impact on human rights and why? (Please select at least two areas).

#### **Who should undertake a Human Rights Impact Assessment?**

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- Which agency, or agencies, do you believe should undertake a Human Rights Impact Assessment for PACER-Plus? (For example, do you think it should be a Non-Government Organisation?, the Pacific Islands Forum Secretariat? National governments? The UN? Other?)

- Who do you think should be consulted during a Human Rights Impact Assessment? How can we make sure everyone who wants to, has a chance for input into an assessment?

- Who do you believe should fund a Human Rights Impact Assessment?

***When do you think a Human Rights Impact Assessment should be undertaken for PACER-Plus?***

- Human rights impact assessments can be undertaken before negotiations for a new trade agreement are completed (these assessments are called *ex ante* assessments), or after a new trade agreement is implemented (*ex post*). When do you feel a Human Rights Impact Assessment for PACER-Plus should be completed, and why?

***How should the results of a Human Rights Impact Assessment be incorporated into PACER-Plus?***

- When research into the human rights impact of PACER-Plus is completed, how do you think these findings should be used? (For example, do you think the findings should be used to change the rules included in PACER-Plus?)

***Do you have any other comments, suggestions or questions?***

- Please feel free to add any comments or queries you might have. All suggestions are most welcome.