

UNCTAD Expert Meeting on Taking Stock of IIA Reform

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Australia

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1. On behalf of Australia I would like to thank UNCTAD, and in particular the Investment Division, for providing this opportunity today.
2. Australia has more limited experience with Investment Agreements than many other countries attending today. We have 21 Bilateral Investment Treaties (BITs) containing investor-State dispute settlement (ISDS) provisions, and an additional six Free Trade Agreements (FTAs) with ISDS provisions. To date, Australia has faced only one ISDS dispute, initiated by Phillip Morris under the Australia-Hong Kong BIT. This dispute, which commenced in 2011, was resolved at the end of last year in Australia's favour. This case was a very high profile dispute involving a challenge to Australia's tobacco plain packaging measures. It raised the profile of ISDS within Australia and highlighted concerns about ensuring governments are able to implement legitimate, non-discriminatory public policy measures on issues such as health, the environment and essential security.
3. The current Australian Government has a policy of negotiating ISDS provisions on a 'case-by-case' basis. We have seen this in practice in the conclusion of recent FTAs, so that the Japan-Australia Economic Partnership Agreement does not contain ISDS provisions, whereas the Korea-Australia FTA, the China-Australia FTA and our most recently concluded Trans Pacific Partnership (TPP) Agreement, all contain ISDS.
4. We consider that negotiating ISDS as part of an investment chapter in a comprehensive FTA can bring wide-spread benefits, including promoting and protecting both inward and outward foreign direct investment.
5. These FTAs contain explicit safeguards, which we consider are implied in earlier agreements, and recognised in customary international law, and a range of procedural innovations. For Australia, we would not negotiate ISDS absent these explicit safeguards. Our overall objective is to ensure an appropriate balance between protecting our investors, promoting a stable investment climate to promote inward foreign direct investment and ensuring appropriate capacity to regulate in the public interest.
6. While Australia has not developed a model BIT or model investment chapter, we have established a practice reflected in our recent FTAs which implements the above basic principles. For example, in our recent FTAs there is a specific clarification that the obligations of 'fair and equitable treatment' and 'full protection

and security' are limited to the minimum standard of treatment required under customary international law.

7. In relation to the ISDS mechanism itself, in our more recent agreements, there are a number of procedural safeguards, which include: an expedited procedure to decide preliminary objections and to dismiss unmeritorious claims promptly; the power for the tribunal to award costs against an investor if it makes a frivolous claim; and a provision that a joint interpretation by the Parties of a provision of the FTA is binding on a tribunal.

8. In our more recent FTAs, Australia has also addressed the status of older style BITs, for example we have agreed to terminate BITs with Mexico, Peru and Vietnam upon entry into force of the TPP Agreement.

9. Finally, domestically we are working with other Federal and State Government agencies to ensure that the obligations under our international investment agreements are fully understood and adhered to. This has the twin benefits of avoiding disputes and of ensuring a consistent and comprehensive approach to foreign investment.

10. More broadly, Australia has engaged in this debate in a range of organisations including not only the important work within UNCTAD but also the OECD, G20 and the WTO. There are other relevant bodies, including ICSID and UNCITRAL, whose work is important, and we think ensuring coordination and a clear understanding of relevant roles at this level will facilitate progress in the discussion, particular as other novel proposals emerge, such as the investment court proposed by the EU.

11. In conclusion Australia considers it crucial to secure an effective and appropriate balance between protecting the rights of investors – which will in turn ensure that we can attract and retain high quality and much needed foreign direct investment – while at the same time ensuring that Australian Governments, at both the Federal and State level, can implement public regulatory measures.