

The Peruvian State's Response to International Investment Disputes



The dispute settlement system between foreign investors and host States of investment has seen an important development in recent years. This should not be a surprise if we consider that the trend of signing bilateral agreements for the promotion and protection of investments had a notable increase at the beginning of the nineties. These agreements establish a series of guarantees and minimum protections for foreign investment, as well as a mechanism for the resolution of disputes that may arise with respect to alleged breaches of said commitments. The vast majority of proceedings initiated at the *International Centre for Settlement of Investment Disputes* (ICSID) are based on an alleged breach of one of these instruments.

Peru has not been a stranger to the tendency of signing international agreements for the promotion and protection of investments and, unfortunately, it has also seen a sharp increase in new international investment controversies in recent years.

After facing a first case in 2003, Peru understood the

importance of being able to efficiently and effectively organize its defence, establish coordination mechanisms within the State, centralize all relevant information and define the responsibilities of the entities involved in the controversies.

Thus, a few years later, with the issuance of Law No. 28933, the *State Coordination and Response System for International Investment Disputes (SICRECI)* was created. Some of its objectives are to optimize the response and coordination within the public sector in the face of international investment controversies, centralize the information of investment agreements and treaties signed by the Peruvian State and establish an early alert system to deal with the emergence of any international investment dispute.

One of SICRECI's most important elements was the creation of the Special Commission (the *Special Commission*) that represents the State in international investment disputes. It is a multi-sector collegiate body whose purpose is the representation of the State in all stages of the controversy, which includes both, the previous stage of negotiation and international arbitration, and who also carries out the selection process of local and international firms that are in charge of the legal defence of the State.

The Special Commission is composed of representatives of the Ministry of Economy and Finance, who chairs it, Ministry of Foreign Affairs, Ministry of Justice and Human Rights and the Agency that promotes investment in Peru (PROINVERSION). Additionally, the Special Commission has non-permanent members such as the Ministry of Foreign Trade and Tourism (in the case of disputes arising in application of the treaties that contain investment provisions) and a representative of each public entity involved in a dispute.

This *ad hoc* structure is specifically designed to allow all interested parties to have a vote on the most important

decisions of the process, including participating in the negotiation process, the appointment of arbitrators and assisting the work of lawyers hired to carry out the legal defence of the State.

The system has proven to be successful. Peru has finalized 17 cases to date. Out of those, in 14 cases the State obtained completely favourable results, including 2 amicable solution agreements that ended the controversy and 1 case in which the arbitration process was discontinued. In addition, Peru is the first Latin American State to file a lawsuit against an investor at ICSID.

Only on 3 occasions has Peru been ordered to pay an amount in favour of investors. However, in all cases a significant reduction of the contingency was achieved: in 1 of the cases the State was ordered to pay less than half of the amount originally claimed and in the other 2 it was ordered to pay amounts close to 4% of the original claim.

It is important to note that in 5 awards, in addition to a decision favourable to the State, the Tribunal also ordered reimbursements in favour of Peru of costs and expenses incurred in the arbitration. In total, including reimbursements, penalties, royalties and similar concepts that result directly from the awards rendered, Peru has received more than twice the amount it was ordered to pay investors.

SICRECI, in addition to the positive results it has obtained, is an essential element of the policy designed by the Peruvian State to attract foreign direct investment. The implementation of a dispute prevention and response system creates a stable and predictable climate for investments in the country, as it generates security for investors of having a serious counterpart who is concerned with the early identification and resolution of disputes and, when the latter is not possible, in an adequate defence of the State in these processes.

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