

# ***Regulation of International Business Transactions***

## ***Regional Institutions: Developments in the South Pacific***

By:

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### *Introduction*

The South Pacific is not an area of the world with which people are as familiar as, say Europe or North America. Sometimes it is referred to as *Oceania*<sup>1</sup>; sometimes it is included in the term 'Asia-Pacific' although more often than not, this expression actually only refers to the Pacific Rim States, ie. those States surrounding the Pacific Ocean.<sup>2</sup> So, it is best to begin with a definition. In using the term 'South Pacific' I am referring to those States located in the southern part of the Pacific Ocean but not necessarily all south of the Equator. Specifically, I am referring to the South Pacific Island States of: The Cook Islands; East Timor (*Timor L'Este*); The Federated State of Micronesia; The Republic of Fiji; Kiribati; The Marshall Islands; Nauru; Niue; Palau; Papua New Guinea; Samoa; The Solomon Islands; Tonga; Tuvalu; Vanuatu;

These are not the only islands in this part of the world. Other islands are: American Samoa<sup>3</sup>; Easter Island<sup>4</sup>; French Polynesia<sup>5</sup>; Guam<sup>6</sup>; Hawai'i<sup>7</sup>; New Caledonia<sup>8</sup>; Norfolk Island<sup>9</sup>; Northern Marianas<sup>10</sup>; Pitcairn<sup>11</sup>; Tokelau<sup>12</sup>; Torres Strait Islands<sup>13</sup>; Wallis and Fortuna<sup>14</sup>; West Papua<sup>15</sup>; and, of course, Australia (the world's largest island and smallest continent) and New Zealand.

The fifteen states to which I referred earlier are, however, sovereign states. It is these states to which I refer in using the term 'Pacific Island States'. Each of these States can trace a historical relationship over centuries with Member States of the European Union. Since the 1960s, collectively they have had a relationship with the European Communities that has been governed by a series of conventions. The most recent iteration of this convention arrangement is the

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<sup>1</sup> "In geographical and anthropological terms, as well as for many others, Oceania refers to all of Melanesia, Micronesia, Polynesia and Australia. It is also used in this sense by most United Nations and other international agencies, and by a number of governments in their international relations, which deal with Oceania as a region, in the same way as they deal with Latin America, the Middle East or Sub-Saharan Africa as regions. When used in this 'international relations' sense, it usually includes New Zealand and often Australia, but it does not include West Papua, Hawai'i or Easter Island, or any other island which is fully incorporated into a metropolitan power. Some people reserve the term for the tropical Pacific Islands. Others use it to refer only to independent nations, or only to islands settled by indigenous people, or with other connotations.", Crocombe, R., *The South Pacific*. 2001, Suva, Fiji: Institute of Pacific Studies, 19.

<sup>2</sup> The term 'Pacific Basin' "includes all countries on the Rim of the Pacific Ocean and the Island states and territories within the ocean." Crocombe, n.1 above.

<sup>3</sup> Territory of the United States of America

<sup>4</sup> Province of Chile

<sup>5</sup> External Territory of France

<sup>6</sup> Self-governing territory of the United States of America

<sup>7</sup> 50<sup>th</sup> state of the United States of America

<sup>8</sup> Self-governing territory of France

<sup>9</sup> External territory of Australia

<sup>10</sup> Self-governing Commonwealth in union with the United States of America

<sup>11</sup> Dependent territory of the United Kingdom

<sup>12</sup> Self-governing territory administered by New Zealand

<sup>13</sup> Part of the Australian state of Queensland

<sup>14</sup> Overseas territory of France

<sup>15</sup> Province of Indonesia

Cotonou Agreement.<sup>16</sup> The earlier treaties, the Yaoundé Conventions of 1963 and 1969, followed by successive Lomé Conventions (I – IV-*bis*, concluded between 1975 and 1995) framed the cooperation and development assistance provided by the European Communities to their partner developing States.

*Lomé remained the most far-reaching, elaborate, and complex North-South contractual agreement among its contemporaries. During most of [it's] 25-year history, it was widely held as the undisputed flagship of the EU's development initiative<sup>17</sup>...*

These States, together with Australia and New Zealand, are also members of the Pacific Islands Forum. This Forum, originally established in 1971 under the name South Pacific Forum<sup>18</sup> 'is the region's premier political and economic policy organisation.'<sup>19</sup> The Forum has its Secretariat in Suva, Fiji. The ACP States collectively have a Secretariat in Brussels

The purpose of this paper is to consider the institutional framework within which international business transactions might be regulated in these States. Binding on these States is a set of treaties that seek to assist the development and integration of these Pacific Island States regionally and internationally. The novel aspect of this and the reason for making it the focus of this paper is the explicit identification of the private sector as one of the actors in working towards these aims (of development and integration). In the treaty between the EU and the Pacific Island States, the role of the private sector in this regard is highlighted. The significance of the private sector in this region had already been recognised in 1997. At that time, the Forum Economic Ministers held their first meeting and recognised 'that Private Sector Development...is central to ensuring sustained economic growth...'<sup>20</sup> In 2004, the Trade and Investment Division of the Pacific Islands Forum Secretariat drew up the *Private Sector Development (PSD) Strategy Document*. This document sets out 'a vision for private sector development in the Forum Island Countries.' One of the intriguing things about this document is that it seems to be a blueprint for creating a private sector 'from scratch'. This does not appear to be an end in itself however but rather a means of improving development and assisting these States to integrate economically at least, at a regional and an international level. Before discussing these treaties, it is useful to consider the term 'regulation'.

### ***Defining 'Regulation'***

In a sense, what is focussed on in this discussion depends on how the term 'regulation' is defined. At one level, for example, one could say that, in these States, international business transactions are regulated generally, much as they are in the rest of the world: by agreement between the parties and litigation or arbitration if the agreement breaks down. At a higher level, however, such transactions will increasingly be circumscribed by treaty provisions, particularly if they involve the provision of goods or services.

Regulation is not a settled concept. The term has no single, agreed meaning, 'but rather a variety of definitions in usage which are not reducible to some platonic essence or single concept.'<sup>21</sup> Indeed, most writing that deals with this area begins with a disclaimer or qualification that the

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<sup>16</sup> Partnership Agreement between the members of the African, Caribbean and Pacific Group of States (ACP) of the one part, and the European Community and its Member States of the other part, signed in Cotonou on 23 June, 2000

<sup>17</sup> Gerrit Faber Olufemi Babarinde, (ed) *The European Union and the Developing Countries: The Cotonou Agreement* (2005), 4.

<sup>18</sup> The Forum changed its name in October, 2000.

<sup>19</sup> "Key Facts about the Pacific Islands Forum and its Secretariat" (2006) 1 *Niu Pasifika*, 3.

<sup>20</sup> Trade and Investment Division, Pacific Islands Forum Secretariat, *A Vision for Private Sector Development in the Forum Island Countries: Private Sector Development (PSD) Strategy Document*, Pacific Islands Forum Secretariat, May, 2004, Suva, Fiji, p.4.

<sup>21</sup> Robert & Cave Baldwin, Martin., *Understanding Regulation: Theory, Strategy and Practice* (1999), 2.

term is ‘contestable’<sup>22</sup> and defined in different ways across disciplines<sup>23</sup> and within disciplines. Regulation has developed into a distinct field of academic inquiry but ‘it is often difficult to obtain a holistic sense of its contours and the nature of its terrain.’ In her work on regulation, Professor Julia Black has developed a concept of ‘decentred regulation’. Essentially, this approach removes the State from the centre of the discussion of regulation. Instead, the State is just one of a number of institutions and bodies that ‘regulates’ ie exerts influence to achieve particular outcomes. In this context, Black defines regulation as:

*the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.*<sup>24</sup>

She herself favours this ‘essentialist’ definition as it

*delimits ‘regulation’ as an intentional, systematic attempt at problem-solving, so marking it out as a specific site of social activity and thus of investigation.... Regulation is an activity that extends beyond the state, thus regulation may on the basis of such a conceptualisation embrace a variety of forms of relationship between state, law and society. It thus enables the identification, creation and analysis of regulatory arrangements that involve complex interactions between state and non-state actors, and enables each to be identified as both regulators and regulatees*<sup>25</sup>

This ‘essentialist’ definition of regulation, and Black’s comments on it, are particularly apt in the context of the framework of treaties discussed below.

### ***Framework of Treaties***

The Pacific Island States are parties to a number of treaties which, when considered together are directed at assisting these States to integrate at a regional and at an international level. The main treaties are the *Cotonou Agreement* and its attendant *Economic Partnership Agreements (EPAs)* between the European Union and the Pacific Island States.<sup>26</sup> The other treaties are the *Pacific Island Countries Trade Agreement (PICTA)* and the *Pacific Agreement on Closer Economic Relations (PACER)*. In one sense, the Cotonou Agreement in 2000 was the catalyst for the *Pacific Island Countries Trade Agreement (PICTA)*, concluded in Nauru on 18 August, 2001<sup>27</sup>; and the *Pacific Agreement on Closer Economic Relations (PACER)*, also concluded on 18 August, 2001 in Nauru<sup>28</sup>. In addition to these treaties, in 2005 the Pacific Island States, together with Australia and New Zealand, endorsed a strategic arrangement called the *Pacific Plan*. This Plan is ‘a living document’ that ‘ensures flexibility [and] provides a mechanism as a ‘springboard’ for discussing and shaping the region’s longer-term future in an open and inclusive manner.’<sup>29</sup> As noted above, the aim of the Pacific Plan is to ‘enhance and stimulate economic growth, sustainable development, good governance

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<sup>22</sup> Bronwen and Yeung Morgan, Karen, *An Introduction to Law and Regulation: Text and Materials* (2006), xiii.

<sup>23</sup> Anthony Ogus, *Regulation: Legal Form and Economic Theory* (2004), 1.

<sup>24</sup> Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 10 26.

<sup>25</sup> *Ibid.*, 26

<sup>26</sup> African and Caribbean States that, together with these Pacific States make up the ACP States are also signatories to the Cotonou Agreement. However, the EPAs are between the countries in these regional groupings and the EU. In other words, The African and Caribbean States are not parties to the EPAs between the EU and the Pacific Island States and vice versa.

<sup>27</sup> To which Australia and New Zealand are not parties.

<sup>28</sup> To which Australia and New Zealand are parties.

<sup>29</sup> Pacific Island Forum Secretariat, *Pacific Plan: for strengthening regional cooperation and integration* October, 2006, para.25, p.10

and security for Pacific countries through regionalism.<sup>30</sup> This coincides largely with the aims of the Cotonou Agreement, aims that are to be given effect through the EPAs.

### *The Cotonou Agreement*

Consistent with its predecessors, this agreement is an ‘aid and development’ agreement. Article 1 sets out the objectives of the partnership: the alleviation and eradication of poverty ‘consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.’<sup>31</sup> What is novel, if not unique about this agreement is that it defines the ‘actors of cooperation’ as including non-state actors: the private sector; economic and social partners, including trade union organisations; and Civil Society in all its forms according to national characteristics.<sup>32</sup>

The Cotonou Agreement has been described as resting on five pillars.<sup>33</sup> These pillars are: a political dimension; the promotion of participatory approaches; development strategies and priority for poverty reduction; the establishment of a new framework for economic and trade cooperation; and reform of financial cooperation. One significant aspect of the Cotonou Agreement is the explicit acknowledgement of the role of the private sector and of civil society in developing and integrating these states regionally and internationally. In article 10(2) of Cotonou, the parties ‘recognise that the principles of the market economy, supported by transparent competition rules and sound economic and social policies, contribute to achieving the objectives of the partnership.’ In setting out the development strategies, the agreement refers to the aim of ‘developing the private sector’ (art.20)(1)(a)).

At a meeting of the Pacific ACP ministers and the EC Commissioners for Trade and for Development held in Brussels on 2 October, 2007, it was agreed that it would not be possible to conclude the complete EPAs by the end of 2007. As a result, the meeting agreed to conclude an interim agreement which would enter into force on 1 January, 2008 while continuing to negotiate the EPAs. It is intended that the latter agreements will be concluded by the end of 2008. The interim agreement was initialled on 23 November, 2007 between the EU and Papua New Guinea and Fiji. Whether or not other Pacific Island States will sign this agreement remains to be seen.

So, if we were to look again at Professor Black’s definition of ‘decentred regulation’, we could say that there is an attempt, through the provisions of the Cotonou Agreement, to alter the behaviour of others, the ‘defined standards’ perhaps being those of a market economy and a liberal democracy and the outcome, that of economic integration at a regional and an international level. The regulatory arrangements that flow from this are in part, captured in the interim agreement concluded between the EU and Fiji and Papua New Guinea in the first instance, in November, 2007; and the continuing negotiation of the complete EPAs. Similarly, the Private Sector Strategy document sets out a strategy of regulation that impacts not only on private actors but on the public sector as well.

### *The PACER Agreement*

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<sup>30</sup> Pacific Island Forum Secretariat, *Pacific Plan: for strengthening regional cooperation and integration* October, 2006, para.2, p.4

<sup>31</sup> These objectives are echoed in the PACER agreement (see article 2 of that agreement); and in the Pacific Plan (see paragraph 4, p.2 of that document). Underpinning all these instruments is the requirement that measures be WTO-compatible.

<sup>32</sup> See Partnership Agreement between the members of the African, Caribbean and Pacific Group of States (ACP) of the one part, and the European Community and its Member States of the other part, signed in Cotonou on 23 June, 2000, art.6

<sup>33</sup> *Cotonou Agreement* at: << <http://www.europa.eu.int/scadplus/leg/en/lvb/r12101.htm>>> accessed, 20 May, 2004; Olufemi Babarinde and Gerrit Faber, *The European Union and the Developing Countries: The Cotonou Agreement*. Martinus Nijhoff Publishers, Leiden, 2005, p.29

In 2001, Australia and New Zealand concluded the *Pacific Agreement on Closer Economic Relations (PACER)* with the Pacific Island States (not including Timor L'Este). This treaty came into force on 3 October, 2002. According to art.6(3)(a) of that agreement, if a Pacific Island State 'enters into formal negotiations for free trade arrangements which would include one or more developed, non-Forum country [*the European Union, for example*] then that Forum Island Country shall offer to undertake consultations as soon as practicable with Australia and New Zealand, whether individually or jointly, with a view to the commencement of negotiation of free trade arrangements'. This obligation has now been triggered for Fiji and Papua New Guinea by the conclusion of the interim agreement with the EU.

At the same time in 2001, the Pacific Island States concluded an agreement intended to establish a free trade area among them and, among other things, intended to 'further the development and use of the resources of the Pacific region with a view to the eventual creation of a single regional market among the Pacific Island economies in accordance with the respective social and economic objectives of the Parties, including the advancement of indigenous peoples.'<sup>34</sup>

Clearly, this area is a rich, scholarly lode to mine. It is an area that has been rather neglected by legal scholars. There is much that they can contribute to the existing scholarship engaged in by other disciplines.

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<sup>34</sup> Pacific Islands Trade Agreement, (PICTA), art.2(e). available at: <<  
[http://www.forumsec.org/resources/article/files/PICTA%20-%20endorse%20&%20sign\(18-8-01\).pdf](http://www.forumsec.org/resources/article/files/PICTA%20-%20endorse%20&%20sign(18-8-01).pdf)>>  
accessed, 2 March, 2008. Neither Australia nor New Zealand is a party to PICTA.

