UNCTAD High-level International Investment Agreements (IIA) Conference 2018

Mr. Vernon MacKay

Director, Investment Trade Policy

Global Affairs Canada

Investment agreements aim to provide a stable and predictable environment for investors and investments. Where an investor alleges a breach of a treaty's obligations, such procedures enable the investor to seek compensation through arbitration. At the same time, these agreements should facilitate inclusive trade. This means working to ensure that all segments of society, both domestic and overseas, can take advantage of the economic opportunities flowing from trade and investment.

The first element of inclusive trade is to **safeguard the right to regulate while providing protection.** This includes environmental regulation, the promotion of safety, public health or any other public policy objectives. For example, Canada's BITs ensure that obligations with respect to investor protection are examined in the context of public policy considerations.

A number of other treaty elements aim more broadly at preserving regulatory space. These include clauses that:

- Clearly define the investment protection standards (for example, by including more detailed clauses on fair and equitable treatment and indirect expropriation);
- Contain exceptions to transfer-of-funds obligations or carve-outs for prudential measures;
- Reservations for existing and future non-conforming measures;
- The exclusion of most taxation-related measures;

- A general exception for measures intended to protect human, animal or plant life or health, and for the conservation of natural resources; and
- Prudential exceptions to maintain the integrity and stability of the financial system.

Some of Canada's recent treaties explicitly re-state the governments' right to regulate, such as the Comprehensive Economic and Trade Agreement (CETA) with the European Union and Canada's amended free trade agreement with Chile.

Investor-State dispute settlement (ISDS) has been the object of attention in recent years, including for reasons of perceived lack of transparency, potential conflicts of interests by arbitrators, inconsistency in arbitral decisions, and efficiency and accessibility. A second element of inclusive trade is to **improve the ISDS system** so as to address these and other concerns. For example, Canada has taken steps to:

- Improve the consultation process;
- Introduce mediation as an alternative dispute settlement procedures;
- Ensure arbitrators avoid conflicts of interest; and
- Ensure that frivolous claims can be expeditiously dispensed.

In a decisive shift towards openness, the Mauritius Convention entered into force in Canada in late 2017. The decision to ratify was made not only in response to public concern, but also with a view to the benefits for Canadian investors and to send a clear message that Canada is an attractive destination for foreign investment. Other advantages include clearer and more predictable rules as a result of more decisions being published and greater systemic coherence in how disputes are resolved.

A permanent tribunal and appellate body would also address criticisms with regards to consistency of arbitral decisions as well as fairness and impartiality of arbitrators. Canada is actively participating at UNCITRAL on possible reform of the ISDS mechanism used in international investment agreements. Such a system would be set up once a minimum critical mass of participants is established and be fully open to accession by any country.

A third element of inclusive trade is the notion of **responsible business conduct** with respect to the environment, labour, human rights, community relations, and anti-

corruption efforts. Since our free trade agreement with Peru, all of Canada's free trade agreements with investment chapters – as well as our recent BITs – contain provisions on corporate social responsibility (CSR). These provisions call for countries to promote internationally recognized principles and standards of CSR and to encourage their enterprises to incorporate such principles and standards into their practices and operations.

One of the recent policy developments in Canada's trade policy is the incorporation of specific international standards, such as the OECD Guidelines for Multinational Enterprises, in treaties with partners who also endorse them. Specific references in our treaties with Chile and the European Union re-affirm the partners' commitments to these standards and encourage their wider use. In addition, Canada's BITs discourage governments from regulating in a manner that would undermine health, safety, and environmental standards for commercial gain.

A fourth element of inclusive trade is to ensure that tribunals **respect the intent of the Parties.** All of Canada's free trade agreements with investment chapters – as well as our recent BITs – include provisions that explicitly allow Parties to issue binding notes of interpretation. For example, last year the Joint Commission of our free trade agreement with Colombia adopted a joint interpretative declaration that reaffirms the parties' right to regulate and clarifies the provisions on "like circumstances", full protection and security, and minimum standard of treatment. Canada is committed to using these provisions to avoid and correct any misinterpretation by tribunals.

To conclude, Canada believes it is important to respond to concerns that have been raised by our citizens and stakeholders with respect to international investment agreements, as we have done with the European Union. In this respect, Canada was pleased to join Chile and New Zealand earlier this year in confirming our shared commitment to help make international trade policies more inclusive. It is Canada's goal to ensure that the benefits of trade and investment are more broadly shared.