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1. Breakout session 2

Thank you Mr. Chair. And thanks to the UNCTAD, and in particular to Elisabeth, for the opportunity to engage in these discussions.

Before explaining what we have done regarding the three areas of reform in which this panel is based, **I wanted to put the Colombian experience into some context.** As you will see, a discussion that was occurring globally and progressively, touched Colombia mostly unprepared and in a very short period of time. This has provoked particular situations and nuances in our approximation to IIA Reform.

First of all, **Colombia had no disputes until 2015. Not a single one.** We as public servants from the Colombian Government used to come to fora like this one with naiveté and a permanent smile: “we have no disputes; thus, our investment climate and regime are excellent and **nobody complains**”.

So, ongoing global discussions over the regime were **of course important, but were of course not urgent.** Somehow detached from our reality and from the priorities of the political agenda.

Suddenly in 2016-2017, we received 11 notices of disputes by investors. And a huge turmoil ensued. At the cabinet, at the Parliament, in academic circles, in the media! Difficult questions abounded: like “what is this all about?”, “are we prepared?”, “Can the state win, or just don't lose?”, “how much is at stake?”, “who are these guys?”, “was the fault of this government or the previous one?” “what are our peers doing?” “are there ICSID and non-ICSID cases? Explain that”. And more intimately “is FET tied to international customary law in that particular BIT there?”, “Can they really choose the rules of UNCITRAL of the 76 as the applicable rules to the case?”

Claims by investors in these eleven disputes are about one-fifth of Colombia's GDP. Not of public expenditures, but of its GDP. And Colombia is a medium sized economy, so it's a huge amount of money at stake.

So, of course, a mini-crisis ensued. The ministry of mining **blamed** the Ministry of Environment, The ministry of ICT blamed the Constitutional court, everyone blamed the Ministry of Trade for what it had signed, The Ministry of Finance blamed everyone. The media was soooo happy. The opposition was soooo happy.

But, at the end, the relevant question was **“Why?”**, “what happened?” Is confidence eroding? Is the rule of law eroding? Why this sudden burst of litigiousity?

Because, and this is important, nothing had actually happened. It was the same government for five years. **There was no regime change.** There was not a new spectacular law of expropriations, or a change in subsidies to a particular industry. The only major political move was the **Peace agreement, but** it was not yet finalized, no dispute has to do with the peace agreement, and in any case, that should go for the climate investment, not against, as security numbers have not been better for decades.

And our **investor surveys showed nothing spectacular either.** The investment climate was the same. No one beyond the 11 seemed particularly concerned or else

So, We had our problems, of course we had. But nothing on a scale big enough to explain the new situation. **It was then a market circumstance?** As long as the prices of commodities fall, more lawyers and less engineers are on the move. Yes, probably that's part of the reason. But just. Colombia relented but was and is far away from a recession. Macroeconomic stability is the thing in which Colombia over-excels. **And cases were in very different sectors, some of them thriving.** So some of the litigiosity might be explained by the hard times of the **commodities cycle**, but that was not a good answer in itself either.

What then?

One possibility is that we have been victims of a board decision by an international law firm. Indeed, 9 out of 11 cases have been brought up by the same team of lawyers. But this one is anecdotal. The only reality is that 9 cases are from the same lawyers. **But the point is that we don't have good answers to explain what happened.**

And you might imagine that the whole government was really concerned. And outraged. Those were the days of the **Rage against the regime.** So we lived the global debate and the difficult decisions that it implies in a very short period of time, with Parliament and the media over our heads. Some wanted to throw the table, some others recommended calm.

Anyway, **heads eventually cooled. And we approached the situation in a balanced and pragmatic way.** The UNCTAD's menu of policy options for reform was actually a good template to work with, as it provided serenity and some sort of validation to what we were doing. So, the decision was to work on the policy options, **but in a case-by-case basis, and always looking after the consensus of the other State in the game.**

We are working on the **replacement** of our two oldest BITs. One of the countries has been very receptive, and technical work actually started yesterday. The other one is still pending (it's newer).

We are also working with **Joint interpretations.** We have three cases with excellent technical results. They are yet to be formalized but they have been already finalized at the technical level. These are good examples as one is an interpretation of the Investment chapter of an FTA through its Administration commission, the other is a normal BIT with

no commission, and the third one is a BIT which is still not yet in force. So legal challenges and discussions and experiences have been very good.

We also have cases of **rules of harmonization of different treaties**. Here we have two different experiences. With Korea, we had a BIT and then we signed an FTA. It was not a complete replacement, but there is a harmonization rule that states that the FTA simply prevails over the BIT. With Japan, the decision was different, in that case, we had a BIT, and the new FTA simply stated that, regarding investment matters, the rules were the ones in the BIT. This solution appears to be practical, as any potential amendment, any replacement in the future, would be not a renegotiation of the FTA, but just of the bit of the BIT. Symbolically this is powerful. In any case, the Japan FTA is not yet in force, so, at the moment, we only have the BIT.

We also have failed cases of abrogation or consolidation, but these were previous to the mini-crisis in 2016. We had FTAs with Mexico, Chile and PERU. And the agreement by the Pacific Alliance arrived on top of them. The decision was, however, a decision of coexistence. So now we have a lot of rules And, for example, one of the claimant investors has chosen the old Mexican FTA instead of the new Pacific Alliance treaty. This stills puzzles me, from a legal perspective, and even from a common sense perspective

In conclusion. **Colombia arrived late** to the discussion on reforming the Ilas regime. We came late to this party. Late and loud, accompanied by the media and everyone. In any case, the Government decided to take a very balanced and mild approach. We have had a very good experience with some policy options, namely replacements and joint interpretations. And still a lot of work to do especially tackling coexistence which impedes predictability both for the investors and for the state.