

## SYMPOSIUM ON INSTITUTIONALIZING INVESTMENT DISPUTE PREVENTION

### INVESTOR-STATE DISPUTE PREVENTION INSTITUTIONS IN LATIN AMERICA – THE CASE OF PERU

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For Peru, the introduction of dispute prevention mechanisms was a consequence of the country's increased openness to foreign investment. Following a severe economic crisis, the government launched several pro-investment reforms in the 1990s. These included signing bilateral investment treaties and free trade agreements with investment protection provisions, as well as investment contracts with foreign investors. The resulting flow of foreign direct investment (FDI) into the country, in turn, increased the likelihood of the state facing investor-state dispute settlement (ISDS) cases. As Peru began to face investment claims in the early 2000s, the Coordination and Response System for International Investment Disputes, also known as "SICRECI" for its acronym in Spanish, was established to manage the practical challenges of coordinating the state's defense. In practice, however, SICRECI's mandate has expanded progressively beyond coordinating ISDS defense, as the institution has undertaken several actions to prevent disputes and otherwise adapted to the specifics of Peru's pro-investment policy. SICRECI became one of the first models of dispute prevention mechanisms, with international organizations showcasing it as an example of how states, in particular developing countries, could address and mitigate a growing number of concerns over the impact of investment arbitration.<sup>1</sup>

#### *The Creation of SICRECI: A Response to the First Encounter with Investment Arbitration*

Following Peru's first international investment dispute in 2003,<sup>2</sup> authorities quickly realized that a policy pursued by the Peruvian government to attract FDI brought with it an increased likelihood of facing ISDS cases. Moreover, they realized that Peru lacked an institutional framework to systematically respond to investment disputes, or to address their root causes and consequences. While the first ISDS cases were overseen by the Ministry of Foreign Affairs and *ad hoc* committees with the help of outside counsel, the state lacked a structure with the capacity to centralize information related to a given dispute and to define responsibilities among agencies involved.<sup>3</sup>

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<sup>1</sup> UNCTAD, [BEST PRACTICES IN INVESTMENT FOR DEVELOPMENT: HOW TO PREVENT AND MANAGE INVESTOR-STATE DISPUTES: LESSONS FROM PERU](#) (2011).

<sup>2</sup> A prior case was in 1998 settled at an early stage and the proceeding was discontinued: *Compagnie Minière Internationale Or S.A. v. Republic of Peru*, ICSID Case No. ARB/98/6, [Award](#) (Feb. 23, 2001).

<sup>3</sup> UNCTAD, *supra* note 1, at 29.

In response to these and other factors, the Peruvian government established SICRECI in 2006.<sup>4</sup> The model for SICRECI was developed domestically and was structured to account for: the problems Peru faced handling the first cases; the dispute resolution clauses in treaties and investment contracts Peru had adopted; and an intention to establish a consistent, orderly, and efficient policy to handle future cases. The design of SICRECI was commissioned by the General Directorate of International Economic Affairs and the Competition and Productivity of the Ministry of Economy and Finance, and it accounted for information gathered from relevant actors from academia, as well as public officials from the Ministry of Economy and Finance, Ministry of Foreign Affairs, Ministry of Justice, Ministry of Foreign Trade and Tourism, and the Private Investment Promotion Agency (Proinversión), among others.<sup>5</sup>

### *SICRECI as a Dynamic, Flexible, and Institutionalized Framework*

SICRECI's structure has successfully enabled the state to address challenges encountered when facing investment disputes. It consists of a Special Commission in charge of representing the state throughout all stages of a given international investment dispute. The permanent members of the Commission include representatives from the Ministry of Economy and Finance (who serves as the Chair), the Ministry of Foreign Affairs, the Ministry of Justice and Human Rights, and Proinversión. Non-permanent members can also be added to the Special Commission, including a representative from the Ministry of Foreign Trade and Tourism, and a representative from any public entity involved in the dispute.<sup>6</sup>

This means that there are as many Special Commissions as disputes that arise. The Special Commission's *ad hoc* composition provides several advantages. It allows for the participation of relevant actors in all stages of a case as non-permanent members. In doing so, the Special Commission can consider and benefit from the views, policies, and expertise of agencies closer to the day-to-day operation of a project or familiar with technical aspects of a case throughout the dispute.

However, in addition to the flexibility of the *ad hoc* structure, the retention of permanent members allows the same core agencies to work closely in coordinating the state's defense in all ISDS cases. This framework allows public officials from the permanent members of the Special Commission to develop a familiarity with the nature of ISDS cases. Among other things, this expertise has better positioned the Commission to differentiate between attempts by investors to use the system opportunistically to improve their position in a discussion with an agency, from cases where—even if the state disagrees with the investor—there is some legitimate basis for the investor's dispute.

### *SICRECI's Turn Toward Dispute Prevention*

While SICRECI was originally developed primarily to coordinate and manage the state's response to ISDS cases, the collective experience of handling numerous cases has allowed it to become increasingly involved in activities that relate more to dispute prevention. It was this dimension that international organizations hailed as an important component of a more systematic and comprehensive approach to internalizing lessons learned from the state's exposure to investment disputes.<sup>7</sup>

<sup>4</sup> Ley No. 28933, 15 Dec. 2006, [Ley que establece el Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión](#), Official Gazette El Peruano (Dec. 16, 2006) (Peru).

<sup>5</sup> Ministerio de Economía y Finanzas, [Exposición de Motivos](#), Oficio N°275-2010-EF/13.03, Official Gazette El Peruano (July 13, 2010) (Peru).

<sup>6</sup> [Ley No. 28933](#), *supra* note 4, Arts. 1, 7.

<sup>7</sup> See [UNCTAD](#), *supra* note 1.

Early resolution of investor-state grievances through amicable settlement was understood to be an important part of dispute prevention. In 2008, a procedure was established for the amicable resolution of disputes by mutual agreement between the state and investor.<sup>8</sup> The process is roughly divided into two stages. In the first phase, the Special Commission directly negotiates a potential resolution with the investor. If an amicable resolution is identified and it is both technically and legally sound, the Council of Ministers is informed—and final approval from that collegial body of the executive branch is then required.<sup>9</sup> While this process starts with a technical evaluation by the Special Commission to find feasible solutions, it is eventually delegated on to a higher authority within the Peruvian Government, such as the Council of Ministers, for a thorough evaluation. This might include a political level evaluation of the negotiated solution with a broader scope. This process has allowed the amicable resolutions of some disputes,<sup>10</sup> but it has not been the only option the Special Commission has used to settle cases.

In most instances, the Special Commission has directly coordinated with the agencies involved in the controversy to find an amicable solution to a given dispute. In these cases, the negotiations with the investor include a commitment to withdraw the claim once the underlying subject matter of controversy is resolved.<sup>11</sup> As explained above, the ability of the Special Commission to evaluate the potential for a negotiated solution is a consequence of the aggregate experience of the members of the Special Commission in handling various cases. While this approach has been effective, tracking the exact number of disputes resolved or avoided remains challenging. The lack of centralized information is primarily due to the fact the regulation does not explicitly envisage this informal practice of resolving claims by negotiating with the responsible agency of government to withdraw or vary the measure responsible for the dispute.

Another dispute prevention endeavor is the Ministry of Economy and Finance's organization of capacity-building workshops.<sup>12</sup> These workshops, tailored to certain sectors and areas of economic activities (such as mining, energy, transportation, and communication), feature presentations from external counsel working on Peru's cases and public officials from the Special Commission. The aim of these workshops is to gather decisionmakers in the public sector and raise awareness about the scope, meaning, and implications of Peru's obligations under investment contracts and treaties, and to encourage them to consider this in investment-related decisions.

SICRECI also established an early alert system that enables prompt and effective actions in response to potential disputes.<sup>13</sup> The overarching goal is to prevent such disputes from escalating into arbitration, wherever possible. An investor can trigger the early-alert mechanism by notifying the relevant agency, or SICRECI directly. In addition, the law also mandates that all public entities inform SICRECI whenever they are made aware, through any means, of an investor's intention to trigger a dispute resolution mechanism. Public entities do not need to have received a formal communication to activate the early alert. In practice, however, there has been variable levels of compliance

<sup>8</sup> Decreto Supremo, No. 125-2008-EF, [Reglamento de la Ley No. 28933 que establece el Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión](#), Art. 13 (Oct. 23, 2008) (Peru).

<sup>9</sup> *Id.*

<sup>10</sup> Resolución Suprema, No. 075-2013-EF, [Autorizan la Solución Amistosa entre el Estado Peruano y Elecnor S.A., Isolux Corsán Concesiones S.A. y Caraveli Cotaruse Transmisora de Energía S.A.C.](#) (Dec. 18, 2013) (Peru); Resolución Suprema, No. 013-2016-EF, [Autorizan la Solución Amistosa entre el Estado Peruano y la empresa Aby Transmisión Sur S.A.](#) (July 5, 2016) (Peru).

<sup>11</sup> See *APM Terminals Callao S.A. v. Republic of Peru*, ICSID Case No. ARB/16/33, [Resolution of the Secretary General Noting the Termination of Procedure](#) (Feb. 22, 2017) (the Special Commission agreed to suspend the arbitration so negotiations could take place). Once the underlying dispute had been resolved, the investor withdrew its claim. See [APM Terminals recibió aprobación final de las obras del Terminal Norte del Puerto del Callao](#), RUMBO MINERO (last accessed July 22, 2024).

<sup>12</sup> Ministerio de Economía y Finanzas Press Release, [MEF capacitó a funcionarios públicos en solución de controversias internacionales](#) (Feb. 25, 2019).

<sup>13</sup> [Decreto Supremo, No. 125-2008-EF](#), *supra* note 8, Art. 6.

with this requirement of immediate notification across the state apparatus. Agencies with prior experience of interacting with SICRECI seem more likely to notify promptly.<sup>14</sup>

The early alert system has been designed to avoid formalities that would prevent agencies from activating the system as early as possible. This emphasis on informality and agility was designed to facilitate a more expeditious and efficient functioning of the framework. If a potential dispute is allowed to escalate and parties exchange divergent views while waiting for the formal notification, practical experience has shown that the scope for possible negotiated solutions decreases.

Importantly, SICRECI also envisages the internal allocation of responsibility in cases where Peru faces an adverse investment arbitration award. It requires that the government entity whose measure led to a successful investor claim bears responsibility for the payment of an award or the execution of a settlement.<sup>15</sup> The overarching aim of this allocative structure is to nudge Peruvian agencies to comply with SICRECI's recommendations on dispute prevention. This might encourage them to avoid actions that could engage the state's international responsibility. Internalizing the costs of adverse investor-state awards within a given public entity has proven to be successful in curbing actions that could have triggered new cases or aggravated existing ones.<sup>16</sup> At the same time, it must be acknowledged that such internalization is unlikely to eliminate the risk of future disputes.

#### *SICRECI's Adaptation to Peru's Investment Contract Policy*

In addition to the extensive network of investment treaties, Peru has also signed investment contracts, offering dispute resolution clauses including the possibility of initiating arbitration proceedings administered by the International Centre for Settlement of Investment Disputes (ICSID). In many instances, this embrace of investment contracts has spanned a variety of economic sectors, sizes of investment, and types of projects to be developed.

Peru's frequent use of ICSID arbitration clauses in a variety of contracts has generated some advantages as well as some unintended consequences. The inclusion of ICSID clauses in investment contracts has allowed the state to file claims and counterclaims within this forum.<sup>17</sup> Investment contracts outline the rights and obligations for both the state and the investor, ensuring a balanced approach to investor-state dispute resolution, which is often criticized for being biased toward investors.

As to the unintended consequences, Peru has participated in forty-four international investment arbitrations at ICSID. Particularly, between 2020 and 2022, Peru was one of the most recurrent respondents at the Centre, according to statistical information published by ICSID. Of these forty-four cases, a total of twenty rely on a

<sup>14</sup> Organismo Supervisor de la Inversión en Infraestructura de Transporte de Uso Público Press Release, [Ositrán advierte que retraso en entrega de permiso municipal para construcción de Estación Central de la línea 2 nos puede llevar al Ciadi](#) (May 21, 2024).

<sup>15</sup> [Ley No. 28933](#), *supra* note 4, Art. 14.

<sup>16</sup> *See, e.g.*, Regional Government of Arequipa, Executive Regional Resolution, No. 665-2017-GRA/GR (Dec. 29, 2017) (Peru). This resolution authorized the Regional Public Prosecutor to withdraw from an administrative litigation process related to a permit of a foreign investor, based on a recommendation from the Special Commission. The Resolution expressly mentions the potential budgetary impact caused by an adverse decision in an eventual ISDS case. The investor ultimately initiated the case: Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru, ICSID Case No. ARB/19/28, [Award](#) (Dec. 20, 2023).

<sup>17</sup> In one case, Peru filed a contractual claim against the investor for not paying certain penalties. *See* Republic of Peru v. Caravelí Cotaruse Transmisora de Energía S.A.C., ICSID Case No. ARB/13/24, [Procedural Order Taking Note of the Discontinuance of Proceedings](#) (Dec. 26, 2013). This case marked the first time a Latin American state appeared as a claimant before ICSID. In another case, a state-owned company filed a counterclaim against the investor related to unpaid royalties. *See* Pluspetrol Perú Corporation and Others v. Perupetro S.A., ICSID Case No. ARB/12/28, [Award](#) (May 21, 2015).

contract as the basis for jurisdiction—a much higher proportion than other states that are frequent respondents in ICSID claims. Indeed, Peru's cases alone represent almost 13 percent of all cases recorded in ICSID's history invoking a contract as the basis of jurisdiction.<sup>18</sup> This highlights the need to explore whether the prevalence of investor-state contracts necessitates rethinking the prevailing approach to dispute prevention and coordination.

It is important to remember that ICSID cases are made public and are subject to greater scrutiny by the public and the press, as compared to contractual cases resolved in other forums. From a public policy perspective, this higher level of transparency is a real strength of the ICSID system. One disadvantage, however, is that the public exposure experienced by a country like Peru is likely higher and more damaging due to its policy of inserting ICSID clauses in its investment contracts. Unlike other states that address the same types of disputes in alternative forums, Peru is subject to the exposure of ICSID dispute resolution even for contractual disputes that do not involve alleged breaches of investment protection standards related to legitimate expectations, government transparency, or arbitrary measures.

While SICRECI was conceived to be a system to handle ISDS cases, it has had to adapt to the reality of coordinating the state's defense in contractual cases as well. This has influenced SICRECI's evolution, leading it to adopt prevention measures (such as the workshops discussed above), to support government agencies in meeting their contractual obligations. In contractual cases, the entity involved in the controversy plays a central role. Unlike treaty cases, where the entity provides important information and expertise, in contractual cases, it also controls many aspects of the project as the contractual counterpart. This adds complexity, as these cases often involve ongoing contractual relations. While treaty disputes typically involve frustrated or expropriated investments, contractual cases require parties to. This dynamic has affected the Special Commission and has forced the system to adapt. For example, SICRECI now stipulates that unlike other investment contexts in contractual disputes the government entity involved can lead negotiations with an investor.<sup>19</sup>

In addition, because of its involvement in such contractual cases, SICRECI has also had to deal with the reputational impact the high-profile ICSID contractual disputes brings not only for Peru as a host state for FDI, but also for the SICRECI itself as a reliable and effective mechanism to organize the state's defense in these cases. The number of cases faced by Peru after SICRECI was launched and operationalized may also point to the need to consider dispute prevention alongside other, systemic, and comprehensive reforms aimed at reducing state exposure to ISDS.

### *Conclusion*

SICRECI aims to ensure a comprehensive and coordinated approach to investment disputes. Initially, SICRECI managed ISDS cases as they arose. Over time, its role has expanded to include proactive efforts preventing disputes through measures such as amicable resolutions of disputes and instituting capacity-building workshops for relevant stakeholders. SICRECI has also had to adapt to Peru's frequent use of ICSID arbitration clauses in investment contracts, continually adapting its strategies to manage these cases effectively and mitigate their impact on Peru's international reputation.

<sup>18</sup> ICSID, *Case Database* (last accessed Aug. 27, 2024).

<sup>19</sup> *Ley No. 28933*, *supra* note 4, Art. 8(c).