UNCTAD High-Level IIA Conference
Reform of the International Investment Agreement Regime: Phase 2

Australian Statement for Opening Plenary (as delivered) - 9 October 2017

Ms Deanna Easton
Counsellor
Permanent Mission of Australia to the UN and WTO

1. Mr Chair, let me first express Australia's appreciation for the work of the Investment Division in preparing the Phase 2 background note, and for providing this opportunity to share with colleagues our experiences in international investment agreement reform.

2. Like many countries, Australia has sought to develop its network of international investment agreements on a number of fronts – most obviously, through the conclusion of free trade agreements with new treaty partners. In addition, we have been working with our existing treaty partners to review the terms of our existing agreements. For example, in a comprehensive update of the Singapore-Australia Free Trade Agreement, we made a number of substantive changes to the investment chapter, such as:

- explicitly recognising the right to regulate to protect public welfare;
- clarifying that the most-favoured-nation clause does not extend to ISDS provisions;
- carving out intellectual property from expropriation and performance requirements clauses; and
- clarifying that government action which may be inconsistent with an investor's expectations does not constitute a breach of the minimum standard of treatment, even if it results in loss or damage to the investment.

3. We also added various ISDS rules of procedure, including a code of conduct for arbitrators, a range of transparency requirements and a mechanism for the consolidation of claims. In doing so, Australia has incorporated modern protections and best-practice procedures into an already robust investment relationship.

4. In a similar vein, Australia has replaced some of its first-generation bilateral investment treaties (BITs) with investment chapters upon the conclusion of comprehensive free trade agreements with BIT partner countries. The Australia-Chile BIT, for example, was terminated upon entry into force of our free trade agreement. Australia's BITs with Mexico, Vietnam and Peru are similarly slated for replacement upon entry into force of the Trans-Pacific Partnership. In addition, those BITs that will not be captured by current FTA negotiations are also under review and renegotiation.

5. Many of the approaches we have taken to reforming our network of investment agreements are reflected in UNCTAD's ten options for reform. We also

seek to manage the relationship between coexisting treaties through our approach to treaty drafting, and we are very supportive of engaging multilaterally, in forums such as this. We are also examining, together with other countries, the idea of joint interpretations. While this option presents some challenges given the range of treaty texts, we do think it is worthwhile examining further.

6. While these processes are ongoing, the Australian Government has taken steps to increase awareness of international investment obligations. An important step in our policy-making process – the Regulatory Impact Statement – now reminds public servants to consider Australia's obligations under trade and investment treaties in developing any new policy proposal. We have also instituted a quarterly inter-departmental committee process among federal government agencies, and regular outreach missions to state governments, in order to maintain awareness of our obligations. In adopting such measures we aim not only to minimise legal risk of a dispute but also to improve Australia's attractiveness to investors.

7. In conclusion, Mr Chair, Australia has found the process of reforming our network of international investment agreements immensely valuable. Doing so helps maintain an appropriate balance between protecting the rights of foreign investors – so we can attract and retain high quality and much needed FDI – while at the same time ensuring Australia's right to regulate for legitimate public welfare objectives.