**11th Intersessional Meeting of PACER Plus Officials**

**Apia, Samoa**

**4 to 7 August 2015**

### **Draft Chapter on Investment**

**Outcomes of the 11thIntersessional Meeting**

**NOTE:**

This Document contains clean copy draft text incorporating outcomes of the 11th Intersessional Meeting of PACER Plus Officials.

Text that is not agreed is in square brackets and attributed as follows:

* “**AU:**” for text tabled by Australia;
* “**PIC:**” for text tabled by OCTA/PICs; and
* “**NZ:**” for text tabled by New Zealand.

Text in square brackets is bolded and coded as follows:

* **blue** for text tabled by Australia;
* **red** for text tabled by OCTA/PICs; and
* **olive green** for text tabled by New Zealand.

**CHAPTER [...]**

**INVESTMENT**

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| **Article 1**  **Definitions**  For the purposes of this Chapter, the term:  1. **“covered investment”** means with respect to a Party, an investment in its territory of another Party, in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, which has been admitted by the host Party subject to its relevant laws, regulations and policies.  2. **“enterprise”** - means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association or similar organisation and a branch of an enterprise. |
| 3. **“enterprise of a Party”** means an enterprise constituted or organised under the law of a Party**,** or a branch located in the territory of another Party, and engages in substantive business operations there. |
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| 4. **“freely usable currency”** means freely usable currency as determined under the Articles of Agreement of the International Monetary Fund and amendments thereafter, or any currency that is used to make international payments and is widely traded in international principal exchange markets. |
| 5. “**investment,**” means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:  (a) an enterprise;  (b) tangible or intangible, movable and immovable property and related property rights such as mortgages, liens or pledges[[1]](#footnote-2);  (c)shares, stock and other forms of equity participation in an enterprise;    (d) bonds, debentures, other debt instruments, and loans[[2]](#footnote-3);  (e)futures, options, and other derivatives;  (f) intellectual property rights;  (g) turnkey, construction, management, production or revenue sharing contracts, concessions or other similar contracts; and  (h) licences, authorisations, and permits[[3]](#footnote-4)and similar rights conferred pursuant to domestic law.  An investment does not, however, include:  (i)claims to payment resulting solely from the commercial sale of goods and services unless it is a loan that has the characteristics of an investment;  (ii)a bank letter of credit; or  (iii) the extension of credit in connection with a commercial transaction, such as trade financing.  For the purpose of the definition of investment in this Article, returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments. |
| 6. **“investor”** of a Party means a Party, or a natural person or an enterprise of a Party that has made or seeks to make an investment in the territory of another Party. |
| 7. “**measure**” means any measure of a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form; |
| 8. “**measures adopted or maintained”** by a Party means any measure taken by:  (i) central, regional or local Government and authorities; or  (ii) non-governmental bodies in the exercise of powers delegated by central, state, regional or local Governments or authorities; |
| 9. **“natural person of a Party”** means a natural person that possesses the nationality or citizenship of, or right of permanent residence, in that Party in accordance with its laws and regulations.[[4]](#footnote-5); and |
| 10. **“permanent resident”** of a Party means a natural person who has permanent residence status in a Party in accordance with its laws and regulations. |
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| **Article 2**  **Objectives**  This Chapter is intended to encourage a stable and predictable environment to attract and promote the flow of investment between the Parties with due respect to national policy objectives and to the right of each Party to regulate. |
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| **Article 3**  **Scope**  1. This Chapter shall apply to measures adopted or maintained by a Party relating to:   1. investors of all other Parties; 2. covered investments;and 3. with respect to Article 9 (Prohibition of Performance Requirements) all investments in the territory of the Party. |
| 2. This Chapter shall not apply to:  (a) procurement by a Party; and  (b) subsidies or grants provided by a Party, except subsidies provided in connection with measures prohibited under Article 9 (Prohibition of Performance Requirements). |
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| **Article 4**  **Relation to Other Chapters**  1. This Chapter does not apply to measures adopted or maintained by a Party affecting trade in services. |
| 2. Notwithstanding Paragraph 1, Article 8 (Fair and Equitable Treatment), Article 10 (Compensation for Losses), Article 11 (Expropriation and Compensation), Article 12 (Transfers), **[AU/NZ: and]** Article 17 (Subrogation) **[PIC: Article 21 (Settlement of Dispute Between Parties and Foreign Investors)]**shall apply, *mutatis mutandis*, to any measure affecting the supply of service by a service supplier of a Party through commercial presence in the territory of any other Party pursuant to Chapter **[..]** (Trade in Services), but only to the extent that any such measures relate to a covered investment and an obligation under this Chapter, regardless of whether such a service sector is scheduled in a Party's Schedules of Specific Commitments in Annex **[..]**. |
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| **Article 5**  **Obligation to Comply with Domestic Law and Corporate Social Responsibility**  1. The Parties acknowledge that investors of a Party and their investments are subject to the laws, regulations and standards of the host state Partyprovided that the laws, regulations and standards of the host state Party are not inconsistent with the provisions set out under this Chapter. |
| 2. The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party. |
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| **Article 6**  **National Treatment**  1. In the sectors specified in Annex […] of this Agreement, and subject to any conditions and qualifications set out therein, each Party shall accord to investors and covered investments of investors of any other Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the acquisition, establishment, expansion, management, conduct, operation, and sale or other disposition of investments. |
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| 2. In respect of intellectual property rights, a Party may derogate from the obligations set out in this Article provided this is not inconsistent with the WTO TRIPS Agreementand relevant international agreements on intellectual property rights identified in Annex [..][[5]](#footnote-6) |
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| **Article 7**  **Most Favoured Nation Treatment**  1.Each Party shall accord to investors and covered investments of investors of any other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-party or to their investments with respect to the acquisition, establishment, expansion, management, conduct, operation, and sale or other disposition of investments[[6]](#footnote-7). |
| 2. A Party may maintain a measure inconsistent with Paragraph 1 provided that such a measure falls within the scope of any exemptions lists in Annex [] on Exemptions.  [Drafting note: The Parties agree to revisit this article in view of progress achieved on market access] |
| 3. In respect of intellectual property rights, a Party may derogate from the obligations set out in this Article provided this is not inconsistent with the WTO TRIPS Agreement or relevant international agreements on intellectual property rights as in Annex [..].[[7]](#footnote-8) |
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| **Article 8**  **Scheduling of Commitments**  1. Each Party shall set out in Annex […]the sectors where it undertakes specific commitments with respect to Article 6 National Treatment under this Chapter. With respect to sectors where such commitments are undertaken, each Schedule shall specify any conditions or qualifications on national treatment.  2.        Schedules of specific commitments are annexed to this Agreement and shall form an integral part thereof. |
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| **Article 9**  **Minimum Standard of Treatment**  1.Each Party shall accord to covered investments of investors of any other Party the customary international law minimum standard of treatment of aliens including fair and equitable treatment and full protection and security. |
| 2. For greater certainty, Paragraph 1 prescribes the customary international law[[8]](#footnote-9) minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” shall not require treatment in addition to or beyond that which is required by that standard, and shall not create additional substantive rights. The obligation in Paragraph 1 to provide: |
| (a)“fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and |
| (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law. |
| 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. |
| **Article 10**  **Senior Management and Boards of Directors**  1. No Party may require that an enterprise of that Party that is a covered investment appoint to Senior Management positions natural persons of any particular nationality. |
| 2. No Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in a Party.  3. A Party may maintain a measure inconsistent with this Article provided that such a measure falls within the scope of any exemptions listed in Annex […] on Exemptions. |
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| **Article 11**  **Prohibition of Performance Requirements**  1. Where a Party is a Member of the WTO, it shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, ensure that any measure taken is consistent with the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement. |
| 2. (a) Where a Party is not a Member of the WTO, it shall, to the extent of its capacity, strive to ensure that, in connection with the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of an investment of an investor of a Party or of a non Party in its territory, any measure be consistent with the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement. |
| (b) For greater certainty, where a Party is not a WTO member, a list of that Party's measures that do not comply with the TRIMS Agreement shall be listed in Schedule X, Annex XX within two years of the entry into force of this Agreement. After the expiry of this date, new measures that are inconsistent with the TRIMS Agreement may not be introduced. |
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| **Article 12**  **Compensation for Losses**  1. Each Party shall accord to investors of any other Party and to their covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict, civil strife or state of emergency, treatment no less favourable than that it accords, in like circumstances, to:  (a) its own investors and their investments; and  (b) investors of any other Party or non-Party and their investments. |
| 2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of another Party resulting from:  (a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or  (b) destruction of its covered investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation,  the latter Party shall provide the investor with restitution, compensation, or both as appropriate, for such loss.[[9]](#footnote-10) |
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| **Article 13**  **Expropriation and Compensation**  1.A Party shall not expropriate or nationalise a covered investment of an investor from another Party, either directly or indirectly through measures equivalent to expropriation or nationalisation, except:  (a) for a public purpose;  (b) in a non-discriminatory manner;  (c) in accordance with due process of law; and  (d) upon payment of prompt, adequate and effective compensation pursuant to Paragraphs 2, 3 and 4. |
| 2. Compensation shall be equivalent to fair market value of the expropriated investment at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. Compensation shall be determined in accordance with the generally recognised principles of valuation and equitable principles, taking into account, inter alia, the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors. Compensation shall not reflect any change in value occurring because the expropriation had become publicly known earlier. |
| 3. The compensation shall be paid without undue delay. Such compensation shall be in a freely usable currency and include interest at a commercially reasonable rate, taking into account the length of time until the time of payment. It shall be effectively realizable and freely transferable. |
| 4. An investor of a Party affected by a direct expropriation may seek, under the law of the host state making the expropriation, a review, by a judicial or other independent authority of the host country, of the decision to expropriate and of the valuation of its investment in accordance with the principles set out in this Article. |
| 5. For those Parties that are Members of the WTO, this Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement or the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, or creation is consistent with the TRIPS Agreement and with the applicable international agreements on intellectual property rights binding on the Parties. |
| 6. For those Parties that are not currently members of the World Trade Organization, this Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with relevant international agreements or the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, or creation is in accordance with relevant international agreements on intellectual property rights. |
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| **Article 14**  **Free Transfer of Funds**  1. Each Party shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: |
| (a) contributions to capital, including the initial contribution;  (b) profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;  (c) proceeds from the total or partial sale or liquidation of any covered investment;  (d) payments made under a contract, including a loan agreement;  (e) payments made pursuant to Article 10 (Compensation for Losses) and Article 11 (Expropriation and Compensation);  (f) payments arising out of the settlement of a dispute or an agreement between the disputing parties; and  (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment. |
| 2. Each Party shall allow such transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer. |
| 3. Notwithstanding Paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to: |
| (a) bankruptcy, insolvency, or the protection of the rights of creditors;  (b) issuing, trading, or dealing in securities, futures, options, or derivatives;  (c) criminal or penal offences and the recovery of the proceeds of crime;  (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;  (e) ensuring compliance with orders or judgments in judicial or administrative proceedings;  (f) taxation;  (g) social security, public retirement, or compulsory savings schemes; and  (h) severance entitlements of employees. |
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| **Article 15**  **Transparency**  1. Upon request by a Party, information shall be exchanged on measures of another Party that may have a material impact on any covered investment under this Chapter. |
| 2. A Party may request in writing consultations with another Party regarding any actual or proposed measure or any other matter that it considers might materially affect the operation of this Chapter. The other Party shall engage in consultations in accordance with Article XXX of Chapter YYY (Consultation and Dispute Settlement). |
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| **Article 16** Special Formalities and Disclosure of Information 1. Nothing in Article 6 (National Treatment) or Article 7 (Most Favoured Nation Treatment)shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, including a requirement that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not substantially impair the protections afforded by a Party to investors of any other Party and covered investments pursuant to this Chapter. |
| 2. Notwithstanding Article 6 (National Treatment), a Party may require an investor of another Party to provide information concerning an investment solely for informational or statistical purposes. The Party shall protect to the extent possible any confidential information which has been provided from any disclosure that would prejudice legitimate commercial interests of the investor or the covered investment. Nothing in this Paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law. |
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| **Article 17**  **Subrogation**  1. If a Party or an agency of a Party makes a payment to an investor of that Party under a guarantee, a contract of insurance or other form of indemnity it has granted on non-commercial risk in respect of an investment, other Parties shall recognise the subrogation or transfer of any right or claim in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor. |
| 2. Where a Party or an agency of a Party has made a payment to an investor of that Party and has taken over the investor’s rights and claims, that investor shall not, unless authorised to act on behalf of the Party or the agency making the payment, pursue those rights and claims against any other Party. |
| 3. In any proceedings involving an investment dispute, a Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the investor or the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss. |
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| **Article 18**  **Denial of Benefits**  Following notification through the contact point of a Party, a Party may deny the benefits of this Chapter:  (a) to an investor of another Party where the covered investment is being made by an enterprise that it is owned or controlled by persons of a non-party and the enterprise has no substantive business operations in the territory of any other Party; |
| (b) to an investor of another Party where the covered investment is being made by an enterprise that is owned or controlled by persons of the denying Party and the enterprise has no substantive business operation in the territory of any other Party. |
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| **Article 19**  **Investment and Environment, Health and Other Regulatory Objectives**    1. Parties recognise that it is inappropriate to encourage investment by investors of another Party and of non-Parties by not enforcing their own environmental, health, labour, safety or other regulatory standards. |
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| 2. Nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining any measure otherwise consistent with this Agreement that it considers appropriateto ensure that investment activity in its territory is undertaken in a manner sensitive to its environmental, or other regulatory objectives. |
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| **Article 20**  **Promotion and Facilitation of Investment**  1. Taking into account the different levels of economic development of the Parties, the developed country Parties shall aim to assist the developing country Parties in the promotion and facilitation of foreign investment to their countries.In that regard, the Parties shall aim to explore through theChapter on Development and Economic Cooperation and the associated Implementing Arrangementhow the developing country Parties may be assisted to attract investment into their territories**.** |
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| **[PIC: Article 21]**  **Settlement of Disputes between the Parties and Foreign Investors**  **1. Without prejudice to the rights and obligations set out in the Dispute Settlement Chapter, this Article establishes a procedure for the settlement of disputes arising between a host state Party and a foreign investor from another Party to this Agreement.** |
| **2. Any dispute arising between an investor of a Party and the host state Party in relation to a covered investment under this Chapter shall, to the extent possible, be settled amicably through the use of any nonbinding dispute resolution procedures, including negotiations, mediation, fact finding and conciliation.** |
| **3. If the dispute is not settled amicably within six months of the initiation of the nonbinding dispute settlement procedures, the investor may, pursuant to Article 24 of this Chapter, exercise its right to submit the dispute for resolution to the courts or administrative tribunals in the host state which shall consider, inter alia, the provisions of this Chapter and relevant domestic laws and regulations in resolving the dispute.]** |
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| **Article 22**  **Competent Authorities and Contact Points**  1. Each Party shall provide all other Parties with a description of its competent authorities and their division of responsibilities. |
| 2. Each Party shall provide all other Parties with a Contact Point to facilitate distribution of requests and notifications made in accordance with this Chapter. |
| 3. Each Party shall ensure the information provided under Paragraphs 1 and 2 is kept up to date. |
| **Article 23**  **Technical discussions**  1. A Party may, through Contact Points, request technical discussions with another Party on any measure affecting investment between them. The requested Party shall respond promptly to any such request. The Parties shall seek to clarify any measure at issue and, where there is any remaining difference of view, they shall endeavour to find a mutually acceptable solution, taking into account the objectives of this Chapter. In case of measures affecting the investment interests of a developing country Party, the Parties shall endeavour to resolve any concerns in a timely manner. |
| 2. A Party may, through Contact Points, arrange to undertake technical discussions with other Parties on investment matters of mutual interest. Technical discussions should be conducted using electronic means. Where this is not possible, they may be conducted in person or by any other means, as mutually determined by the Parties. |
| 3. The Parties participating in technical discussions pursuant to this Chapter may mutually agree to invite another Party and/or a relevant international or regional organisation in the field of investment to participate for the purpose of providing technical advice. |
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| Article 24  **Review of Commitments**  1. The Parties shall review commitments on investment, with the first review to be undertaken within three years of entry into force of the Agreement and periodically thereafter as determined by the Joint Committee, with the aim of improving the overall commitments undertaken by the Parties under this Chapter.  2. The Parties recognise the limited capacities of developing country Parties which will be taken into account in the review process. |
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| **ANNEX ON EXPROPRIATION AND COMPENSATION**  1. An action or a series of related actions by a Party cannot constitute an expropriation, unless it interferes with a tangible or intangible property right or property interest in a covered investment. |
| 2. Article 11 (Expropriation and Compensation) of Chapter X (Investment) addresses two situations:  (a) the first situation is direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and  (b) the second situation is where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. |
| 3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in Paragraph 2(b) requires a case-by-case, fact-based inquiry that considers, among other factors: |
| (a) the economic impact of the government action, although the fact that an action or series of related actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;  (b) whether the government action breaches the government’s prior binding written commitment to the investor whether by contract or licence; and  (c) the character of the government action, including, its objective and rationale. |
| Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety and the environment do not constitute expropriation of the type referred to in paragraph 2(b). |

1. For greater certainty, market share, market access, expected gains and opportunities for profit-making are not, by themselves, investments. [↑](#footnote-ref-2)
2. Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics. Loans issued by one Party to another Party are not investments. [↑](#footnote-ref-3)
3. Whether a particular type of licence, authorisation, permit or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licences, authorisations, permits and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the licence, authorisation, permit or similar instrument has the characteristics of an investment.) [↑](#footnote-ref-4)
4. [For the purposes of this Agreement, For the Cook Islands, nationality means a “Cook Islander” as defined under the national constitution of the Cook Islands; and

   For Niue, a natural person is a Niuean national or permanent resident. [↑](#footnote-ref-5)
5. The placement of this paragraph will be subject to further discussions among the Parties. New Zealand had stated that with the agreement among the Parties to use a positive list, inconsistent measures could possibly be listed in the Schedules. [↑](#footnote-ref-6)
6. Agreed subject to using a positive list approach. [↑](#footnote-ref-7)
7. The placement of this paragraph will be subject to further discussions among the Parties. [↑](#footnote-ref-8)
8. The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article [8][9] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article [7][8], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens. [↑](#footnote-ref-9)
9. For greater certainty, in the event of providing both restitution and compensation, their combined value shall not exceed the loss suffered. [↑](#footnote-ref-10)