



PACER Plus **Chapter Summary 2021**

Chapter 9: Investment



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Introduction

What is this summary and who is it for?

This summary describes the main obligations in PACER Plus that apply to investment. It is intended for anyone who wants an overview of the PACER Plus obligations.

The summary does not cover:

- the rules around subrogation (Article 17)
- promotion and facilitation of investment (Article 20)

What does the PACER Plus Investment Chapter do?

The Investment Chapter aims to encourage a stable and predictable environment to attract and promote investment between PACER Plus countries.

The obligations that are imposed on host countries (i.e. those countries receiving investment) are designed to further this objective in order to increase the level of sustainable investment in line with national development objectives.

It is important to note that investors must respect each country's national policy objectives and rules. And further, that the obligations do not prevent countries from regulating activities and behaviour of investors. In particular, countries may:

- adopt or maintain laws, regulations, policies etc that they consider appropriate to ensure that investment activity is sensitive to its environmental, health, or other regulatory objectives. Any such measures must be consistent with PACER Plus (e.g. they mustn't discriminate or be arbitrary)
- put in place special formalities (such as a requirement to register a company) in connection with **covered investments** (defined later in these Guidelines), as long as they do not substantially impair the protections available to investors and investments under the Investment Chapter (e.g. they mustn't discriminate against foreign investors).

A **covered investment** is an investment by an investor from one PACER Plus country (the "home" country) in another country (the "host" country) which has been approved and is subject to the host country's laws.

To what agencies is the Investment Chapter relevant?

The Investment Chapter is relevant to any agencies who regulate or engage with foreign investors and investments.

The obligations vary depending on the sector of investment

Most of the obligations in the Investment Chapter apply in respect of investors and investments in all sectors of the economy. However, the national treatment obligation only applies to investors and investments in sectors that are listed in a country's Schedule of Commitments on Investment.

Each PACER Plus country has a **Schedule of Commitments** on Investment that lists the sectors in respect of which it has agreed to abide by the **national treatment** obligation. For each sector (or sub-sector) that a country has committed, it was also able to list exceptions where the national treatment obligation will not apply or will only apply in a modified way.



Relationship between the Investment Chapter and other Chapters

The relationship between the various PACER Plus chapters can be a bit confusing. Here are the key points from other Chapters to be aware of in relation to the Investment Chapter.

Services Chapter

What types of investment are covered by the Services Chapter?

- The Services Chapter applies to some kinds of investments. It applies when a services supplier from one PACER Plus country establishes a commercial presence in another PACER Plus country in order to supply services (for example, when a company invests in Tonga in order to supply car rental services).
 - For example, an Australian company that sets up an office in Nuku'alofa to supply car rental services is making an investment. It is not the supply of the services itself that is an investment, but the business being set up to provide the services.

What types of investment are covered by the Investment Chapter?

- The Investment Chapter applies to a broader range of investments than the Services Chapter. The term "investment" is defined as: "every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".
- An investment as defined in the Investment Chapter might include an investment in an enterprise as well as things like shares, stocks, intellectual property, licences and permits.

Do any of the obligations in the Investment Chapter also apply to the types of investments covered by the Services Chapter?

Yes. The following obligations in the Investment Chapter apply not only to the kinds of investments defined in the Investment Chapter, but also to *the supply of services through a commercial presence* (even if the services sector in question is not listed in Tonga's Schedule of Commitments for Services):

- Article 9 (International minimum standard of treatment)
- Article 10 (Senior management and boards of directors)
- Article 12 (Compensation in times of civil strife etc)
- Article 13 (No expropriation without compensation)
- Article 14 (Free transfer of funds)
- Article 17 (Subrogation)



Movement of Natural Persons (MNP) Chapter

The MNP Chapter addresses the temporary movement across borders of business people, semi-skilled, and skilled workers.

It can be difficult for a foreigner to **invest** in or provide a **service** to customers in another country unless, for example, they can visit to check up on their operations, and send senior managers to work in-country for a while. The Chapter therefore includes commitments to facilitate the temporary entry of business people.

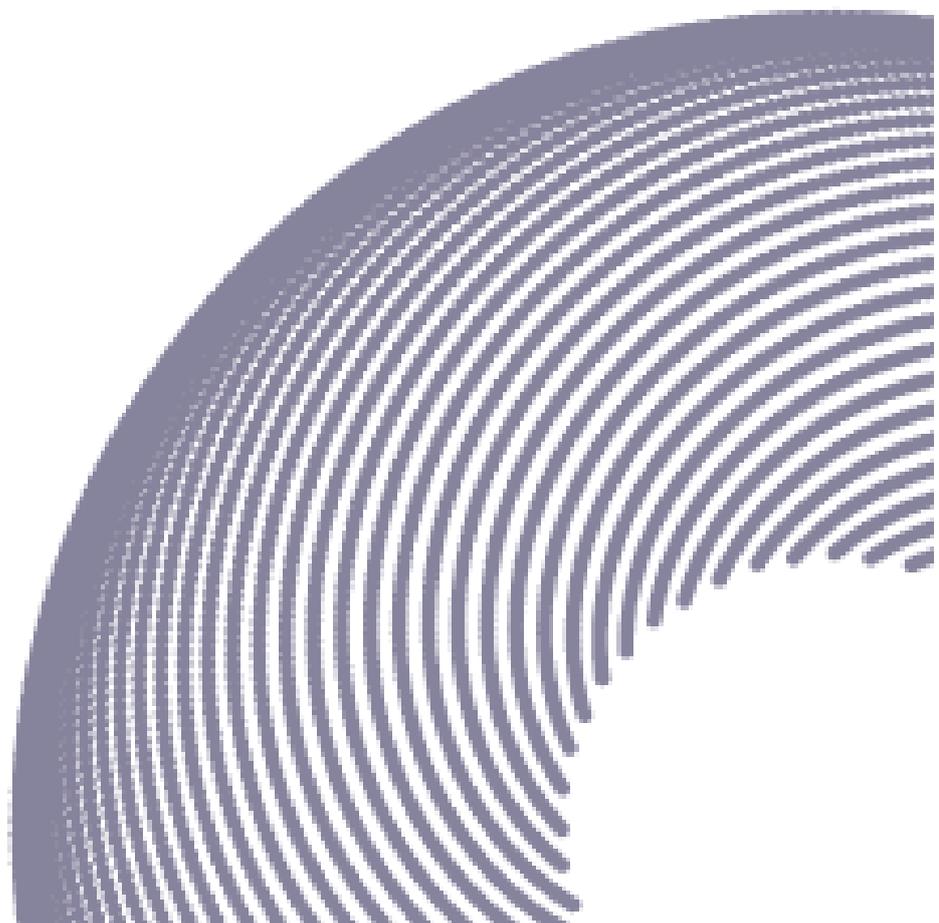
The Chapter also has commitments on **semi-skilled and skilled workers** which allows receiving countries to fill gaps in their local labour markets, and sending countries to access work and incomes for their people.

Transparency Chapter

The Investment Chapter has transparency obligations that require countries to provide certain information to other PACER Plus countries about measures relating to investment. These obligations are set out more fully in these guidelines.

Transparency is about making measures known to those who want to find out about them. It is important for predictability in investment: it is easier for investors if they know as much as possible about the rules and requirements they will face when entering a market.

- PACER Plus also has a separate Transparency Chapter, which sets out general transparency requirements.





National treatment – applies only to investments in sectors that are listed in a country's schedule

The **national treatment** obligation only applies to investors and investments in the sectors that a country has listed in its Schedule of Commitments on Investment.

National treatment is a type of non-discrimination rule. It requires that in sectors listed in a country's Schedule of Commitments, a country must treat investors and **covered investments** from another PACER Plus country no less favourably than it treats, in like circumstances, its own investors and investments.

A **covered investment** is an investment by an investor from one PACER Plus country (the "home" country) in another country (the "host" country) which has been approved and is subject to the host country's laws.

This national treatment obligation does not apply to the type of investment that is also known as "Mode 3 services" (that is, the commercial presence of a services supplier in a country). However, the national treatment obligation in the Services Chapter will apply to that type of investment, if the relevant sector has been committed under the Services Chapter.

What does 'no less favourably' mean?

The 'no less favourably' requirement means that a PACER Plus government must not take action that puts an investor or covered investment from a PACER Plus at a detriment as compared to an investor or investment from another country.

e.g. a government must not distinguish between a business from another PACER Plus country investing in a fishing business versus a local business doing the same in a manner that puts the foreign investor in a worse position than the local business.

This obligation applies at all stages of an investment – from the acquisition and establishment of an investment, through to its operation and management, and eventual sale.

Exceptions to the national treatment obligation

The national treatment obligation is not absolute. For some sectors, countries have negotiated exceptions to allow them to discriminate against investments from other PACER Plus countries. As long as the type of discrimination is listed in their schedule, then it is allowed.



Investors and investments to whom the obligations are not owed

A country may deny the benefits of PACER Plus to investors or investments in certain situations. This rule means that, in those situations, a country may act in a manner that is contrary to the obligations described in this summary.

When can a country deny benefits to investors or investments?

Benefits may be denied where:

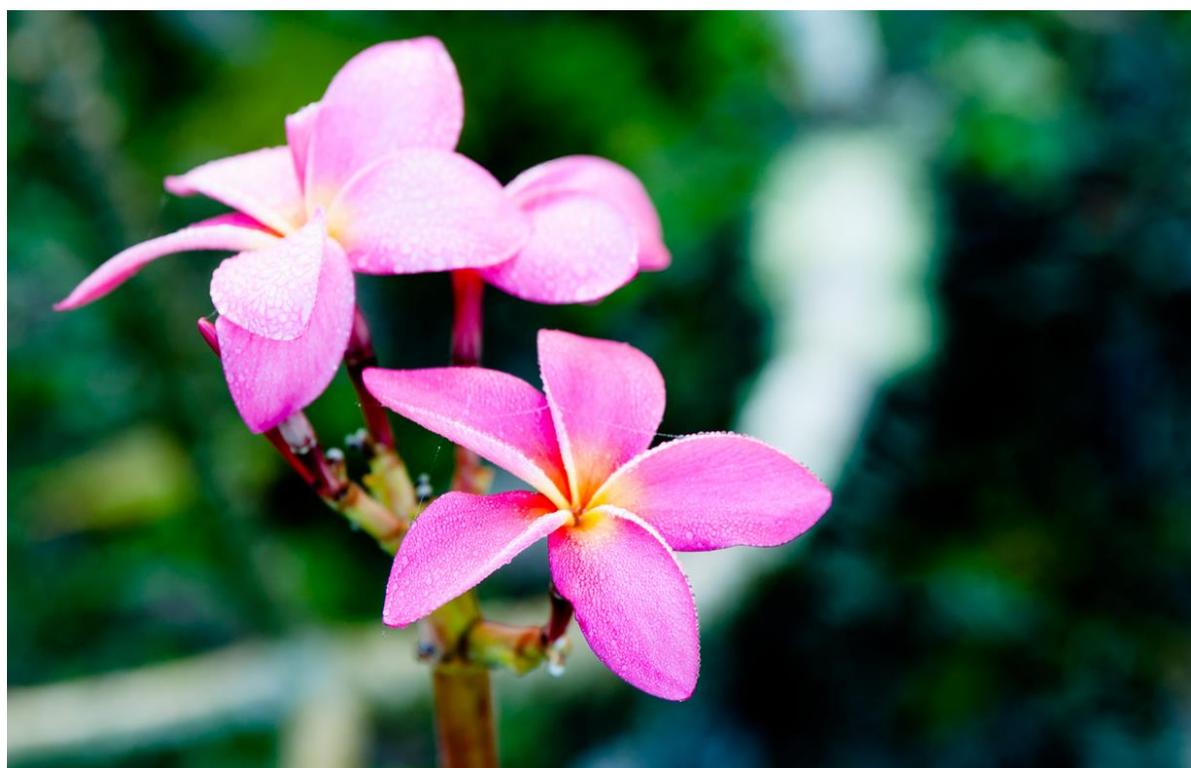
- the covered investment is being made by a business that is owned or controlled by persons of a different country and the business has **no substantive business operations** in any other PACER Plus country
 - e.g. where a business is registered in Australia but the shareholders and directors are from Europe and they do not have any business operations in another PACER Plus country.
- the covered investment is being made by a business that is owned or controlled by people from the host country and the business has **no substantive business operations** in any other PACER Plus country
 - e.g. where a business that is registered in Australia invests in Samoa, but it is controlled by Samoan nationals and has no substantive business in any PACER Plus country other than Samoa.

Substantive business operations means that a business actually does something concrete in a country rather than simply having an address there. For example, an Australian car rental company that rents cars to customers in Tonga has a substantive business operation in Tonga; an Australian car rental company that only has a registered office in Tonga but does nothing else there does not have a substantive business operation in Tonga.



Obligations that apply in respect of all investors and investments

Most of the obligations in the Investment Chapter apply in respect of all investors and investments, regardless of whether the relevant sectors have been listed by a country in its Schedule of Commitments. The following obligations are described in this summary:





Corporate Social Responsibility

While the PACER Plus obligations usually fall on governments and their officials, in the case of the Investment Chapter, investors and investments also have to uphold their end of the bargain. The Investment Chapter says that investors and their investments are expected to comply with the domestic law of the host state Party. Domestic law includes all laws, regulations and standards.

There is also a related obligation that rests on governments. Governments should encourage businesses operating within their country, or subject to their jurisdiction, to practice **Corporate Social Responsibility**. This could include, for example, encouraging businesses to follow generally accepted principles such as the OECD Guidelines for Multinational Enterprises.

Corporate Social Responsibility is a term used to describe a company's commitment to manage the social, environmental and economic effects of its operations responsibly and in line with public expectations. The OECD Guidelines for Multinational Enterprises can be found here: <http://mneguidelines.oecd.org/guidelines/>





Most favoured nation (MFN)

Each country has agreed to treat investors and covered investments from all PACER Plus countries in accordance with the most favoured nation obligation (**MFN**).

The MFN rule applies to investors who are investing in or have already invested in a country, as well as to an investor who is trying to invest in a country.

MFN is a type of non-discrimination rule. Investors and covered investments from a PACER Plus country are entitled to treatment that is:

no less favourable than the treatment a country provides, in like circumstances, to investors and covered investments from other non-PACER Plus countries

What does 'no less favourable' mean?

The requirement to provide 'no less favourable' treatment means that a government from a PACER Plus country must not disadvantage an investor or covered investment from a PACER Plus country to the benefit of an investor or investment from a non-PACER Plus country.

e.g. a PACER Plus government should not impose higher standards on an Australian business investing in a new hotel as compared to an American investor who is also investing in a hotel in the country.

Exceptions

Countries were able to negotiate country-specific exceptions to the MFN obligation. These are listed in country's Schedules of Commitments.





International minimum standard of treatment

Each country has agreed to provide investors from PACER Plus countries with a minimum standard of treatment, in accordance with **customary international law**.

Customary international law refers to international obligations arising from the established international practice of governments, as opposed to obligations arising from formal written conventions and treaties.

The minimum standard of treatment under customary international law includes:

Fair and equitable treatment

Full protection and security

Fair and equitable treatment

There is no one precise definition of fair and equitable treatment. In broad terms, the obligation requires that all officials who deal with investors and their investments are:

- aware of the standards of treatment to which they must adhere, and
- ensure that they meet those standards in respect of all interactions and processes.

Different circumstances may be relevant in determining whether there has been fair and equitable treatment.

Examples of fair and equitable treatment standards between PACER Plus countries and PACER Plus investors include:

- access to justice, including to a country's courts or other administrative proceedings
- due process (e.g. allowing a foreign investor to appear in court to make their case in a proceeding)
- meeting the investor's legitimate expectations regarding a stable and predictable legal framework for the investment
- meeting specific representations made to the investor that the investor relied upon in making the investment decision (e.g. where officials assure an investor in writing that they will get a permit to operate a tourism business)
- transparency in the legal procedures or actions of the host country
- no harassment, coercion, abuse of power, or bad faith conduct by the host country, and
- no arbitrary, disproportionate, or inconsistent actions.



Full protection and security

This obligation requires governments to exercise vigilance and due diligence with regard to the physical protection of covered investments and investors, taking into account a country's circumstances and resources. This rule includes ensuring that PACER Plus investors have access to police protection when required.

e.g. if there are public protests and the protestors threaten to damage an investor's physical property, such as a hotel, then the government has an obligation to exercise vigilance and due diligence. For example, by taking steps to protect the hotel from damage by the protestors. In particular, this protection could include ensuring that the police take reasonable steps to provide protection.

This is largely the responsibility of the police force.





No expropriation without compensation

A government can only **expropriate** or nationalise a covered investment if the following conditions are all met:

- for a public purpose
- in a non-discriminatory manner
- in accordance with the due process of the law, and
- on payment of prompt, **adequate** and effective compensation.

If a covered investment is expropriated, the investor has a right under PACER Plus to seek a review of the decision to expropriate and of the valuation of its investment.

Expropriation refers to two types of situations:

- a situation in which ownership of a covered investment is legally transferred from the investor to the state (a **“direct”** expropriation), and
- a situation in which, even though legal ownership has not been transferred from the investor to the state, the state has taken measures that have an equivalent effect to direct expropriation. Such as by depriving the investor of the economical use and enjoyment of the investment (an **“indirect”** expropriation).

Both types of expropriation are allowed, but only if the conditions set out above are met, including the payment of compensation.

Whether or not there has been an expropriation requires a case-by-case analysis that considers, among other factors:

- the economic impact of the government action,
- whether the government action contravenes an earlier written commitment that the government provided to the investor, and
- the character of the government action (its objective and rationale).

There are some actions that are designed to achieve legitimate public welfare objectives. For example, the protection of public health, safety and the environment. So long as they are non-discriminatory, these do not constitute an expropriation.



What is 'adequate' compensation?

PACER Plus provides that compensation must be the fair market value of the investment. The fair market value is determined as at the time the expropriation was announced or occurred, whichever is the earlier event.

Compensation must not reflect any change in value occurring because the expropriation was publicly known earlier than the date at which occurred.

Compensation must be determined in accordance with the generally recognised principles of valuation and equitable principles, including taking into account:

- the capital invested
- depreciation
- capital already repatriated
- replacement value, and
- other relevant factors.

Payment of compensation

Compensation must be paid without **undue delay**.

It must be paid in a freely usable currency and include interest at a commercially reasonable rate, taking into account the length of time before payment occurs. A "freely usable currency" is defined as:

- the euro, Japanese yen, pound sterling, US dollar and Chinese renminbi (as per the IMF Articles of Agreement), or
- any currency that is used to make international payments and is widely traded in international principal exchange markets.

The requirement to pay compensation without **undue delay** means that compensation must be paid with no unjustifiable loss of time.

Exclusions from the obligation

The expropriation obligation does not apply to the issuing of compulsory licenses for intellectual property rights in accordance with any international agreements a country has entered into.



Guarantee of free transfer of funds

PACER Plus countries must allow transfers of monies relating to a covered investment to be made freely and without delay into and out of its territory.

Currency of transfers

A freely usable currency at the market exchange rate at the time of transfer.

Grounds for preventing or delaying a transfer

PACER Plus allows a country to prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to:

- bankruptcy, insolvency, or the protection of the rights of creditors
- issuing, trading, or dealing in securities, futures, options, derivatives
- criminal or penal offences and the recovery of the proceeds of crime
- financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities
- ensuring compliance with orders or judgments in judicial or administrative proceedings
- taxation
- social security, public retirement, or compulsory savings schemes, or
- severance entitlements of employees.

There are also relevant exceptions to the obligation to permit transfers. These exceptions are found in the **Exceptions Chapter** of PACER Plus.

The **Exceptions Chapter** allows a country to take certain measures if it is in **serious balance of payments and external financial difficulties**, or facing the threat of this. Those measures might include restricting payments or transfers for transactions related to covered investments.

In addition, the Exceptions Chapter allows a country to take measures for **prudential reasons**, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.



Senior management and boards of directors

Under PACER Plus, a host country must not:

- require members of a PACER Plus investor's senior management team to be of any particular nationality, or
- require that the majority of the Board of Directors of a PACER Plus investor be of a particular nationality or resident in any particular country.

In other words, investors may appoint people of any nationality to be on their senior management team and Board of Directors.

Each country has its own country-specific exceptions, which are found in Annex 9-B.





Performance requirements

What are performance requirements?

Performance requirements are requirements that a host country imposes on an investor either as a condition of being allowed to invest, or as a condition of being able to receive certain incentives (such as tax exemptions).

PACER Plus obligations

PACER Plus requires that:

- WTO Members act consistently with the WTO's Agreement on Trade-Related Investment Measures (known as **TRIMS**), and
- non-WTO Members, to the extent of their capacity, act consistently with TRIMS

Non-WTO Members must also provide a list of any of their measures (such as laws and regulations) that do not comply with TRIMS. They must do this within two years of the date on which PACER Plus enters into force. After two years, these countries must not introduce any new measures that are inconsistent with TRIMS.

What does TRIMS require?

TRIMS provides that, in respect of measures that affect trade in goods, countries cannot apply measures that:

- treat goods from other countries less favourably than like domestic products, or
- constitute a quantitative restriction on imports or exports within the meaning of GATT Article XI.

TRIMS provides some examples of measures that would be disallowed. These include requiring investors to:

- purchase or use products of domestic origin or from any domestic source (e.g. requiring an investor who opens a vanilla processing plant to use only domestic vanilla)
- limit their purchase or use of imported products to an amount related to the volume or value of local products that it exports (e.g. requiring an investor in a vanilla processing factor to only use as many imported vanilla beans as it will export)
- limit their ability to export products (e.g. requiring that vanilla produced in a factory only be exported and not be sold in the host country)

Other types of performance requirements are allowed.



Compensation in times of civil strife, armed conflict, state of emergency

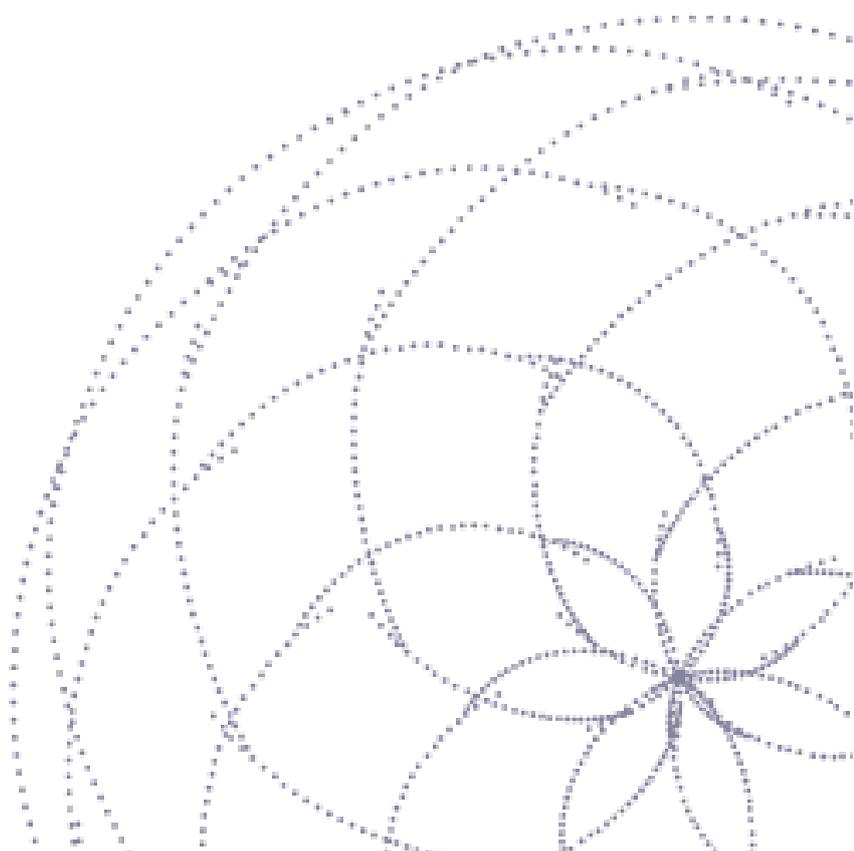
Host countries owe foreign investors a certain standard of treatment in times of armed conflict, civil strife or state of emergency in their country. If these circumstances result in losses suffered by covered investments, officials must treat foreign investors from PACER Plus countries:

- no less favourably than domestic investors and investments, and
- no less favourably than investors and investments from any other country.

If a country's forces or authorities have requisitioned (taken use of) or destroyed a covered investment during any of these extreme circumstances, a government is required to provide the investor with **restitution or compensation**, or both as appropriate.

Restitution involves re-establishing the situation that existed before the losses were suffered, such as by returning seized property.

Compensation involves payment of money to the investor to compensate for the losses suffered.





Transparency

Transparency is about making measures known to those who want to find out about them. It is important for predictability in investment. It is easier for investors if they know as much as possible about the rules and requirements they will face when entering a market.

What information must be provided?

Laws, regulations and other rules

A host country, if requested by another PACER Plus country, must provide information about any laws, regulations or other rules that may have a material impact on any covered investment.

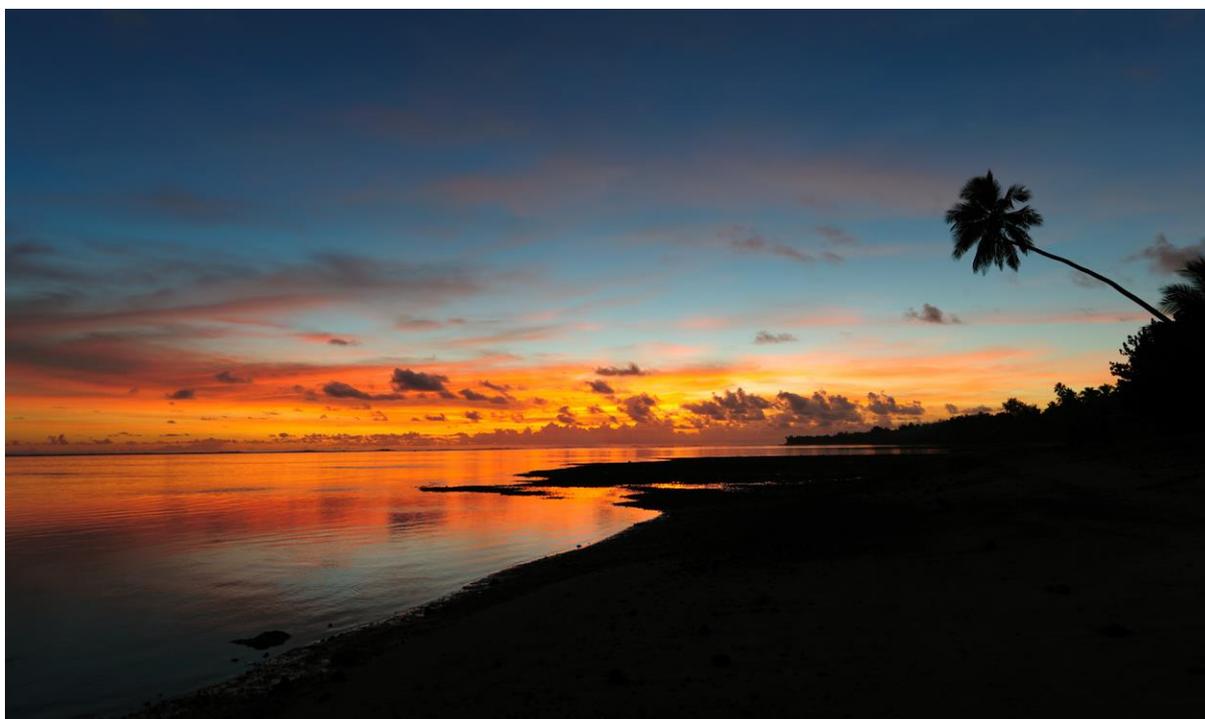
Any PACER Plus country may request consultations with another regarding any existing or proposed rules affecting covered investments.

Names of relevant officials

Countries must provide other PACER Plus countries with the names of the government departments or authorities who deal with foreign investment, including a description of their role and responsibilities.

Keeping information up to date

All published information must be checked periodically to ensure it is still accurate and complete.





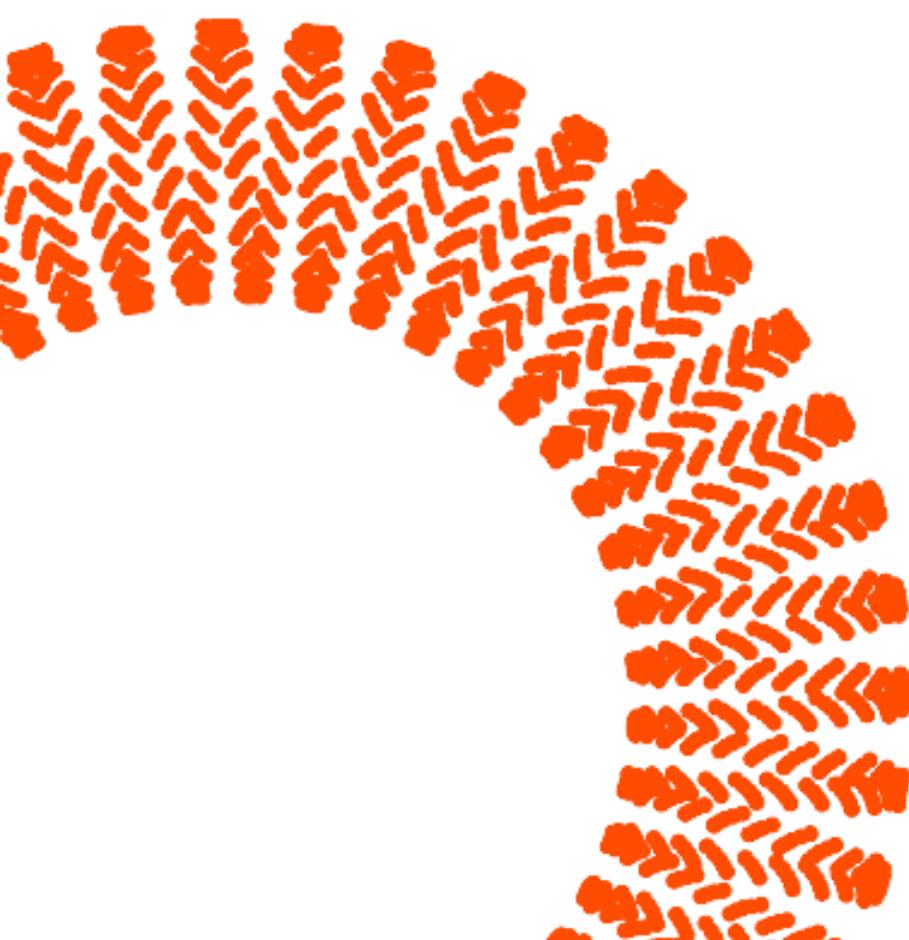
Contact Points

What are Contact Points required to do?

Each PACER Plus country must identify a Contact Point who will work with other countries' Contact Points and assist with the distribution of requests and notifications about investment.

The Investment Contact Point's responsibilities are:

- to facilitate distribution of requests and notifications made under the Investment Chapter, and
- to make and receive requests for technical discussions with other PACER Plus countries on any measure affecting investment between them, and arrange those discussions.





Confidentiality

A PACER Plus country may require an investor of another PACER Plus country to provide information concerning an investment solely for the purposes of collecting information or statistics.

If a PACER Plus country requires an investor to share information, then the PACER Plus country should protect any information that is confidential and which would prejudice the legitimate commercial interests of the investor or the covered investment.





Exceptions to the investment obligations

Overview

PACER Plus has a number of exceptions that allow countries to justify actions that would otherwise be a breach of the obligations in the Investment Chapter. The exceptions are set out in Chapter 11 (General Provisions and Exceptions).

The description of the exceptions below is very general, and **advice should be sought on the application of the exceptions in any given situation.**

General exceptions

Exceptions that apply to the investment chapter cover measures:

- necessary to protect **public morals or maintain public order**
- necessary to protect **human, animal or plant life or health**
- relating to the conservation of living or non-living **exhaustible natural resources**
- necessary to secure **compliance with laws or regulations** that themselves are consistent with the obligations, such as those relating to the prevention of deceptive and fraudulent practices
- necessary to protect **national works or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value** (including protection of “creative arts of national value” such as dance and music, indigenous traditional practice, and contemporary cultural expression)

For measures taken for these reasons, the exception can only be relied upon so long as the measure is not applied in a manner that would constitute:

- **unjustifiable or arbitrary discrimination**, or
- a **disguised restriction** on international trade or investment flows.

Unjustifiable or arbitrary discrimination will occur where the discrimination is not rationally related to the measure’s policy objective.

A **disguised restriction** could include a measure that unjustifiably or arbitrarily discriminates between investors, or any other type of measure that abuses the exceptions or is an illegitimate use of them.

PACER Plus does not require any country to provide information if it considers that to do so would be contrary to its **essential security interests**.

Also, PACER Plus does not prevent any country from taking:

- a measure that it considers necessary to protect its **essential security interests**, or
- actions in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.



Essential security interests are those:

- relating to fissionable and fusionable materials or the materials from which they are derived,
- relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purpose of supplying or provisioning a military establishment
- taken so as to protect critical public infrastructures including communications, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructures, or
- taken in time of war or other emergency in international relations.

Measures to safeguard the balance of payments

PACER Plus countries are entitled to adopt or maintain restrictions on payments or transfers related to covered investments if they find themselves in **serious balance of payments and external financial difficulties**, or under threat of such difficulties. This must be done consistently with WTO rules and meet the other conditions set out in Chapter 11, including being consistent with the IMF Articles of Agreement.

Prudential measures

PACER Plus does not prevent countries from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. While prudential measures may be taken, they can't be used as a means of avoiding a country's PACER Plus commitments or obligations.

Taxation

The obligations in PACER Plus have limited application to taxation measures. In the case of investment, the Performance Requirements and Expropriation obligations will apply to taxation measures.

Treaty of Waitangi (only applicable to New Zealand)

New Zealand may adopt any measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by PACER Plus, including in fulfilment of its obligations under the Treaty of Waitangi. Such measures may not be used as a means of arbitrary or unjustified discrimination or as a disguised restriction on trade.

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