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## STATEMENT

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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 to discuss and review International Investment Agreements (IIAs) and to consider options for reform. I am delivering these remarks for Patricia Holmes, Assistant Secretary of the Trade and Investment Law Branch of the Australian Department of Foreign Affairs and Trade, as Patricia was not able to be here in person today.
2. Investment and investor-State dispute settlement (ISDS) is a controversial area where stakeholders have contrasting and sometimes conflicting policy positions. However all stakeholders share an interest in having access to accurate and useful information. This is where UNCTAD plays such an important role. The resources which UNCTAD has developed to provide information on both the evolution of investment agreements, and the outcomes of ISDS disputes are an extremely valuable resource for all governments.
3. 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, UNCITRAL and the WTO.
4. I would also like to take the opportunity to welcome the adoption of the G20 Guiding Principles for Global Investment Policymaking, adopted by the G20 in Shanghai earlier this month, and to thank UNCTAD for its role in facilitating this achievement.

### **Australia's experience**

5. Like many other states, Australia approach to IIAs has evolved over the last decade or so. During this period, Australia has negotiated investment commitments as part of comprehensive FTAs rather than separate investment treaties. Australia has sought to introduce greater certainty into the interpretation of key investment obligations and also more control over the operation of ISDS provisions when they are included in an agreement. I will also make some remarks on what UNCTAD describes as the 'second phase' of IIA reform.

### **Evolution in drafting of substantive obligations**

6. As many of you would know, the obligations of fair and equitable treatment (FET) and expropriation are the most common bases for ISDS claims. Australia's modern agreements contain significantly more guidance on what these obligations require, and what conduct will breach these obligations, than earlier IIAs. Australia's modern agreements explicitly state that FET does not require any treatment in addition to what is required by the customary international law minimum standard of treatment. Similarly, these modern agreements contain

detailed guidance on the factors necessary to establish that an indirect expropriation has occurred. They also confirm the principle that in general, non-discriminatory regulation for legitimate public welfare objectives does not constitute expropriation.

7. The purpose of this more elaborated approach to drafting key obligations is to increase the consistency and predictability of the interpretation of these obligations and to ensure that they are not interpreted too broadly.

### **Evolution of ISDS procedures**

8. Australia's modern agreements – where these include ISDS – contain significantly more detailed procedures than earlier agreements. They are intended to ensure a greater degree of consistency and predictability in the arbitral process in the event of a dispute. In some respects the more detailed ISDS provisions also give the government parties more control over the arbitral process. For example, each of Australia's relevant modern agreements provides that a joint interpretation of the (government) Parties of a provision of the treaty is binding on any ISDS tribunal.
9. There are several other procedural safeguards which Australia has included in modern agreements. They include a requirement to deal with and potentially dismiss frivolous claims as a preliminary matter. This ensures that governments do not have to waste money defending manifestly unmeritorious claims through a full hearing. They also include procedures to protect governments from having to defend multiple simultaneous disputes arising out of the same events, which can place a serious strain on government resources.

### **Second phase of IIA reform**

10. The focus of this meeting is what UNCTAD calls the 'second phase' of ISDS reform, which focuses on the risks and inconsistencies associated with the large body of *old* IIAs. We all learn from experience and the evidence suggests that the practice of many governments in drafting IIAs has developed over time. This practice has been informed by the significant increase in ISDS disputes over the last 20 years and the interpretations of investment tribunals.
11. The sheer number and diversity of IIAs does suggest that reform would be assisted by some degree of multilateral coordination. Bilateral and plurilateral approaches can also present a complementary pathway to reform. For example the Trans-Pacific Partnership Agreement (TPP) illustrates the potential to use regional agreements to harmonise and update investment rules. When the TPP enters into force there will be a single set of investment rules which apply between each of the 12 TPP Parties. The TPP doesn't automatically replace any pre-existing agreements between the Parties however Australia agreed with each of Mexico, Peru and Vietnam, that our older-style bilateral IIAs will terminate on entry into force of the TPP. In this way Australia and these partners have used the TPP as a mechanism to update our older IIAs.

Australia's approach to IIAs has developed significantly over recent years and we welcome UNCTAD's call for greater consistency and predictability in the system of IIAs. While there seems to be broad consensus on the desirability of this objective there are also some significant differences between governments in relation to IIAs. These differences – in both the policy positions of governments and treaty obligations of IIAs – present a challenge to efforts to harmonise the system of IIAs. It seems clear that reforming the system of IIAs will require compromise and flexibility from all involved. The adoption of the G20 Investment Principles is a positive signal in this regard.