PACIFIC AGREEMENT ON CLOSER ECONOMIC RELATIONS (PACER) PLUS NEGOTIATIONS:

DISPUTE SETTLEMENT MECHANISM

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EXECUTIVE SUMMARY

In this memorandum, we aim to provide guidance on the type of dispute settlement mechanism that best serves the interests of the Pacific Island Countries ("PICs") in the PACER Plus negotiations. This mechanism must be efficient, cost-effective, and inspire confidence in potential investors. We are cognizant of the need for a dispute settlement mechanism that does not involve binding procedures that could result in burdensome monetary damages imposed on the PICs. Accordingly, we recommend focusing on dispute prevention. Specifically we suggest providing for a dispute prevention mechanism (DPM) in the PACER Plus treaty text to encourage the resolution of investor grievances before formal dispute settlement procedures become inevitable. We also recommend obligatory negotiations at the outset. Though not mandatory, mediation should be strongly encouraged in the text, and be pursuant to a specific procedure outlined in the Investment Chapter. The PICs may consider retaining domestic courts as a binding dispute settlement procedure available at the option of the investor, but such a provision should be tailored to reflect the differing legal capacity levels of the PACER Plus parties.

I. INTRODUCTION

This memorandum considers possible investor-state dispute settlement mechanisms for the PICs, with a special focus on dispute prevention and mediation. Specifically, in Part II, we outline our understanding of the current draft text and highlight areas requiring attention. Part III explores broadly the rationale, benefits and shortcomings of a mechanism focusing on dispute prevention and mediation. In Part IV, we provide our recommendation for an investor-state dispute settlement mechanism for PACER Plus in the form of two options. Finally, in Part V, we suggest treaty text for dispute prevention and mediation, which includes our assessment of the

mediation text from Dr. Martin Roy. This Part also offers draft text for two possible soft law mechanisms, which might appeal to the investors as an additional means of incentivizing conflict resolution.

II. CURRENT DRAFT TEXT

In the current Dispute Settlement Chapter, there is an integrated state-to-state mechanism for the resolution of disputes arising under the PACER Plus Agreement. The mechanism is integrated in that its provisions apply to both trade and investment disputes.[1] The PICs proposed an additional procedure for investor-state disputes, contained in Article 22 of the Investment Chapter. According to our understanding, the procedure includes two steps: 1. non-binding negotiation, mediation, conciliation and fact-finding with a six month cooling-off period, followed by 2. recourse to the courts or administrative tribunals of the host state.

As written, the PACER Plus Agreement seems to offer no additional recourse for aggrieved investors outside of voluntary non-binding procedures or the use of domestic courts applying domestic law – both of which are available to investors whether or not this treaty exists. We interpret the mediation provision as voluntary because PICs proposed Article 22(2) provides a list of non-binding dispute resolution procedures that a Party "shall, to the extent possible" pursue. In theory, a Party could attempt negotiations to satisfy this provision without ever resorting to mediation. We interpret PICs proposed Article 22(3), the domestic courts provision, as providing no novel rights to investors because the text does not clarify whether domestic courts are empowered to directly enforce treaty rights.

[1] Traditionally, an integrated state-to-state mechanism is created in free trade agreements to hear both trade and investment disputes, while a unique system is created for private investors within the investment chapter. If the PICs wish, it is possible to set-up a separate mechanism for state-to-state investment issues. However, this would be fairly novel. We might also regulate more clearly how the state-to-state mechanism interacts with the investor-state mechanism, but again, this would be unusual.

III. TYPES OF DISPUTE SETTLEMENT: A REVIEW OF POSSIBLE MECHANISMS

If the PICs retain proposed Article 22, investors may have little confidence in the available avenues to vindicate the rights supposedly guaranteed in PACER Plus. While the dispute resolution mechanism proposed in Article 22 retains the greatest possible level of sovereignty for the PICs, it may do so at the expense of attracting investors. The challenge, therefore, is to design a dispute settlement mechanism that provides sufficient confidence to investors without threatening the monetary judgments common in binding dispute resolution mechanisms like domestic courts and ISDS. A monetary award against a PIC risks effectively bankrupting the country. Still, to enhance investor confidence, and thus achieve the PICs' goal of promoting foreign investment, the text of Article 22 should be revisited.

This Section considers and evaluates the utility of a mechanism composed of a dispute prevention system and ad hoc mediation. Note, optional soft law techniques to supplement this mechanism are proposed later in Part V, given our belief they are relevant only in the event our current proposal is deemed to provide insufficient confidence to investors.

A. DISPUTE PREVENTION MECHANISM

The PICs should consider supplementing any dispute settlement system with a "dispute prevention mechanism" (DPM). A number of experts are drawing attention to dispute prevention and investment facilitation rather than focusing on formalized dispute settlement. This might prevent the escalation of disputes and preserve mutually beneficial investor-host state relationships.[2] Roberto Echandi, Director of the Program on International Investment at the World Trade Institute, explained the rationale supporting the development of a DPM as reflective of a desire to shift the international community's primary focus away from investment dispute

[2] James Zhan & Diana Rosert, *UNCTAD Multi-Stakeholder Meeting Seeks Reform of Investment Treaties and Investment Dispute Settlement*, 5 Inv. Treaty News Quarterly 13 (Int'l Inst. for Sustainable Dev., Nov. 2014).

resolution to dispute *prevention*, in hopes of preventing the destruction of formerly harmonious business relationships.[3] Dispute prevention relies on effectively managing conflicts.[4]

Creating a DPM in the PICs

While Echandi declares no one-size-fits-all approach exists, he concludes the development of a DPM must include several "essential elements": stocktaking, a lead agency, information sharing, early alert mechanisms, problem-solving methods, political decision-making, and enforcement of decisions.[5] It should also ideally include "procedures for intra-governmental information, coordination and decision-making with respect to grievances raised by investors."[6]

(i) Individual DPM in Each PACER Plus Party

The PICs might propose the creation of a joint mixed committee composed of government representatives and non-governmental actors in each PACER Plus state.[7] Such bodies could develop additional protocols to ensure communication and consultation between government officials and foreign investors. Both governments and investors must engage in "serious and good faith attempts to effectively explore interest-based conflict prevention processes."[8] These good faith efforts would precede any formalized procedure to resolve the dispute.[9] To facilitate this exchange, meetings must be sufficiently regular.[10] To conserve

[3]Roberto Echandi, "Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention," NCCR TRADE REGULATION WORKING PAPER NO 2011/46, 4 (August 2011). Dispute prevention was conceptualized by UNCTAD in 2010 as the process of "minimizing potential areas of dispute through extensive planning in order to reduce the number of conflicts that escalate or crystallize into formal disputes." *Id.* at 20. Echandi explains that the distinction between "conflicts" and "disputes" is critical. Conflict is essentially a "problem unattended" and a dispute is a "unattended conflict which has evolved into a 'defined, focused disagreement, often framed in legal terms.'" *Id.* at 22. With this distinction in mind, Echandi posits that "conflicts" can be reduced through extensive planning. *Id.* at 20.
[4] *Id.* at 21.
[5] *Id*.
[6] *Id*. at 31.
[7] *Id.* at 29.
[8] *Id.* at 28.
[9] *Id*.

resources, the PICs should leverage their existing investment facilitation agencies to establish the DPM.

Currently, each PACER Plus party has a designated government entity primarily responsible for investment promotion as specified in detail in this memorandum's Annex, Table I, *infra*. One or more individuals from each of these agencies could be selected as responsible for creating and maintaining a joint mixed committee in their respective countries. They should set regular meetings and remain in contact with relevant stakeholders. Additionally, these individuals should actively market their dispute prevention services as a resource to investors.

The existing focus on dispute prevention among the PICs' investment promotion authorities varies widely. For example, Fiji's statutory organization, Investment Fiji, seems well-equipped to undertake dispute prevention.[11] However, neither Tuvalu nor Niue has an investment promotion website, and therefore their ability to effectively encourage dispute prevention may be limited by capacity constraints.

(ii) Collective DPM

Given the constraints faced by some PICs, a collective "PACER Plus forum" would certainly provide cost and scale advantages as opposed to individual state mechanisms. Notably, some of the smaller PICs with scarce resources might prefer a collective DPM. This collective mechanism could supplement the individual mechanisms described above, or replace them. If

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10 *Id.* at 31. Echandi notes a possible drawback to this effort is that it might be perceived as "an informal way to promote diplomatic protection in disguise." *Id.* at 29.

[11] Investment Fiji has created an "Investor's Portal" meant to function as "one stop for all your queries regarding doing business in Fiji." Investors can provide basic information about themselves to register (e.g. name, email address, company name, industry, company address, etc.). Once registered, they will receive "personalized online services and information[] in the [relevant] industry." Further, registering provides access to a designated "sector manager," who is presumably available as a resource for frustrated investors. Given the organization's role as "a liaison between Government, the private sector, and regional and international agencies," a channel of communication between foreign investors and relevant government officials is now open. Echandi considers these channels of communication as central for effective dispute prevention systems. For more information about Investment Fiji's "Investor's Portal," *see*: http://www.investmentfiji.org.fj/pages.cfm/for-investors/investors-portal/.

supplementing, in the event that a PIC does not have a functioning DPM, the investor in that PIC could submit a grievance to this collective forum instead.

A collective forum would be comprised of representatives (ombudspersons) from the PICs, Australia, and New Zealand. They would be prepared to receive investor grievances early in the investment process. Such ombudspersons could be pulled from the relevant investment agencies, as defined in Annex, Table I, *infra*. The PICs have proposed the establishment of a Joint Committee on Trade in Services and Investment,[12] which could house this collective mechanism (hereinafter referred to as "Dispute Prevention Committee"). Expanding the function of the proposed Joint Committee in this manner provides a useful means of identifying capacity and technical assistance needs for the PICs based on investor feedback.

With both options, either creating individual state DPMs or a collective mechanism, those tasked with maintaining the DPM and the relevant stakeholders must have a thorough understanding of the PACER Plus treaty, and particularly the rights provided for in the Investment Chapter. Thus, depending on current capacity levels, targeted capacity-building programs are likely necessary.[13] Several international agencies have already created legal capacity building programs; thus, it may not be necessary to create new programs. Instead, the PICs should first try to take advantage of existing opportunities.[14] For example, DLA Piper's "Pacific Islands Nation Development" pro bono project aims to develop legal capacity in the Pacific Islands. They hope to work with more than 300 lawyers. Currently, "[t]he workshops support a cross-section of public defenders, government/public and commercial lawyers to gain a

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12 *See* Draft Chapter on Investment, PIC Proposed Article 25 "Trade in Services and Investment Committee."
[13] Echandi describes capacity building as "crucial" to the success of conflict management/prevention.[13] He notes "officials should become familiar with the basic notion of conflict management and how it interacts with dispute resolution. . . . [as well as] master [an understanding of] the rights and obligations derived from [the agreement]." Echandi *supra* note 3, at 29.
14 *Id*.

greater understanding of ethics and conflicts, legal process, legal drafting and analysis, evidence, trial preparation and advocacy."[15] Perhaps DLA Piper could develop a workshop to support the implementation of the PACER Plus Agreement and invite relevant stakeholders.

We suggest adding a DPM to the PACER Plus treaty text. This DPM could be included as a provision in proposed Article 22 of the Investment Chapter, or may require an additional article (*see* Part V for draft treaty text to create a DPM).

1. Relevant Models

Brazil recently unveiled its new model investment agreement, the "Cooperation and Facilitation Investment Agreement" (CFIA) and concluded two such agreements. This model contains no recourse to ISDS, instead emphasizing the need for investment facilitation and dispute prevention. Daniel Godinho, Brazil's Secretary of Foreign Trade at the Ministry of Development, Industry, and Foreign Trade, contends the agreement focuses on "the promotion of an attractive environment for investors while preserving space for public policies."[16] Under the Brazilian model, each party establishes "Focal Points" (ombudspersons), who are tasked with improving investment conditions in the state and serve as a communication and support channel between investors and the host-state.[17] The model also establishes a Joint Committee, comprised of government representatives from both parties to the investment agreement.[18] The Joint Committee shares information, monitors the implementation of the agreement, prevents disputes, and solves possible disagreements in an amicable manner.[19] The Joint Committee establishes ad

[15] For more information about the program provided by DLA Piper, see her: http://www.dlapiperprobono.com/what-we-do/signature/pro-bono/pacific-islands.html.
[16] UNCTAD, *supra* note 2, at 81-82.
[17] Mr. M. Daniel Godinho, Secretary of Foreign Trade for Brazil, *Address at 2014 World Investment Forum: The Brazilian Experience With IIAs* (16 Oct. 2014), *available at* http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Godinho.pdf.
[18] *Id*.
[19] Id.

hoc working groups to discuss specific issues relevant to investment (i.e. "thematic agendas of cooperation and investment facilitation") and invites members of the private sector to join those groups.[20] The subject matter of these meetings include: business visa facilitation, payment and currency transfers cooperation, regulatory and institutional exchanges of expertise, technical and environmental regulations, professional and labor trainings, and logistics and transportation understandings.[21] Secretary Godinho noted that, "while Investor-State Dispute Settlement is the backbone of traditional IIAs, the Brazilian model favors mechanisms to prevent disputes based on dialogue and bilateral consultation, prior to the initiation of . . . arbitration procedures. Such mechanisms call for the direct and continuous involvement of the . . . Focal Points and Joint Committee."[22]

Notably, in the event dispute prevention is not successful at producing a solution, state-to-state arbitration, rather than investor-state arbitration, is the available final recourse. In the recently concluded agreement with Mozambique, the States parties can:

> "resort to arbitration mechanisms between states to be developed by the Joint Committee, when deemed desirable between the Parties."

Brazil's agreement with Angola also provides for state-to-state arbitration, but does not empower the Joint Committee to develop the arbitration mechanism. Instead, the provision states that if a dispute is not resolved:

> "by recommendation of the Joint Committee [Dispute Prevention Committee], the Parties can resort to arbitration mechanisms between States to settle the dispute."[23]

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20 Id.

21 *See* Presentation at World Inv. Forum Side Event, Cooperation and Facilitation Investment Agreement – CFIA, *available at* http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/Brazil_side-event-Wednesday_model-agreements.pdf.

22 Id.

[23] Herbert Smith, Brazil has Signed Investment Cooperation and Facilitation Agreements with Mozambique and Angola, available at https://www.lexology.com/library/detail.aspx?g=21d9da21-aced-4b7a-b95c-c63504996435.

The language in this second provision, seems to contemplate the possibility of choosing from a number of arbitration mechanisms, but also seems to vest discretion in the Joint Committee to determine whether or not the States Parties may resort to state-to-state arbitration. This language could by improved by specifying whether the Joint Committee would also be responsible for selecting an arbitration *mechanism* to be used in a particular dispute (i.e. also specifying the appropriate mechanism in its recommendation to resort to arbitration) or whether the States parties would have to agree on the mechanism, or whether one of the States parties may choose the mechanism so long as the Joint Committee recommends state-to-state arbitration.

2. Sample Treaty Language

Sample treaty language for a DPM is included in Part V, *infra*.

3. Pros and Cons

A DPM addresses many of the shortcomings of ISDS, and other contentious dispute settlement proceedings.[24] Perhaps most relevant for the PICs, the litigious nature of ISDS procedures can irreparably disrupt "formerly harmonious relationships" between foreign investors and host states.[25] When adversarial proceedings disrupt a relationship between the host state and investor, the detrimental impact is twofold. First, the investor involved in the disagreement will likely exit, resulting in a lost source of investment in the host state[26] Second, the host state will also face reputational damages.[27] Investors may perceive the host state as inhospitable to foreign investment and consequently, may decide not to invest in the host state.

[24] *Id.* at 3. Investors and states agree such procedures are "too costly, too slow and too indeterminate."
[25] Id.
[26] *Id*.
[27] *Id*.

In addition, investor-state arbitration is expensive and time-consuming.[28] As such, preventing even a small fraction of disputes would likely be cost-effective. While investor-state arbitration is sometimes touted as less time-intensive than litigation, most investor-state arbitration cases take several years.[29]

Pros:

- *Promotes investment retention:* By pre-emptively resolving conflicts between investors and the state before they reach a level whereby formal dispute resolution is inevitable, PICs can satisfy their goal of promoting flows of foreign direct investment.
- *Preserves resources*: Assuming the procedure is effective, the PICs save the costs and time associated with formal dispute settlement.
- *Preserves sovereignty*: The non-binding nature of this procedure suggests there is less risk to infringing the sovereignty of the PICs.

Cons:

- *Utility of "interest-based" conflict prevention has limits*: Some disputes are better suited for full dispute settlement, such as "those arising from the application of a key public policy measure, or in situations where the investor is submitting a frivolous claim, or when the host state may be more interested in setting a precedent for the future."[30]
- *Delaying a binding decision can frustrate investors*: A DPM's effective operation depends on full participation by relevant parties and the capacity required to resolve the conflict. If the system only serves to create more delays, it will frustrate investors and contribute to the notion that the PICs offer an inhospitable investment climate.

B. MEDIATION

The DPM described above should supplement a dispute *settlement* mechanism centered on negotiations followed by mediation. Currently, the dispute settlement provision contained in the draft Investment Chapter does not clearly specify whether the parties to an investor-state dispute must submit to mediation or instead can circumvent this provision by claiming that they attempted to negotiate. We recommend the text specify that negotiations are mandatory, and

[28] UNCTAD reports that each of the parties to a dispute can expect to pay the equivalent of several million US dollars if the case proceeds through the jurisdictional, merits, and damages phases. UNCTAD, *supra* note 2, at 145. On average, 82% of this amount is attributable to legal fees. *Id.* at 28.
[29] *Id*.
[30] Echandi *supra* note 3, at 30.

encourage one non-binding procedure, preferably mediation (rather than a list of possible non-binding mechanisms). This mediation should be pursuant to a specific process outlined in the PACER Plus treaty text, and could be mandatory at the option of the investor.[31] While some agreements conflate mediation and conciliation, we recommend that the PICs specifically refer only to mediation because mediation is less formal than conciliation and is less likely to develop into a costly, highly-technical mechanism. However, the PICs may want to consider empowering the mediator to make recommendations, including specific settlement amounts, or offer expert opinions on particular issues if this would facilitate the mediation.

To encourage mediation, the PICs should revisit the text in subparagraph 2 of proposed Article 22 to further incentivize mediation and to implement specific procedures governing the mediation process.[32] ASEAN provides an example of an innovative model that incentivizes mediation by establishing a ministerial body, the High Council, which can mediate disputes with the consent of the disputing parties.[33] The PICs might consider creating a body similar to the High Council, comprised of ministerial representatives from PACER Plus states.

Given the predicted paucity of disputes, we suggest mediation be available on an ad hoc basis only. A standing body to mediate disputes would likely waste scarce resources. Such an ad hoc body could take the form of a regional mediation center.

Creating an Ad Hoc Regional Mediation Center in the PICs

31 *See* CETA, *infra*. at subsection (1).

[32] The current text reads, disputes should "…be settled amicably through the use of any non-binding dispute resolution procedures, including negotiations, mediation, fact finding and conciliation"

33 Lina A. Alexandra, *ASEAN Dispute Settlement Mechanism: Anything New?*, The Jakarta Post (9 Apr. 2010), *available at* http://www.thejakartapost.com/news/2010/04/09/asean-dispute-settlement-mechanism-anything-new.html#sthash.nRzTHxId.dpuf.

To account for potential capacity constraints, the PICs should consider creating an ad hoc regional mediation center.[34] The Model BIT from the International Institute for Sustainable Development (IISD) recommends the establishment of "regionally-based mediation centers" to facilitate dispute resolution that consider "regional customs and traditions."[35] As an ad hoc body, a regional mediation center could be available anywhere so long as the host state can provide a suitable location for the mediator(s) and the parties to meet. The PICs should consider what is the ideal role of the mediator, that is, whether the mediator should provide settlement recommendations and/or related expert guidance. Additional important considerations include: how to appoint mediators, how many mediators should be appointed, and what specific procedures these mediators should follow.

The mediator's role should include ensuring the "negotiating parties have sufficient knowledge, information and skills to negotiate with confidence" and the mediator should also include "relevant stakeholders from different segments of a society" in the mediation process.[36] The PICs may wish to expand the responsibilities entrusted to the mediator(s) to allow for expert input from the mediator(s). Empowering the mediator(s) to make settlement recommendations, including suggesting the amount of a settlement (in dollar terms), may offer some advantages. The mediator, as an experienced expert, can provide a valuation regarding, for example, fair

[34]If the PICs decide to create a regional body for mediating investment disputes, they might draw from other regional mediation center models such as the ASEAN model. Another point of reference is "Fiji Mediation Services," created in 2008 to resolve labor related disputes in Fiji. Further, in 2004, the US-China Business Mediation Center was established to resolve commercial disputes between American and Chinese businesses. The Center provides specially trained mediators. The parties select the mediators and can "customize" the process in accordance with their particular needs. For more information about "Fiji Mediation Services," see here: http://www.asianmediationassociation.org/node/20; For more information about the US-China Business Mediation Center, see here: http://www.cpradr.org/PracticeAreas/InternationalInitiatives/EmergingMarkets/AsiaPacific/CPRinChina/USChinaBusinessMediationCenter.aspx.

[35] Howard Mann, Konrad von Moltke, Luke Eric Peterson, & Aaron Cosbey, *IISD Model International Agreement on Investment for Sustainable Development*, IISD, *available at* https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf (hereinafter "Model Agreement iisd").

[36] *Id.* (noting further "Mediators are most successful in assisting negotiating parties to forge agreements when they are well informed, patient, balanced in their approach and discreet.")

compensation for an expropriation under proposed Article 13 of the draft Investment Chapter, "Expropriation and Compensation." Valuation by a mediator might encourage settlement by providing the parties to the mediation with a "starting point" for discussion based on an impartial valuation of the claim.

An ad hoc regional mediation center will require the appointment of mediators. As noted in the United Nations Guidance for Effective Mediation, "mediation is a specialized activity" and the selection of well-qualified, professional mediators is particularly important to successful mediation.[37] The PACER Plus parties should create a list of qualified mediators in advance, and make this list available upon request. The PICs should consider whether this list should include only qualified experts from the PACER Plus countries. Expert mediators from PACER Plus member states would probably require less assistance from the parties to understand the necessary background information related to regional issues and conditions. This time-saving technique would translate to lower costs, assuming all other conditions remain constant. Ideally, these mediators should have expertise in mediating investment claims or in the industry at issue in the claim. Alternatively, the PICs might include international experts on this list. The appointment of international expert mediators may enhance the perceived legitimacy of the mediation process, as well as mitigate concerns the dispute has become too politicized. National mediators might be influenced by local politics, or at least perceived as biased.

Aside from the need to create a list of qualified mediators, the PICs should also consider *how many* mediators should be appointed for each dispute. We recommend the use of three mediators, including at least one international expert, to ensure each party to the dispute believes their interests are adequately represented. Each party can choose one mediator, and should agree

[37] Annex I, United Nations Guidance for Effective Mediation of the Report of the Secretary-General of the United Nations to the General Assembly, Strengthening The Role Of Mediation In The Peaceful Settlement Of Disputes, Conflict Prevention And Resolution, A/66/811 at para. 12 (June 25, 2012).

on the third. In the event the parties are unable to agree, the agreement should specify who is empowered to appoint a mediator. It is important to note, however, that this will add to the time and costs associated with the mediation (at least in the short-term). Some contend it is most efficient to select only one mediator who has enough familiarity with the area that minimal time is required "to educate the mediator on the parties' basic positions for purposes of exploring amicable resolution."[38]

The PICs should also consider *what procedure* these mediators should follow. Such procedures should be detailed in the Investment Chapter. Alternatively, the parties could agree to specific procedures ex post.

1. Relevant Models

In our last call with Dr. Kessie, OCTA Chief Trade Adviser, we discussed the relevance of the mediation provisions in the following three sources: (1) the model drafted by Dr. Roy, (2) the Comprehensive Trade and Economic Agreement (CETA) between the European Union and Canada, and (3) the Free Trade Agreement between the European Union and Singapore. We have reviewed these models and discuss each in turn below. We also reviewed the International Bar Association Rules for Investor-State Mediation and have incorporated some language from those provisions in our draft treaty text.[39] Additionally, per your request, we have included our suggested edits/additions to the model drafted by Dr. Roy in Part V to this memorandum.

[38] Jean E. Kalicki & Jean C. Choi, *Mediation of Investor-State Disputes: Revisiting the Prospects*, Kluwer Arbitration Blog (June 14, 2013), *available at* http://kluwerarbitrationblog.com/blog/2013/06/14/mediation-of-investor-state-disputes-revisiting-the-prospects/

[39] International Bar Association Rules for Investor-State Mediation, International Bar Association (Oct. 4, 2012), *available at* www.ibanet.org

a. The Model Mediation Provisions Drafted by Dr. Martin Roy

The model text provided by Dr. Roy draws from CETA and the EU–Singapore FTA. One open issue is the means of appointing a mediator in case the parties to a dispute cannot agree. The draft includes appointment by the Secretary–General of ICSID. While this is possible, even though not all PACER Plus countries are ICSID members, the PICs might consider other means of appointing mediators. For example, the PICs may consider empowering the Pacific Islands Forum Secretariat to make necessary appointments. Alternatively, the PICs could designate the ICJ, the proposed Trade in Services & Investment Committee (which we have also described as the Dispute Prevention Committee), or the Secretary General of the Permanent Court of Arbitration as the appointing authority.

Additionally, we have added more detail on the type of information a party must include in their request to mediate and have questioned what specific procedural rules (if any) a mediator should follow. For more comprehensive comments on the draft text, see Part V, *infra*.

b. The EU–Canada: Comprehensive Trade and Economic Agreement (CETA)

The recent Comprehensive Trade and Economic Agreement (CETA) between the EU and Canada encourages parties to mediate investment disputes by clarifying in the agreement that parties may at any time agree to mediate (although the process remains voluntary). If they agree to mediate, the parties are limited to sixty days to reach a solution. By referring specifically to *mediation*, rather than the list of possible non-binding procedures included in the current proposed Article 22 of PACER Plus (i.e. "negotiations, mediation, fact finding, and conciliation"), and including a specific procedure to follow, CETA provides for stronger encouragement to mediate. Part V at the end of this memorandum provides sample treaty language based on this model.

c. The Free Trade Agreement between the European Union and Singapore

While the EU–Singapore FTA has not yet been ratified, we reviewed the most recent publicly available version of the Investment Chapter dated October 2014. The Agreement contains detailed mediation provisions in Article 9.17,[40] Annex 9-A,[41] and Annex 9-B.[42] Demonstrating the flexibility of mediation as a dispute settlement mechanism, section 3 of Article 9.17 provides that "mediation may be governed by the rules set out in Annex 9-A" of the chapter or "such other rules as the disputing parties may agree" and allows for modification of time limits by mutual agreement of the parties. Importantly, the mediation provisions specify "Nothing in this Article shall preclude the disputing parties from having recourse to other forms of alternative dispute resolution."[43] One noticeable feature of mediation under this agreement is the imposition of rather strict, defined time limits. This may enable timely resolution of conflicts in critical cases especially where the dispute involves a misunderstanding at different levels of government. Part V at the end of this memorandum provides sample treaty language based on this model.

2. Sample Treaty Language

The following language may be used if the PICs determine that they would like to establish a mediation center (collectively or individually) in order to facilitate mediation.

> The Parties shall establish a regionally-based mediation centre to facilitate the resolution of disputes between Parties and investors or investments, taking into account regional customs and traditions. Mediators officially appointed to such centers shall be incorporated into the Secretariat list.[44]

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[40] Article 9.17 provides for Mediation and Alternative Dispute Resolution. *See* The Investment Chapter of The Free Trade Agreement between the European Union and Singapore (Oct. 2014), *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/3247.
[41] Annex 9-A to the ISDS Section of the investment chapter provides for a mediation mechanism as an alternative to arbitration. *See id.*
[42] Annex 9-B contains a Code Of Conduct For Arbitrators and Mediators. *Id.*
[43] *See id.* at Article 9.17(7).
[44] Text based on Model Agreement iisd, *supra* note 33, at Art. 42.

Secondly, if the PICs determine that mediation should serve as the sole dispute resolution mechanism, the following text may be incorporated into the agreement:

> In the event of a dispute arising out of or relating to this agreement, including any question regarding the existence, validity or termination of this agreement, the parties shall seek settlement of that dispute by mediation in accordance with the [insert choice(s) of Mediation Rules], which Rules are deemed to be incorporated by reference into this clause.[45]

3. Pros and Cons

Pros:

- Mandatory mediation maximizes participation
- ADR may preserve business relationships because it is less contentious than traditional dispute settlement
- Confidential
- Relatively low sovereignty costs
- Informal
- Early intervention (before dispute escalates)
- Lower costs

Cons:

- *Investors' confidence*: since the outcome of the mediation is not binding, investors might not be confident in the process
- Possibility of no resolution (agreement)
- Lack of binding outcomes
- Lacks enforceable remedies
- Mediation requires experienced mediators with multidisciplinary knowledge

C. SOFT LAW

In addition to dispute prevention and mediation, any dispute resolution method can be supplemented by a soft law mechanism or mechanisms. We use the term "soft law" to describe any mechanism in international relations that is similar to a legal obligation in some respects, which may even involve a written exchange of promises between states, but "nevertheless falls

[45] *See* London Court of Arbitration India (LCIA) Recommended Clauses, *available at* http://www.lcia-india.org/Mediation_Clauses.aspx.

short of what is required to formally bind states."[46] Following Guzman and Meyer's model, we approach soft law mechanisms as a continuum "running between fully binding treaties and fully political positions."[47]

We discuss four possible soft law mechanisms that may be incorporated into this model: (1) expert indicator reporting without formal participation of the States Parties; (2) "peer review and reporting," conducted exclusively by the States Parties; (3) expert review of reporting by the States Parties; and (4) an individual complaint mechanism that requires States Parties' engagement in the review process, but concludes in issuance of recommendations (rather than binding decisions). Figure 1, below, illustrates the soft law continuum, ranging from options that are closer to the "purely political" end of the spectrum to those that approach "hard law" at the right end of the spectrum. Each of the four soft law mechanisms discussed in this report have been placed along the continuum.

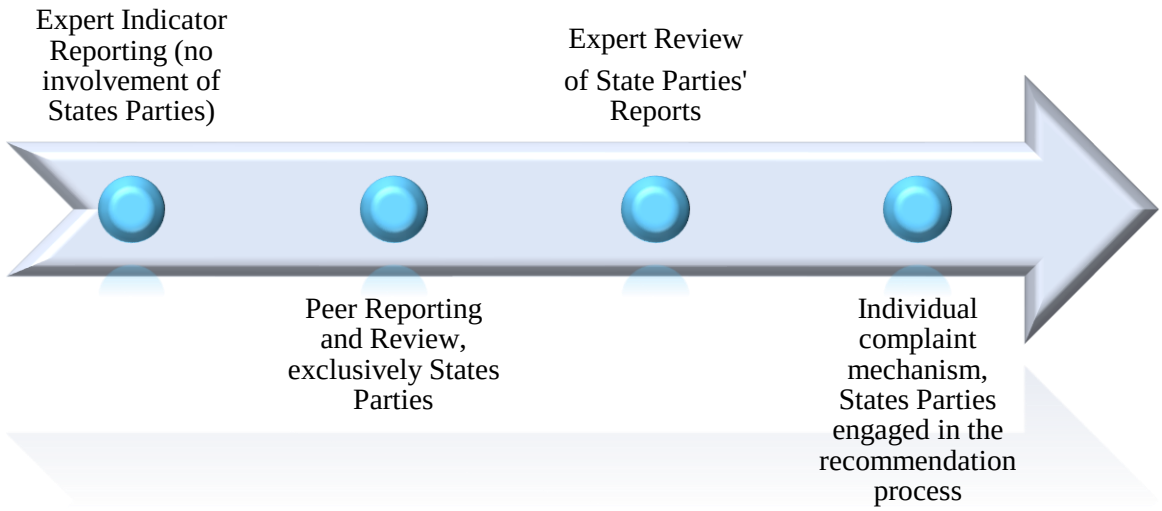


Figure 1

[46] Andrew T. Guzman and Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171, 172 (2010).
[47] *Id.* at 173.

1. Relevant Models

While soft law mechanisms are most common in the environmental and human rights law context, they have been also been utilized, *inter alia*, in international financial and trade regulation. Some models relevant to the PACER Plus Agreement are listed in the following table.

Soft Law Mechanism	Relevant Model
Expert indicator reporting without formal participation of the States Parties	Transparency International's Corruption index and barometer (civil society model) or WTO Secretariat's regular global trade monitoring reports (institutional model)
"Peer review and reporting," conducted exclusively by the States Parties	ASEAN Model; the Trade Policy Review Mechanism (TPRM) at the WTO; or the International Organization of Securities Commissions (IOSCO)
Expert review of reporting by the States Parties	Treaty-body monitoring mechanisms: the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, or the Inter-American Commission on Human Rights
Individual complaint mechanism that requires States Parties' engagement in the review process, but concludes in issuance of recommendations (not binding decisions)	Treaty-body monitoring mechanisms: process under the First Optional Protocol to the International Covenant on Civil and Political Rights

Table 1

Expert reporting that does not formally involve the States Parties might nonetheless offer a meaningful way to influence governance. A number of actors have taken an active role in creating indicators, rankings, and/or measurement reports, including: public international development agencies, governmental aid agencies, businesses, investors, human rights treaty monitoring bodies, NGOs, and scientific or technical expert organizations.[48] The PACER Plus States Parties may choose to appoint independent experts to create and apply a measurement tool.

[48] Kevin E. Davis et. al, *Introduction: Global Governance by Indicators* in GOVERNANCE BY INDICATORS GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS, at 3-4 (IILJ 2012).

"Peer review and reporting," conducted exclusively by the States Parties, would enable the States Parties to encourage compliance with the PACER Plus agreement without resort to full-blown state-to-state arbitration. Expert review of reporting by the States Parties would decrease the political nature of the process and would increase the perceived impartiality of the process.

The individual complaint mechanism is the closest soft law mechanism to more traditional dispute resolution. The individual complaint mechanism would enable investors, rather than States Parties, to engage in the process directly and would likely be less political than some of the other options for this reason. Additionally, this option is similar to mediation, but is more public and the experts provide recommendations at the conclusion of the review.

The PICs may choose to implement one or more of these mechanisms; multiple combinations are possible. Based on our previous conversations with Dr. Kessie, we would recommend the peer review and reporting mechanism or the expert review of reporting by the States Parties. The reports issued under either of these models could be included as a regular agenda item at meetings of the Dispute Prevention Committee (or other applicable PACER Plus meetings) in order to incorporate the soft law method of "naming and shaming" to encourage compliance with the terms of the agreement. Sample treaty text incorporating this into the agreement has been included in Section V, *infra*.

2. Sample Treaty Language

Sample treaty language for soft law mechanisms is included in Part V, *infra*.

3. Pros and Cons

Pros:

- *Investors' confidence*: recourse to independent experts and an opportunity to publicly "name and shame" may boost investors' confidence
- Relatively low sovereignty costs
- Stakeholder engagement: stakeholders from investors, government, and civil society could submit information to the committee regarding concerns
- Transparency: regular review/discussions would increase transparency

Cons:

- *Investors' confidence*: since soft law is not binding, investors may not be confident in the process
- *Novel approach*: may increase investors' risk perception
- Depending on the model(s) chosen, costs may be an important consideration

IV. RECOMMENDATIONS

We recommend focusing on dispute prevention similar to the Brazilian model discussed in Section III.A.1, *supra*. Specifically, we suggest creating a DPM to resolve investor grievances before formal dispute settlement procedures become inevitable. Also, consistent with the Brazilian model, we recommend regular stakeholder meetings centered on specific thematic areas (i.e. border control measures) that involve open dialogue between relevant government officials with the private sector and non-governmental organizations. Private sector participation in the DPM is crucial to its success.

In the event a dispute is not effectively prevented, we recommend obligatory negotiations at the outset. Mediation should be strongly encouraged in the text, and possibly mandatory at the option of the investor. It should be pursuant to a specific procedure outlined in the Investment Chapter. In this regard we recommend the modified language proposed by Dr. Roy, *see* Part V, Section B.1, *infra*. While option 1 below is reflective of our primary recommendation, we have included three additional options for your review in the event our primary recommendation is insufficient due to a lack of recourse to a binding outcome (outside of the integrated state-to-state mechanism provided for in the Dispute Settlement Chapter and the pursuit of domestic remedies).

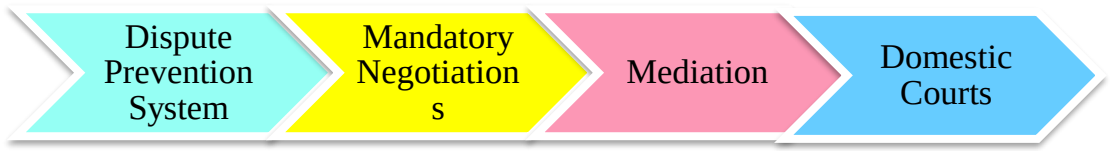
Option 1

This option relies on a robust dispute prevention system, such that most, if not all, investor grievances are resolved at an early stage before formal dispute settlement is necessary. If this mechanism is not successful at preventing the dispute, the investor shall have recourse to mediation pursuant to a specific process. Mediators could be empowered to provide recommendations to the parties. Monitoring and surveillance of the implementation of these recommendations could be a standing item on the Dispute Prevention Committee agenda until the issue is resolved. Then, if no satisfactory solution is reached after mediation, the aggrieved investor must rely on convincing their home state to seek recourse on his or her behalf in the state-to-state mechanism provided for in the PACER Plus Dispute Settlement Chapter. As an integrated mechanism, the state-to-state dispute settlement system is always available as one avenue to produce a binding outcome. We suggest adding a provision explicitly stating that the investor-state dispute settlement mechanism shall not prejudice any other right to recourse, including the right to the state-to-state mechanism.

Additionally, this mechanism is not intended to preclude recourse to domestic remedies. While we do not suggest the exhaustion of local remedies as a prerequisite to mediation (given the potential for legal capacity constraints to frustrate investors), the investor should be able to pursue domestic remedies whenever he/she desires. A provision to this effect should also be explicitly included in the agreement. Although this

could, in theory, lead to parallel proceedings with mediation and review by a domestic court running concurrently, we believe this scenario is unlikely. If the PICs instead prefer requiring the exhaustion of local remedies prior to mediation, we recommend adding a specific time limit, such as 60 days, to avoid the use of domestic remedies as a delay tactic.

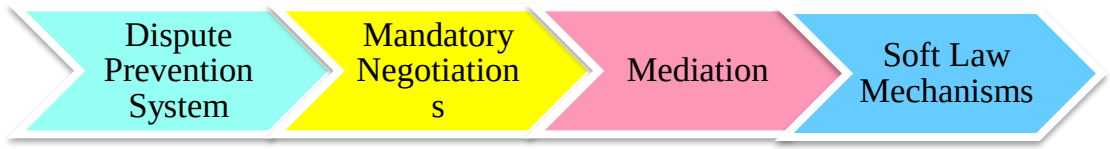
Option 2



If the PICs determine they would like to retain domestic courts as an option or a requirement following mediation in proposed Article 22 of the Investment Chapter, the provision should be tailored to reflect differing capacity levels. Recourse to domestic courts might be limited to investments in host states with adequate legal capacity so as to avoid frustrating an investor with an inefficient and ineffective additional procedure. For a relevant example of a dispute settlement provision tailored in this manner, see the following text from the investment chapter of the Australia-ASEAN FTA:

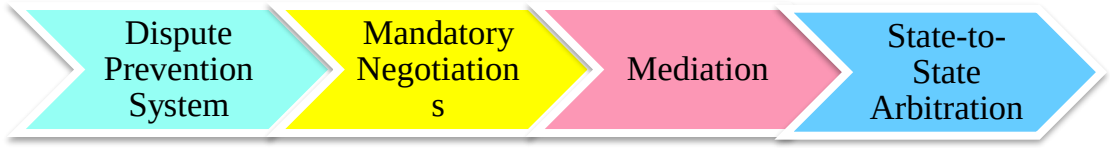
> Article 21 - Submission of a Claim
> 1. A disputing investor may submit a claim referred to in Article 20 (Claim by an Investor of a Party) at the choice of the disputing investor:
>   a. where the Philippines or Viet Nam is the disputing Party, to the courts or tribunals of that Party, provided that such courts or tribunals have jurisdiction over such claim; […]

Option 3



In the event our proposal is deemed to provide an insufficient level of protection for investors given its lack of a binding outcome, we suggest implementing a "soft law" mechanism as outlined in Part V, Sections C.1 & B.2 *infra*. Soft law mechanisms are a supplementary means of encouraging dispute resolution, and encourage investment promotion without limiting state sovereignty. However, the utility of including a soft law mechanism should be balanced against the benefits of creating a simple system that does not frustrate relevant parties or over-burden host states, especially those with scarce resources.

Option 4



As noted in the previous discussion of the Brazilian model, the PICs may want to provide some sort of binding outcome in order to boost investor confidence. As such, the PICs might consider providing for state-to-state arbitration *in the event both parties deem this desirable*. Consistent with Brazil's agreement with Mozambique, the Joint Committee (a.k.a. the Dispute Prevention Committee) could be tasked with developing the appropriate mechanism. State-to-

state arbitration provides an opportunity for both states to advocate on behalf of their interests and maintain some level of control over their policy space. This mechanism could limit any potential arbitral award by requiring the arbitrator(s) to consider the economic development of the losing party as a factor in determining the award amount. This could address the PICs concern regarding the possible damaging effects of high monetary judgments against them.

V. DRAFT TREATY TEXT: DISPUTE PREVENTION, MEDIATION, AND SOFT LAW MECHANISMS

This Annex contains draft treaty text for a dispute prevention mechanism (Section A), mediation (Section B), and "soft law" mechanisms that include "naming and shaming" elements (Section C). We have added explanatory notes regarding our suggested edits directly beneath the text. These explanatory notes are labeled as such and are also made in blue font to set them apart from the proposed treaty text. Throughout, we have italicized portions of the text to draw attention to issues that may need modification based on the PICs' preferences.

A. Dispute Prevention Mechanism Treaty Text

This section contains two options for sample treaty text for a DPM. The first option is based on a collective mechanism incorporated within the proposed Trade in Services and Investment Committee. The second option is based on the model Brazilian Cooperation and Facilitation Investment Agreement as embodied in the Brazil-Mozambique Agreement for Cooperation and Investment Facilitation (ACFI).[49]

1. Dispute Prevention Mechanism Treaty Text Under the Proposed Trade in Services and Investment Committee

[49] Brazil-Mozambique Agreement for Cooperation and Investment Facilitation, Maputo, March 30, 2015.

Below is sample treaty text for a Dispute Prevention Mechanism incorporated into the proposed Trade in Services and Investment Committee.

PIC Proposed Article 25 "Trade in Services and Investment Committee"

1. The Parties shall establish a Joint Committee on Trade in Services and Investment (hereinafter referred to as "the Committee") with a view to accomplishing the objectives of Chapters [insert chapter number] and [insert chapter number]. The functions of the Committee shall be:
   (a) to discuss and review the implementation and operation of the Chapter on Trade in Services and the Chapter on Investment, including with regard to [*Article [AU: 18][PIC: 20*] on Promotion and Facilitation of Investment;
   (b) to share information on and to discuss any other matters related to investment and trade in services that concern Chapters [*insert chapter number*] and [insert chapter number]; *and*
   (c) to prevent investor disputes from arising by promoting investor and stakeholder communication and input.

2. The Committee may, as necessary, make appropriate recommendations by consensus to the Parties for the more effective functioning or the attainment of the objectives of the Chapters.

Explanatory note: The PICs may also want to expand upon this provision to include soft law mechanisms (*see* Section C, *infra*).

3. The Committee shall be composed of representatives of the Governments of the Parties. The Committee may, upon mutual consent of the Parties, invite representatives of relevant entities other than the Governments of the Parties with the necessary expertise relevant to the issues to be discussed, and hold joint meetings with private, *non-governmental* sectors.

4. The Committee shall determine its own rules of procedure.

5. The Committee may establish sub-committees and delegate specific tasks to such sub-committees. *The subcommittees may also include other stakeholders, but no non-governmental member or participant of any committee or sub-committee may participate in any voting process including those under paragraph 2 of this article.*

Explanatory note: sub-committees may instill investor's with greater confidence in the system and may also increase approval of the agreement by civil society. However, the PICs may not deem this appropriate.

6. The Committee shall meet *either in person or via electronic communication not less frequently than once per month or* upon the request of *any* Party.

2. Dispute Prevention Mechanism Treaty Text Based on The Model Brazilian Cooperation and Facilitation Investment Agreement

Article [*insert article number*], Joint Committee

1. For purposes of this Agreement, the Parties shall establish a Joint Committee on Dispute Prevention hereinafter "Dispute Prevention Committee".

2. The Dispute Prevention Committee shall be composed of *government representatives of both parties appointed by the respective governments* [alternative text: *experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity for a term of four years*].

3. The Dispute Prevention Committee shall meet at such times and places that the parties agree, with alternating presidencies between the Parties shall be held at least one meeting a year.

4. The Dispute Prevention Committee shall have the following duties and powers:
   i. monitor the implementation and execution of the dispute prevention portions of this Agreement;
   ii. discuss dispute prevention best practices and facilitate capacity building in this area;
   iii. *request and welcome the participation of the private sector and civil society, where appropriate, on relevant issues related to the work of the Dispute Prevention Committee;*
   iv. seek consensus and amicably resolve any issues or conflicts related to investments of the Parties.

5. *The Parties may establish working groups ad hoc, who will meet jointly or separately from the Dispute Prevention Committee*.

6. *The private sector may be invited to join such ad hoc working groups, when the Dispute Prevention Committee deems their participation to be in the public interest consistent with the goal of dispute prevention*.

7. *The Dispute Prevention Committee shall prepare its own rules addresses the procedures for its operation*.

Article [*insert article number*], Ombudspersons

1. The Parties shall establish ombudspersons who will be primarily responsible for each Party's *obligation* to prevent investment disputes under this agreement through open dialogue.

2. The ombudsperson shall perform the following tasks:
   i. *ensuring compliance with guidelines issued by the Dispute Prevention Committee and* interacting with the ombudsperson(s) of the other Parties, observing the terms of this Agreement;
   ii. interacting with the relevant domestic government authorities to evaluate and recommend, where appropriate, referral of suggestions and complaints received from the governments and investors of the other Parties, and informing the government(s) and/or interested investor(s) of such other Parties of the actions taken in this regard;
   iii. directly act to prevent disputes and facilitate their resolution in conjunction with the relevant government authorities and in cooperation with relevant private entities;

iv. provide timely and useful information to the Parties regarding domestic regulatory issues related to investments generally and in relation to specific projects *as agreed in the Dispute Prevention Committee*;

v. report to the Dispute Prevention Committee regarding his/her activities and actions in furtherance of this agreement.

3. Each Party shall draw up the terms of reference to guide the overall operation of ombudspersons, providing expressly, as appropriate, deadlines for the implementation of each of the ombudsperson's duties and responsibilities.

4. Each Party shall designate its ombudsperson and shall provide official contact information to all other Parties. The ombudsperson should respond promptly to communications and requests from the other Parties.

5. The Parties shall provide their respective ombudsperson with the means and resources necessary to perform their duties and shall ensure that the ombudsperson has the necessary authority to access other government agencies that address the issues set out in this Agreement.

Article [*insert article number*], Relationship with the Private Sector

1. *The Parties will discuss initiatives to strengthen the role of investors in Public-Private Partnerships (PPP), especially through greater transparency and faster access to regulatory information.*

2. *The Parties shall encourage involvement by both the private sector and non-governmental organizations (NGOs) in order to encourage open dialogue on issues covered by this agreement*.

Explanatory note: We would recommend including civil society/NGO participation in this section to clarify that these provisions are not meant to promote involvement in the process exclusively by the private sector and to recognize the range of stakeholders who should be involved in the process.

3. The Parties shall disseminate relevant investment information, making such information available to investors or potential investors of the other Parties.

Article [*insert article number*], Dispute Prevention and Resolution

1. The ombudspersons of each Party will act cooperatively with one another and with the Dispute Prevention Committee in order to prevent, manage and resolve any disputes between the Parties.

2. Before initiating formal dispute resolution, any dispute between the parties should be assessed through consultations and negotiations, and examined preliminarily by the Dispute Prevention Committee.

Explanatory note: This section would preclude formal state-state arbitration prior to addressing the issue at the Dispute Prevention Committee.

3. A Party [*or an investor of a Party*] may submit a specific issue of interest to an investor to the Dispute Prevention Committee:

Explanatory note: This provision would require that the states parties submit issues to the Committee. The PICs may also want to extend this right to investors.

i. to submit an issue under this provision, the interested Party shall submit a written request to the Dispute Prevention Committee, specifying the name(s) of the investor(s) concerned and the challenges or difficulties encountered by the investor(s);

ii. the Dispute Prevention Committee shall have a period of *60 days*, which may be extended by an additional *60 days* upon mutual agreement of the Parties, to review the information so submitted;

iii. in order to facilitate amicable resolution between the parties concerned, wherever possible, the following interested parties should fully participate in resolution:

a) representative(s) of the interested investor(s);

b) representatives of governmental and non-governmental organizations involved in the situation.

iv. dialogue and consultation may be concluded at the initiative of *either* Party involved by submitting a report to the Dispute Prevention Committee that includes the following information:

a) identification of the Party;

b) identification of interested investors;

c) description of the measure to which the request relates; and

d) the position of the Parties concerning the measure.

4. The Dispute Prevention Committee shall, whenever possible, convene a special meeting to review the questions so referred.

5. If the dispute cannot be resolved pursuant to this provision, the Parties may resort to *an arbitration mechanisms between States* as provided in [*insert chapter number*] *and investors may resort to mediation as provided in* [*insert article number*].

Explanatory note: This provision could be read to preclude mediation by an investor prior to bringing the issue to the Committee even if investors cannot bring an issue to the Committee. As such, we would recommend excluding the language regarding investors if investors cannot bring an issue to the Committee.

B. <u>Mediation Mechanism Treaty Text</u>

Below, in Part (1), we have included the draft mediation text provided by Dr. Roy along with our assessment. We have made suggestions following an extensive review of the text, including comparisons with mediation text from the EU-Singapore FTA, CETA, the South Africa Model Law, and ASEAN. Additionally, for ease of reference, Part (2) provides slightly

modified text from CETA, and Part (3) includes slightly modified text from the EU-Singapore FTA. Alterations made to the treaty text itself appear in red text, and, as before, explanatory notes are blue.

1. Mediation Treaty Text Based on The Model Mediation Provisions Drafted by Dr. Roy

MEDIATION MECHANISM FOR INVESTOR-STATE DISPUTES

1. The objective of the mediation mechanism provided for in this section is to prevent disputes and to facilitate the finding of mutually agreed solutions between an investor of a Party and another Party (hereafter the parties to the mediation) through a comprehensive and expeditious procedure with the assistance of a mediator.

2. This Article shall apply to any measure under the scope of this Agreement adversely affecting investment between the Parties.

Explanatory Note (1): The PICs may want to clarify that this provision does not establish any sort of pre-establishment rights.

Explanatory Note (2): Is the word "measure" broad enough to include abstaining from an act?

3. An investor of a Party may request, at any time, that another Party enter into a mediation procedure. Such request shall be addressed to the other Party in writing. The request shall be sufficiently detailed to ~~present~~ clearly convey the concerns of the requesting party and shall:

   (a) identify the specific measure at issue;
   (b) provide a statement of the alleged adverse effects that the requesting party believes the measure has, or will have, on investment between the Parties; and
   (c) explain how the requesting party considers that those effects are linked to the measure.
   (d) contact details of the investor, including a physical address in the Territory, email address, facsimile number and telephone number; and
   (e) the relief sought and the estimated amount of damages claimed

Explanatory note: These additions were included in both the South Africa Model Law, and CETA. Contact details could facilitate the ease of communication between parties, and the inclusion of relief sought is certainly critical information necessary to deepen an understanding of the investor's goals.

4. The Party to which such request is addressed shall give sympathetic consideration to the request and shall reply by accepting or rejecting it in writing within thirty [ten] days of its receipt.

5. The parties to the mediation shall endeavor to agree on a mediator no later than fifteen [working/business] days after the receipt of the reply to the request referred to in paragraph 4.

6. A mediator shall not be a national of either party to the mediation, unless they agree otherwise. Such appointment may include appointing a mediator from the roster established pursuant to Article [insert article number] of Chapter [insert chapter number] [the roster established by the Dispute Prevention Committee].

Explanatory Note: This provision contemplates establishing a roster of mediators. This task may be assigned to the Dispute Prevention Committee or a preliminary list could be established prior to concluding this agreement and additions to the list could be handled by the Dispute Prevention Committee or a regional mediation center.

7. If the parties to the mediation cannot agree on the mediator within the established time frame, either party may request the appointment of a mediator by:
   a. The Dispute Prevention Committee or
   b. The Secretary-General of ICSID.[50]

Explanatory Note (1): Alternatively, appointment may be assigned to the Pacific Islands Forum Secretariat, the ICJ, or the Secretary General of the Permanent Court of Arbitration.

Explanatory Note (2): If a regional mediation center is created, as recommended previously, provisions (5), (6) and/or (7) could be modified to provide this center as an option for investors.

8. The mediator shall act in an impartial and transparent manner. The mediator will assist the parties to the mediation to understand both parties' understandings of the measure(s) at issue and the possible adverse effects on investment resulting from the measure(s), keeping in mind that the goal of mediation is for the parties to reach a mutually agreed solution.

9. Within ten days after the appointment of the mediator, the party having invoked the mediation procedure shall present, in writing, a detailed description of the problem to the mediator and to the other party, ~~in particular of~~ detailing the operation of the measure at issue and its adverse effects on investment. Within twenty days of delivery of this first submission, the other party may provide, in writing, its comments to the description of the problem. Either party may include in its description or comments any information that it deems relevant.

10. Recourse to mediation shall be governed by the rules agreed to by the disputing parties including, if available, the rules established by the Trade in Services and Investment Committee pursuant to Article [XXX]. The mediator may decide on the most appropriate way of bringing clarity to the measure concerned and its possible adverse effects on investment. In particular, the mediator may organize meetings between the parties, consult the parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the parties. However, before

[50] *See* Table III for list of which PICs are ICSID members.

seeking the assistance of or consulting with relevant experts and stakeholders, the mediator shall consult with the parties.

11. The mediator may offer advice and propose a solution for consideration of the parties who may accept or reject the proposed solution or may agree on a different solution. However, the mediator shall not advise or give comments on the consistency of the measure at issue with Article X (Investment Protection) of this Agreement.

12. The procedure shall take place in the territory of the party to which the request was addressed or, by mutual agreement, in any other location or by any other means.

13. The parties to the mediation shall endeavor to reach a mutually agreed solution within sixty days from the appointment of the mediator. Pending a final agreement, the parties may consider, and mutually agree upon, possible interim solutions.

14. The solution may be adopted by means of a decision of the Committee on XX [Dispute Prevention Committee]. A party may make such solution subject to the completion of any necessary internal procedures. Mutually agreed solutions shall be made publicly available. However, the version disclosed to the public may not contain any information that a party has designated as confidential [for reasons of national security or as a trade secret].

Explanatory Note (1): The PICs want to utilize "soft law" mechanisms in this process as outlined in Section C, Soft Law Mechanisms. This might include a committee tasked with adopting decisions from mediation. Alternatively, if The Trade in Services and Investment Committee is kept separate from The Dispute Prevention Committee, the PICs might consider which of those committees to vest with this approval authority.

Explanatory Note (2): The PICs may want to limit the right for either party to make the resolution of a dispute confidential. We have included language that would limit this to cases of national security or involving trade secrets.

15. The procedure shall be terminated:
    (a) by the adoption of a mutually agreed solution by the parties, on the date of adoption;
    (b) by a mutual agreement of the parties at any stage of the procedure, on the date of that agreement;
    (c) by a written declaration of the mediator, after consultation with the parties, that further efforts at mediation would be to no avail, on the date of that declaration; or
    (d) by a written declaration of a party after exploring mutually agreed solutions under the mediation procedure and after having considered any advice and proposed solutions by the mediator, on the date of that declaration.

16. Where the parties have agreed to a solution, each party shall take the measures necessary to implement the mutually agreed solution within the agreed timeframe. The implementing party shall inform the other party in writing of any steps or measures taken to implement the mutually agreed solution.

17. ~~On~~ Upon request of the parties, the mediator shall issue to the parties, in writing, a draft factual report, providing a brief summary of (i) the measure at issue in these procedures; (ii)

the procedures followed; and (iii) any mutually agreed solution reached ~~as the final outcome of these procedures~~, including possible interim solutions. The mediator shall provide the parties fifteen [working/business] days to comment on the draft report. After considering the comments of the parties submitted within the period, the mediator shall submit, in writing, a final factual report to the parties within fifteen [working/business] days. The factual report shall not include any interpretation of this Agreement.

Explanatory Note (1): We changed the language in clause (iii) to reflect that interim measures or other preliminary agreements of the parties should be included in the report.

Explanatory Note (2): The PICs should consider permitting the mediator(s) to provide suggested dollar amounts owed to the losing party. Such specificity may effectively encourage settlement rather than engagement in contentious dispute settlement proceedings.

18. The mediation procedure is without prejudice to the Parties' rights and obligations under Chapter [*insert chapter number*] (Dispute Settlement).

19. Effective mediation facilitates an open exchange between the parties to mediation. As such, the mediation procedure is not intended to serve as a basis for formal dispute settlement procedures under any other agreement. A Party, or an investor of a Party, shall not rely on or introduce as evidence in such dispute settlement procedures, nor shall a panel take into consideration:
    (a) positions taken in the course of the mediation procedure;
    (b) the fact that a Party has indicated its willingness to accept a solution to the measure subject to mediation; or
    (c) advice given or proposals made by the mediator.

20. Unless the Parties agree otherwise, all steps of the procedure, including any advice or proposed solution, are confidential. However, either Party may disclose to the public that mediation is taking place.

21. Any time limit referred to in this Article may be modified by mutual agreement between the Parties.

22. Each party shall bear its own expenses derived from the participation in the mediation procedure.

23. The parties shall share equally the expenses derived from organizational matters, including the remuneration and expenses of the mediator. Remuneration of the mediator shall be in accordance with ~~that foreseen in~~ [the prevailing rate for such services as established by reference to, *inter alia*, the prevailing rates for mediation services in the Parties' domestic systems].

Explanatory Note: The PICs may consider establishing these rates by reference to the prevailing rates related to specific mediation centers, ICSID procedures, or domestic mediation costs. We would recommend reference to the rates of a regional, comparable mediation center, but would specifically provide that the reference point could be changed based on agreement of

the Parties. A regional center is The Malaysian Mediation Centre (MMC), a non-political, non-governmental, voluntary and non-profit organization.[51] Notably, Fiji Mediation Services is a member of the MMC.

In general, we noticed the text is missing a reference to "Replacement of mediators; Incapacity or Resignation of mediators; Disqualification of Mediators." These provisions might be useful in the event either party has cause for dissatisfaction with the selected mediator.

2. The EU–Canada: Comprehensive Trade and Economic Agreement (CETA)

Article [*insert article number*]: Mediation
The disputing parties may at any time agree to have recourse to mediation.

Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and shall be governed by the rules agreed to by the disputing parties including, if available, the rules established by the [Trade in Services and Investment Committee pursuant to Article (insert article number)].

The mediator is appointed by agreement of the disputing parties. Such appointment may include appointing a mediator from the roster established pursuant to *[insert article number]*.

Disputing parties shall endeavor to reach a resolution to the dispute within 60 days from the appointment of the mediator.

[…]

3. The Free Trade Agreement between the European Union and Singapore

Article [*insert article number*], Objective
The objective of the mediation mechanism is to facilitate mutually agreed solutions by the parties to a dispute through a comprehensive and expeditious procedure with the assistance of a mediator.

SECTION A
Procedure under the Mediation Mechanism
Article [*insert article number*], Initiation of the Procedure
1. A disputing party may request, at any time, the initiation of a mediation procedure. Such request shall be addressed to the other party in writing.

[51] *See* http://www.asianmediationassociation.org/node/15.

2. The party to which the request is addressed shall give sympathetic consideration to the request and reply by accepting or rejecting it in writing within *ten days* of its receipt.

Article [*insert article number*], Selection of the Mediator

1. The disputing parties shall endeavor to agree on a mediator no later than *fifteen days* after the receipt of the reply to the request referred to in [*insert article number*] (Initiation of the Procedure) of this *Annex*. Such agreement may include appointment of a mediator from the list established according to Article [*insert Article*].

2. If the disputing parties cannot agree on the mediator pursuant to paragraph 1, either disputing party may request either [the Dispute Prevention Committee or the Secretary-General of ICSID, pursuant to the ICSID Convention or the ICSID Additional Facility Rules if applicable]:
   (a) [to draw the mediator by lot from a list of individuals agreed upon at the Dispute Prevention Committee]; or
   (b) in the event that such a list has not yet been established, to appoint a mediator at his or her own discretion, in consultation with the disputing parties, taking into account any individuals whose names appear on both lists proposed by the Parties.

   [The Dispute Prevention Committee or the Secretary-General of ICSID] shall select the mediator within *ten working days* of the request by either disputing party.

Explanatory Note: Only six of the fourteen PICs are ICSID members (*see* Table III in Annex, *infra*). Disputes may arise under this agreement that would not be covered by either the ICSID Convention or the ICSID Additional Facility Rules. As such, we recommend vesting the proposed Dispute Prevention Committee with the authority to appoint a mediator. The PICs may prefer to vest exclusive appointment authority in the Dispute Prevention Committee rather than allowing the investor to choose between the Secretary–General of ICSID and the Committee.

3. A mediator shall not be a national of either Party, unless the disputing parties agree otherwise.

4. The mediator shall assist, in an impartial and transparent manner, the disputing parties in bringing clarity to the measure and its possible adverse effects on investment, and reaching a mutually agreed solution.

Article [*insert article number*], Rules of the Mediation Procedure

1. Within *ten days* after the appointment of the mediator, the disputing party having invoked the mediation procedure shall present, in writing, a detailed description of the problem to the mediator and to the other disputing party, in particular of the operation of the measure at issue and its adverse effects on investment. Within *twenty days* after the date of delivery of this submission, the other disputing party may provide, in writing, its comments regarding the first submission (the description of the problem). Either disputing party may include in its description or comments any information that it deems relevant.

2. The mediator will seek to understand the measure at issue and the alleged adverse effects of that measure on investment. In particular, the mediator may organize meetings between the

disputing parties, consult the disputing parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the disputing parties. However, before seeking the assistance of or consulting with relevant experts and stakeholders, the mediator shall consult with the disputing parties.

3. The mediator may offer advice and propose a solution for consideration of the disputing parties who may accept or reject the proposed solution or may agree on a different solution. However, the mediator *shall not advise or give comments on the consistency of the measure at issue with provisions of this Agreement*.

4. The procedure shall take place in the territory of the disputing party to which the request was addressed or by mutual agreement, in any other location or by any other means.

5. The disputing parties shall endeavor to reach a mutually agreed solution within *sixty days* from the appointment of the mediator. Pending a final agreement, the disputing parties may consider possible interim solutions.

6. *Mutually agreed solutions shall be made publicly available*. However, the version disclosed to the public may not contain any information that a disputing party has designated as confidential.

7. The procedure shall be terminated:
   (a) by the adoption of a mutually agreed solution by the disputing parties, on the date of adoption;
   (b) by a mutual agreement of the disputing parties at any stage of the procedure, on the date of that agreement;
   (c) by a written declaration of the mediator, after consultation with the disputing parties, that further efforts at mediation would be to no avail, on the date of that declaration;
   (d) by a written declaration of a disputing party after exploring mutually agreed solutions under the mediation procedure and after having considered any advice and proposed solutions by the mediator, on the date of that declaration.

SECTION B
Implementation

Article [*insert article number*], Implementation of a Mutually Agreed Solution

1. Where the disputing parties have agreed to a solution, each disputing party shall take the measures necessary to implement the mutually agreed solution within the agreed timeframe.

2. The implementing disputing party shall inform the other disputing party in writing of any steps or measures taken to implement the mutually agreed solution.

3. At the request of the disputing parties, the mediator shall issue a draft factual report to the disputing parties, providing a brief summary of:
   (a) the measure at issue in the mediation procedures;
   (b) the procedures followed; and

(c) any mutually agreed solution reached as the final outcome of these procedures, including possible interim solutions.

The mediator shall provide the disputing parties *fifteen working days* to comment on the draft report. After considering the comments of the disputing parties submitted within the period, the mediator shall submit, in writing, a final factual report to the disputing parties within *fifteen working days*. The factual report shall not include any interpretation of this Agreement.

C. Soft Law Mechanisms Treaty Text

This section includes draft treaty language for three soft-law mechanisms, a reporting mechanism (Part A), an investor complaint mechanism that would enable "naming and shaming" (Part B), and . This language was included in prior versions of our report under the treaty body monitoring mechanism, but soft law elements from that proposal could be incorporated into a system centered on mediation as a means of heightening investor confidence in the mechanism.

1. Reporting Mechanism

Article [*insert article number*], Reporting

1. States Parties undertake to submit a report to the Committee for its review on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this agreement
   (a) within one year after the entry into force of the agreement for the State concerned; and
   (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.
2. These reports shall be maintained for public examination.

Explanatory Note: This basic reporting requirement could be included under the Dispute Prevention Committee. The PICs may also wish to establish a separate committee to handle these issues because the perceived independence of the committee may be enhanced if the committee is comprised of independent experts rather than government officials. The following articles would be applicable if the PICs determined that a separate committee was optimal.

Article [*insert article number*], Establishing the Committee

1. There shall be established a Committee on the Implementation of the PACER Plus Dispute Prevention Mechanism (hereinafter referred to as the Committee) consisting of *fourteen* experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate *three* people from among its own nationals.
3. The initial election shall be held *six months* after the date of the entry into force of this agreement.
4. The members of the Committee shall be elected for a term of four years.
5. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.
6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Explanatory Note: This language establishes an independent expert review committee. The preceding draft article could be used to incorporate the duties of the committee into the Dispute Prevention Committee (rather than establishing a separate committee).

Article [*insert article number*], Reporting

1. States Parties undertake to submit a report to the Committee for its review on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this agreement
   (a) within one year after the entry into force of the agreement for the State concerned; and
   (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.
2. These reports shall be maintained for public examination.

Article [*insert article number*], Committee Rules and Administration

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The secretariat of the Committee shall be provided by [Australia/New Zealand].
4. The meetings of the Committee shall normally be held at [Vanuatu City Hall or via electronic means if all State-parties so agree].

2. Naming and Shaming: Domestic Ombudsperson and Investor Complaint Mechanism

Article [*insert article number*], Domestic Ombudsperson and Investor Complaint Mechanism

1. Any State Party to this agreement *shall* establish or indicate a body ["*ombudsperson*"] within its national legal order which shall be competent to:
   (a) receive and consider petitions from investors within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this agreement; or
   (b) receive inquiries from foreign investors more generally; *or*
   (c) receive inquiries from civil society organizations or individual residents or citizens regarding foreign direct investment.
2. The name of any body established or indicated in accordance with paragraph 1 of this article shall be deposited by the State Party concerned with the *secretariat*, who shall transmit copies thereof to the other States Parties.

3. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 1 of this article, and *certified* copies of the register shall be filed annually through appropriate channels with the *secretariat on the understanding that the contents shall not be publicly disclosed*.
4. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 1(a)-(*b*) of this article, the petitioner-investor shall have the right to communicate the matter to the Committee within *six months*. *This provision is* [*is not*] *intended to operate as a statute of limitations for investor complaints*.
5. (a) The Committee shall *confidentially* bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention.
   (b) Within *three* months, the receiving State shall submit to the Committee *written* explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
6. (a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the investor-petitioner. *The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies*. *However, this shall not be the rule where the application of the remedies is unreasonably prolonged*;
   (b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the investor-petitioner.
7. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

3. **Naming and Shaming: Regular Agenda Item at Dispute Prevention Committee**

The text of these draft articles is drawn primarily from the WTO Trade Policy Review Mechanism (TPRM).

Article [insert article number], Objectives

(1.) The purpose of Investment Promotion Policy Review ("IPPR") is to contribute to the improved adherence by all Members to the commitments undertaken in the Chapter on Investment to this agreement by achieving greater transparency in, and understanding of, the investment policies and practices of States Parties. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual States Parties' investment policies and practices and their impact on the goals of encouraging and promoting the flow of investment between the Parties, as well as creating a secure, predictable and favorable environment for investors of the Parties and their investments, while also respecting the right of governments to regulate investments in the public interest. The IPPR is not, however, intended to serve as a basis for the enforcement of specific obligations under the PACER Plus Agreement or for dispute settlement procedures, or to impose new policy commitments on States Parties.

(2.) The assessment carried out under the IPPR takes place, to the extent relevant, against the background of the wider economic and developmental needs, policies and objectives of the Party concerned, as well as of its external environment.

Article [*insert article number*], Domestic transparency

States Parties recognize the inherent value of domestic transparency of government decision-making on investment policy matters for both Members' economies and foreign direct investment, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems

Article [*insert article number*], Procedures for review

(1.) The investment policies and practices of all Parties shall be subject to periodic review by the Dispute Prevention Committee under the IPPR process.

(2.) The Dispute Prevention Committee shall establish a basic plan for the conduct of the reviews. It may also discuss and take note of update reports from Members. The Dispute Prevention Committee shall establish a programme of reviews for each year in consultation with the Parties directly concerned. In consultation with the Party or Parties under review, the Chairperson may choose discussants who, acting in their personal capacity, shall introduce the discussions in the Dispute Prevention Committee.

(3.) The Dispute Prevention Committee, under the IPPR process, shall base its work on the following documentation:

(a) a full report, referred to in article [insert following article number], supplied by the Party or Parties under review;

(b) a report, to be drawn up by the Secretariat on its own responsibility, based on the information available to it and that provided by the Party or Parties concerned. The Secretariat should seek clarification from the Party or Parties concerned of their investment policies and practices.

Article [*insert article number*], Reporting

In order to achieve the fullest possible degree of transparency, each Party shall report regularly to the Dispute Prevention Committee, under the IPPR process. Full reports shall describe the investment policies and practices pursued by the Party or Parties concerned, based on an agreed format to be decided upon by the Dispute Prevention Committee, under the IPPR process. Between reviews, Parties shall provide brief reports when there are any significant changes in their investment policies; an annual update of statistical information will be provided according to the agreed format. Particular account shall be taken of difficulties presented to least-developed country Parties in compiling their reports. The Secretariat shall make available technical assistance on request to developing country Parties, and in particular to the least-developed country Parties.

ANNEX: **TABLES**

TABLE I, RELEVANT AGENCIES/ORGANIZATIONS IN PACER PLUS COUNTRIES CURRENTLY MONITORING FOREIGN INVESTMENT

State Party	Relevant Agency	Stated Objectives	Website
Australia	Australian Trade Commission/Austrade	Austrade works with potential investors providing practical advice, marketing intelligence and introductions to the people you need to meet	http://www.austrade.gov.au/Invest
Cook Islands	Business Trade and Investment Board (BTIB)	The BTIB aims to: • Update the investment policy every three years to ensure it is consistent with the needs and aspirations of Cook Islanders; Encourage Cook Islanders participate in foreign direct investment through joint ownership. • Ensure that Cook Islands interest s such as land and business ownership are protected and maintained. • Diversify our investment base. • Maintain & update foreign investment registry *Monitoring and compliance*: BTIB is mandated to carry out regular inspections on a foreign enterprise.	http://www.btib.gov.ck/
Federated States of Micronesia	Department of Resources and Development / Foreign Investment Board	The FSM Government will assist investors who request for assistance in identifying prospective local citizen partners, although investors are also free to do so on their own.* *Note particular objectives of each agency unclear from Government website.	http://www.fsmgov.org/info/fi.html
Fiji	Investment Fiji (statutory organization)	Investment Fiji operates independently as the marketing arm of the Fiji Government to: • Provide services and assistance to promote, facilitate and stimulate increased investments and exports. • Provide a range of services to promote investments and the develop industries and enterprises as well as to raise exports of goods and services. • Undertake regulatory functions, promotional activities and advisory and information services to meet its objectives. Investment Fiji also acts as a liaison between Government, the private sector and regional and international agencies.	http://www.investmentfiji.org.fj/
Kiribati	Ministry of Commerce, Industry and Cooperatives (Foreign Investment Promotion Division)	The Division is responsible for: • All matters pertinent to foreign investment in Kiribati. • Facilitation of foreign investments at all stages starting from providing information on how to invest in Kiribati to processing of foreign investment applications and providing after care assistance for approved foreign investments. • Monitoring current investments • Investment promotion	http://www.mcic.gov.ki/?page_id=41
Nauru	Department of	*Unclear from government website, beyond "oversees foreign investment"	http://naurugov.nr/

State Party	Relevant Agency	Stated Objectives	Website
	Commerce, Industry & Environment		government/ministries/hon-aaron-stein-cook,-mp.aspx
New Zealand	New Zealand Trade and Enterprise (NZTE) is the Government's international business development agency.	NZTE's purpose is to grow companies internationally – bigger, better, faster – for the benefit of New Zealand.	https://www.nzte.govt.nz/en/invest/
Niue	InvesNiue	InvesNiue is the country's premiere resource for investment facilitation. We are a Government body, responsible for facilitating investment in our country's industries, such as Tourism, Agriculture, Aquaculture, Handicrafts, and Internet Domain Names. *Note: the site notes that "assistance in implementing investment projects after Cabinet approval has been given will be provided by either the Chamber of Commerce or the PDU," indicating that the agency does not provide continuous investor service.	http://www.invesniue.com/
Palau	Palau Foreign Investment Board		No website[52]
Papua New Guinea	Investment Promotion Authority | Papua New Guinea	The IPA is the organization that houses the Companies Office of PNG, the Securities Commission of PNG and the Intellectual Property Office of PNG, hence the roles and functions of the IPA is diverse. The IPA is also the point of identification of markets for PNG exports and dissemination of investor- related information about PNG.	http://www.ipa.gov.pg/

Republic of the Marshall Islands Islands	Ministry of Resources and Development (Trade and Investment Division)	The Division is responsible for:
		• Investment promotion
		• The provision of investor facilitation services
		• Policy advice to Government
		
		Any investor, non-citizen or citizen, may request assistance from the Division for:
		• obtaining information on:
		  ◦ investment conditions and data on the cost of doing business in the country;
		  ◦ investment related authorization procedures.
		• facilitation assistance in:
		  ◦ arranging meetings with government officials;
		  ◦ identifying local private consulting, accounting and legal services to assist investors comply with the various approvals required in order to establish and operate their business activities;
		  ◦ following-up with government officials to ensure that investment related applications are processed efficiently.
			http://www.rmiembassyus.org/Econ%20Invest/National%20Investment%20Policy%20Statement%5b1%5d.pdf

[52] *See* World Bank Group, GLOBAL INVESTMENT PROMOTION BEST PRACTICES 2012, at p. 47, *available at* www.wbginvestmentclimate.org

State Party	Relevant Agency	Stated Objectives	Website
Samoa	Industry Development & Investment Promotion Division (IDIPD)	The Division provides policy and other advice on investment promotions and industry development. It facilitates the development of the industrial sector through active promotion of both local and foreign investment in the country. It maintains the Foreign Investors registry and follows up on status of those investments. The Division coordinates information on the state of industry and economic development and works closely with the Ministry of Foreign Affairs and Trade on trade related issues. To enhance the development of a sound enabling investment environment through the provision of adequate, accurate and timely information for investor decision through effective administration of existing programs of assistance. These are aimed at sustaining the private sector development.	http://www.mcil.gov.ws/idipd_invest.html
Solomon Islands	The Foreign Investment Division	The Division is the de facto investment promotion agency of the Solomon Islands. Their responsibilities include promoting and facilitating foreign investment. As required under the Foreign Investment (Amendment & Validation) Act 2009 and Regulation 2006. They also have an aftercare role to assist foreign investors comply with their terms of registration.	http://www.investsolomons.gov.sb/
Tonga	The Trade Promotion Unit of the TradeInvest & Business Development division of the Ministry of Commerce, Tourism & Labour	The TradeInvest & Business Development division is responsible for the facilitation and marketing of exports and investments both locally and abroad. It is also dedicated to facilitating the development of businesses through the provision of professional, timely and knowledgeable business support services and advice to businesses across Tonga. It is the first point of contact for all foreign investors seeking to invest in Tonga. The Division is comprised of the Trade Promotion Unit, Investment Promotion Unit, Marketing Intelligence Unit, and the Business Development Unit.	http://www.mctl.gov.to/?page_id=416
Tuvalu	Ministry of Finance and Economic Development		No website[53]
Vanuatu	Vanuatu Investment Promotion Authority (VIPA)	To expeditiously facilitate, promote and foster foreign investment in Vanuatu and to generate greater economic prosperity for the people of Vanuatu.	http://www.investvanuatu.org/

[53] *See* World Bank Group, GLOBAL INVESTMENT PROMOTION BEST PRACTICES 2012, at p. 47, *available at* www.wbginvestmentclimate.org.

TABLE II, EXISTING PICS INVESTMENT AGREEMENTS WITH DISPUTE SETTLEMENT PROVISIONS

	Australia-Fiji Trade Agreement (1999)	Australia - Papua New Guinea BIT (1990)	China - Papua New Guinea BIT (1991)	Germany - Papua New Guinea BIT (1980)	Japan - Papua New Guinea BIT (2011)	Papua New Guinea - United Kingdom BIT (1981)	Tonga - United Kingdom BIT (1997)
Cook Islands							
Federated States of Micronesia							
Fiji	No investor-state or state-state DS						
Kiribati							
Nauru							
Niue							
Palau							
Papua New Guinea		Article 13 & Annex A: state-state arbitration; Article 14 & Annex B: investor-state ISDS or domestic courts	Text not available	Article 10: state-state arbitration	Article 15: state-state arbitration; Article 16: ISDS	Text not available	

	Australia-Fiji Trade Agreement (1999)	Australia - Papua New Guinea BIT (1990)	China - Papua New Guinea BIT (1991)	Germany - Papua New Guinea BIT (1980)	Japan - Papua New Guinea BIT (2011)	Papua New Guinea - United Kingdom BIT (1981)	Tonga - United Kingdom BIT (1997)
Republic of Marshall Islands							
Samoa							
Solomon Islands							
Tonga							Article 8: investor-state ISDS (arbitration); Article 9: state-state arbitration
Tuvalu							
Vanuatu							

Table II note: A number of the PICs are signatories to the Cotonou Agreement and the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA). However, these agreements do no contain investor-state dispute settlement provisions and are excluded from this table.

TABLE III, DISPUTE SETTLEMENT CONVENTIONS & LEGAL SYSTEM INFORMATION

	ICSID Convention, Date of Adoption	New York Convention, Date of Adoption	Legal System[54]
Cook Islands	NA	1958	common law, similar to New Zealand common law
Federated States of Micronesia	1965	NA	mixed legal system of common and customary law
Fiji	1965	1958	common law system based on the English model
Kiribati	NA	NA	English common law supplemented by customary law
Nauru	NA	NA	mixed legal system of common law based on the English model and customary law
Niue	NA	NA	English common law
Palau	NA	NA	mixed legal system of civil, common, and customary law
Papua New Guinea	1965	NA	mixed legal system of English common law and customary law
Republic of Marshall Islands	NA	1958	mixed legal system of US and English common law, customary law, and local statutes
Samoa	1965	NA	mixed legal system of English common law and customary law; judicial review of legislative acts with respect to fundamental rights of the citizen
Solomon Islands	1965	NA	mixed legal system of English common law and customary law
Tonga	1965	NA	English common law
Tuvalu	NA	NA	mixed legal system of English common law and local customary law
Vanuatu	NA	NA	mixed legal system of English common law, French law, and customary law

[54] Information on legal systems obtained from The CIA World Factbook, *available at* https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html