STATEMENT

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The importance of foreign investment for small island states is widely acknowledged considering the unique challenges faced by them. Unlike large developing countries with significant natural resources and sizeable populations, small island states normally do not have these magnets to attract foreign investors. They are also disadvantaged to the extent that they tend to have restrictive rules as far as foreign ownership of land is concerned. This is particularly the case for small island states in the Pacific. Notwithstanding these challenges, small island states generally have liberal investment laws and regulations designed to attract foreign investment, particularly into the most productive sectors of their economies.

Against this background, it was a challenge for the 14 Pacific Island Countries (PICs) to enter into negotiations with their developed country neighbours, namely Australia and New Zealand. For a start, most of the PICs are not parties to International Investment Agreements. Out of the 14 PICs, only four countries had concluded Bilateral Investment Treaties with other countries, but most of them are not operational. However, it was the PICs not Australia nor New Zealand, which advocated for the inclusion of investment in the negotiating agenda, underscoring their belief that if they are to achieve robust economic growth and sustainable development, they would need to attract foreign investment commensurate with their developmental needs.

At the outset, the Parties recognised the vulnerabilities of the PICs and agreed that the Investment Chapter will focus mainly on investment liberalisation, promotion and facilitation, and protection. With respect to liberalisation, it was agreed that given the lack of experience of most PICs with international investment agreements, each party would decide for itself which sectors it wanted to liberalise. In that regard, the Parties agreed to use a positive list to schedule commitments. This enabled the PICs to decide on which sectors they wanted to undertake commitments and inscribe limitations they deemed appropriate. Some PICs, for example, maintained their FDI screening laws and regulations, undertook minimal commitments in certain important sectors of their economies such as fisheries, excluded certain sectors from the coverage of the Chapter such as small scale agriculture and maintained existing limits on foreign capital participation such as 49 percent foreign equity. Others have specified that foreign investors can only lease but not own land. In a way the broad definition of investment in the Agreement has been circumscribed by the scheduling methodology used.

The right of countries to regulate in the national interest is also explicitly recognised in the Investor Chapter. It relevantly provides that nothing in the Chapter shall be construed to prevent a Party from adopting or maintaining any measure otherwise consistent with the Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to its environmental and other regulatory objectives. It is also provided that foreign investors and their investments shall be subject to the laws, regulations and standards of the host state Party.

Investors are also encouraged to incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or supported either by the host state or home state Party. Furthermore, the Parties also acknowledge that it is inappropriate for them to encourage investment into their territories by not enforcing their own environmental, health, labour, safety or other regulatory standards.

Regarding promotion, Australia and New Zealand have agreed to assist the PICs to promote and attract investment into their countries. The Parties will jointly agree within the framework of the Development and Economic Cooperation Chapter the specific measures that could strengthen the capacity of the PICs to attract investment and benefit therefrom. The specific conditions in each PIC would be taken into account in designing and implementing measures which would promote and facilitate the inflow of foreign investment.

Regarding protection, a conscious effort has been made in the Agreement to define some of the contentious issues in international investment agreements, including "minimum standard of treatment of foreign investors" as well as "indirect expropriation", taking into account current trends in recently concluded international investment agreements. The most important feature of the Chapter is the exclusion of investor state dispute settelement (ISDS) mechanism within its framework. Unless otherwise agreed privately, all disputes between an investor and a host state have to be resolved by courts in the host country. This is a departure from current trends in IIAs and seem to address the identified shortcomings of ISDS system and also the capacity constraints of the PICs to engage effectively in international arbitration.

The Investment Chapter also contains a number of special and differential treatment provisions in favour of the PICs, particularly those which are not WTO Members. They are, for example, not obliged to comply with the WTO TRIMS Agreement in the context of the prohibition on performance requirements.

To sum up, I believe that in the absence of multilaterally agreed rules, the Investment Chapter of the PACER Plus is quite innovative and responds to the unique circumstances of small island states. It combines flexibility with security and predictability, which are important in achieving a balanced agreement which strikes a careful balance between the interests of host states and foreign investors.