

PRACTICAL LAW

ARBITRATION BLOG



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ICSID arbitration and foreign investment in Peru endangered

On 6 June, the second round of the presidential elections will be held in Peru, which will pit the “Peru Libre” political party against that of “Fuerza Popular”. The future of *ICSID arbitration* and foreign *investments* in the country depends on the result of this election.

In Chapter XXI of the Peru Libre party’s *Ideology and Program* (relating to foreign policy), the *ICSID arbitration* system is criticised, stating that it is a control and biased tool at the service of transnational companies. The party proposes to withdraw Peru from it, and instead create the Dispute Resolution Center of the Union of South American Nations (UNASUR) or use the *bilateral investment treaties* (BITs) as *arbitral institutions*.

As is known, foreign *investors* use ICSID arbitration for the security it provides, and other advantages. For example, the *arbitration award* is executed directly as if it were a judgment issued by a judicial court of an ICSID member state. For this reason, if Peru withdraws from ICSID, it will also say goodbye to foreign investments, which represent a large percentage of private investment in the country. According to the *Economic Commission for Latin America*, in 2019, prior to the pandemic, direct foreign investment was USD8.892 billion. Without this arbitration system, it is unlikely that the majority of investors from the *163 countries* that are party to the ICSID convention will risk investment in Peru or accept that resolution of disputes be dealt with before a slow, formalist court against whom allegations of corruption have also been made.

Regarding the Center for Dispute Resolution of the UNASUR, it should be noted that the creation of such a center was proposed in 2008, when UNASUR was first established. Subse-



by **Professor Carlos A Matheus**

Arbitrator and consultant
at *CML Arbitrator & Consultant*

quently, in 2010, after having withdrawn from ICSID a year earlier, Ecuador presented a proposal for an arbitration center. Today, the center remains just a proposal and UNASUR has virtually disappeared. The majority of states, including Peru, have withdrawn from it, leaving only Guyana, Suriname, Bolivia and Venezuela. The proposal of the “Peru Libre” party is unrealistic, therefore, because:”

- UNASUR, a treaty that [Peru denounced in 2019](#), is in the process of being dismantled.
- As a result, Peru will become a state of less importance.
- If such an arbitration center were created, it would serve only as a forum for foreign investment controversies among the remaining members of UNASUR. That is, for investments in Peru that come, for example, from Bolivia or Venezuela.

On the other hand, the proposal to use BITs as arbitration centers shows a lack of understanding of [investment arbitration](#). BITs do not create arbitral institutions. Rather, the contracting states establish through the BIT a mechanism for the resolution of disputes related to investments, in which they usually entrust the management and administration of the arbitration (if not to ICSID) to an arbitral institution, such as, for example, the [ICC International Court of Arbitration](#), or the [Permanent Court of Arbitration](#).

This poorly conceived proposal, and the inexperience evidenced in its design, also demonstrates ignorance of the fact that Peru, through its [System for the Coordination and Response of the State in International Investment Disputes](#) (SICRECI), has greatly benefited from ICSID arbitrations in which it has been sued. In 17 cases before ICSID that ended in February 2020, Peru obtained positive results in 14 cases. In addition, of the almost USD50 billion claimed in those arbitrations, only about USD43million was awarded to investors.

We can only hope that at the end of the road, everything turns out well because paraphrasing Montesquieu, “an injustice committed against arbitration is a threat to everyone”.
