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**Ariel Martins, Head, Investment Treaty Negotiation Unit, Ministry of Foreign Affairs
and Worship, Argentina**

Introduction

Mr. President, first of all, I would like to thank UNCTAD for organizing such an extraordinary global event which allows different actors and opinions to be heard on a very sensitive topic: Phase 2 of International Investment Agreement's Reform.

For Argentina, foreign direct investment is one of the main sources for sustainable development and inclusive growth. This is why, since 2015, Argentina has undertaken a new approach regarding international investment agreements, or IIAs. It has shifted its policy and has begun to negotiate new BITs and, most recently, renegotiate some of the old ones.

We strongly support the principle that protection of foreign investments is the main purpose of the whole system of IIAs. The pillars of any investment system must be its credibility, its fairness, and its never-ending search for the achievement of the value of justice in its decisions.

This is why Argentina supports a holistic reform of the IIA regime with the knowledge that old IIAs have open and vague clauses, which in turn, have been interpreted very broadly and inconsistently by arbitral tribunals. The consequence of this was a lack of legitimacy of the current IIA system.

In order to promote and to achieve reform, States should negotiate treaties with balanced and coherent rights and obligations for both disputing parties. Precise and well-drafted substantive and procedural provisions in IIAs are crucial to guarantee not only the well-functioning of the system, but also its own survival.

On a general level, Argentina encourages States to remain within the system. We can make our system work better and we can also make all the necessary adjustments and changes only if we stick with it and continue engaged in promoting its improvement.

Therefore, disengaging from the IIA system is not an option for Argentina.

More substantively, Argentina encourages States:

- One, to consider which old generation treaties States could renegotiate. There may be some that are more easily renegotiated given the particular circumstances of each State. If renegotiation is not possible (which may be a

valid decision due to political reasons), then the joint interpretation process could be another possible option for States to promote reform.

- And, two, to include updated provisions in both new and renegotiated treaties that establish a more balanced relationship between States. This could imply the inclusion of at least four elements:

i- First, more precise rights. We encourage States to define investors' rights in a more clear and unambiguous way. Definition on the minimum standard of treatment, references to global standards, references to the applicability of other branches of public international law, such as human rights and environmental law, and the express recognition of the right to regulate for legitimate objectives are just some of the main rights which need precision.

ii- Second, less vagueness. We encourage States to avoid open drafting, imprecise concepts, and clashes of substantive provisions within the same agreement. In this respect, Argentina supports the inclusion of a clear definition of the most-favored-nation clause (with the exclusion of procedural matters and a prospective applicability in those cases where States have still not renegotiated their old BITs), among others changes.

iii- Third, a definition of "investment" that specifies exactly what type of investment States want to protect and which want they don't

iv- And, fourth, an analysis on whether and to what extent States should or should not include elements of liberalization in their treaties. States, and particular developing States, should consider the pros and cons of inclusion of such elements (pre-establishment, prohibition on performance requirements and non-conforming measures, among others).

Above all, Argentina would like also to point out that none of these potential changes in IIA drafting should distract States from fulfilling the main purpose of IIAs: the protection of foreign investments. Argentina believes that this principle should remain the cornerstone of the system.

From an ISDS perspective, Argentina understands that two of the core principles are transparency and fairness in arbitral proceedings. To this extent, Argentina encourages States:

- to include in IIAs more detailed procedural rules for the appointment of arbitrators in order to guarantee their impartiality and independence. In particular, clear rules about who will be appointing the third arbitrator (the Chairman of the tribunal) should be particularly considered in order to avoid suspicious appointments.
- regarding the qualifications of arbitrators, they should have a solid background both in international commercial law and public international law. States need both voices to be represented. Otherwise, we risk converting the arbitration arena into a self-contained regime. Argentina strongly rejects this approach. Disputes between States and arbitrators must be decided from a holistic perspective, taking into account the different legal sources applied according to the mixed nature of investor-State arbitration.

- Argentina also encourages the inclusion of procedural rules that define the material scope of applicability for arbitrators, limiting their discretionary power. Among these rules could be the inclusion of fixed terms to submit decisions and the obligation for tribunals to consult the disputing parties before taking relevant procedural decisions.
 - Another option would be to include the right for States to counterclaim even when we know there are some difficult issues concerning how this instrument can be effectively introduced into BITs, which traditionally look only at the investors' rights.
 - Additionally, the inclusion of the "rejection *in limine* of frivolous claims" institution could help avoid unnecessary delays in claims.
 - A strong challenge mechanism based on the necessity to ensure that all arbitrators are neutral, independent, and impartial is also needed. This would provide credibility and fairness to the system and a lower chance of having decisions issued by partial and dependent arbitrators.
 - Also, a challenge mechanism could be provided for reasonable methods of proof. The inclusion of the standard of "justifiable doubts" introduced in Article 11 of UNCITRAL Arbitration Rules as proof of lack of independence and impartiality rather than the proof of "manifest lack" of such qualifications included under ICSID Convention is strongly supported by Argentina.
 - Last but not least, Argentina promotes that all decisions must be justified. It is unconceivable that such an important decision may be issued without any legal reasoning. Such situation simply overrides the most basic rules of due process for disputing parties.
- Another final point: we cannot avoid commenting on the role of the Arbitral tribunals Secretariats. There is a very well-known practice of these Secretariats intervening in deliberations and in the drafting of Arbitral decisions on jurisdiction, awards, or decisions on annulment proceedings. To what extent is this appropriate? To what extent would it be appropriate for them to intervene? The first question has a simple answer for us: to the extent they do not influence the arbitrators and/or interfere in the decision-making deliberations of the arbitral tribunal. The second question is more difficult to answer. We simply do not know.
- So, how could States promote impartiality and independence within these arbitral institutions? In this respect, what arbitrators could tell the disputing parties about the degree of interference could shed light on a very sensitive issue. Apart from this, States can only request a better and more transparent applicability of the arbitral procedural rules and promote the inclusion of specific rules to avoid inappropriate interferences.
- Argentina would like also to recall on the proposal made by some States to create an appellate body that could provide coherence and assure predictability to the arbitral decisions. The existence of such body at the WTO is a great example that should guide our next steps. We encourage the introduction of an appellate body for the health of the system.

- Finally, Argentina understands that all States should engage in the multilateral negotiations to reform the ISDS system which will be launched next month at UNCITRAL. We understand that legitimacy of any revision of the ISDS system will be grounded, among other things, in the highest possible number of States involved in the process.

In this respect, Argentina considers two issues should be taken into consideration: 1) all UNCITRAL member States should be guaranteed equal participation and opportunities from the very beginning. This also means assuring responsible engagement from all, both developed and developing States; 2) negotiations launched by UNCITRAL should be expressly conducted by State officials. It is well known by States that UNCITRAL Working Groups include not only States, but also private actors (such as lawyers and private arbitrators, among others). To a certain extent, this is understandable due to the historical private and commercial approach adopted in the discussions at UNCITRAL. However, the reform of ISDS is a sensitive and crucial issue and government officials' voices and interests should be unquestionably represented in this intergovernmental discussion.

These concrete suggestions mentioned by Argentina will only be hypothetical if States do not realize that their will is absolutely necessary to promote change. Indeed, to move toward a new type of agreement, positive and concrete engagement from both developed and developing States is needed. On the one hand, developed States should abandon the rhetorical message of change and move into action. On the other hand, developing States should understand that there is still much to do in terms of improving their legal, political, labor, and tax environments, just to mention some areas, in order to provide a trustworthy and reliable environment for foreign investors. In particular, regarding ISDS, States and investors should once and for all understand that precisely drafted rules benefit both since they provide less space for discretion of arbitrators, more credibility for the system, and above all more legal certainty, one of the most important values, together with the search for fair decisions, to be achieved by any dispute settlement mechanism.

In other words, we need a sincere compromise from the community of States to build a fairer environment for both States and investors.

Summing up, as mentioned yesterday, IIAs are just legal tools. Guaranteeing an adequate level of protection to foreign investments together with the fulfillment of principles such as sustainable development and inclusive growth of States is a challenge to which all actors are called to participate.

Mr. President, change in the end, is in our hands.

Thank you very much.