



■ INDEPTH FEATURE Reprint July 2020

INVESTOR-TREATY ARBITRATION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in investor-treaty arbitration.





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Respondents



LAUREN FRIEDMAN
Partner
King & Spalding
+1 (212) 790 5350
lfriedman@kslaw.com

Lauren Friedman is a partner in the global disputes practice specialising in international arbitration. She has handled dozens of international commercial arbitrations and investment treaty arbitrations, including some of the largest disputes on record. She also handles domestic court remedies in support of international arbitration cases, including applications for interim measures, domestic discovery proceedings and proceedings to enforce arbitral awards. Ms Friedman has helped clients resolve their disputes successfully, including through dismissal of claims, procurement of awards in the billions of dollars and settlements on terms favourable to clients.



ISABEL SAN MARTÍN
Associate
King & Spalding
+33 (1) 7300 3937
isanmartin@kslaw.com

Isabel San Martín is an associate in the global disputes practice, based in the Paris office. Her practice focuses on international arbitration and public international law. She has experience in commercial and investment treaty arbitrations under the ICSID, LCIA, UNCITRAL, and SCC Rules, in a variety of sectors, including energy, natural resources and construction, and with a particular focus on disputes in Europe and Latin America. Ms San Martín is admitted to the bars of New York, Paris and Madrid.

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Q. Could you provide an overview of recent trends and developments in investor-treaty arbitration in Spain? How would you describe the volume of such disputes over the last 12 months or so?

A. Spain is among the most frequently sued states in investor-state arbitration. Based on the latest statistics, Spain faced five new cases in 2018 – surpassed only by Colombia – and at least three new cases in 2019. Spain currently faces roughly 47 cases – perhaps more than any other country worldwide. Of those 47 cases, 33 are pending before tribunals, while the remaining 14 are in the enforcement stage. The onslaught of cases against Spain started just seven years ago. Until that time, Spain had faced roughly four cases in total. Yet circumstances changed significantly in response to a series of regulatory measures that Spain adopted starting in 2010. Spain has since become the second-most frequent respondent state worldwide – surpassed only by Argentina – even after accounting for 30 years of data.

Q. What are some of the common causes of investor-treaty disputes in Spain?

What role are bilateral and multilateral investment treaties playing?

A. The vast majority of cases against Spain arise from a series of reforms to its renewable energy incentive regimes between 2010 and 2014. All of these cases have been brought pursuant to the Energy Charter Treaty (ECT). While renewables cases comprise the bulk of investor-state arbitrations against Spain, the country also faces other types of disputes, including a Permanent Court of Arbitration (PCA) arbitration brought by Mexican investors who held shares and bonds in Banco Popular, the sixth-largest financial institution in Spain, until it was resolved in June 2017. The arbitration challenges the significant role that the Spanish authorities played in fuelling a liquidity crisis and in selling the bank to Santander Bank for €1 in a deal that destroyed investments.

Q. Do you believe the current investor-state dispute settlement system works well? Would you recommend any reforms to the system?

A. The current investor-state dispute settlement (ISDS) system offers investors

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a powerful tool to challenge foreign governments when their acts or omissions harm the investment. Without the ISDS system, foreign investors would have to sue foreign governments in foreign domestic courts, which may be biased against them, and may be riddled with delays and deficiencies. The current ISDS system provides a neutral and sophisticated option specifically designed to avoid such problems. That said, there is room for improvement. Taking into account the ISDS system as it relates to Spain, we have seen significant inconsistencies in final awards, with a similar set of facts leading to different rulings by different tribunals. While some commentators recommend overhauling the entire system to address this issue, it could also be addressed more gradually by employing clearer terms in investment treaties that give rise to ISDS protection.

Q. How would you characterise the challenges involved in enforcing an arbitral award against sovereign and state

entities? What lessons can parties learn from recent arbitration decisions?

A. Most states voluntarily comply with their arbitral awards after exhausting available avenues to challenge decisions, although that experience is far from universal. It is too early to tell whether Spain will voluntarily comply with awards rendered against it. Thus far, Spain has lost 14 cases but has paid only one – the very first award rendered against it in 2000. Although 13 awards remain outstanding, enforcement remains ongoing as Spain is seeking to challenge those awards in domestic courts, which may justify a delay in payment. Recent enforcement efforts have highlighted the importance of identifying assets in enforcement-friendly jurisdictions even prior to receiving a final award. Many ECT awards rendered against Spain are being enforced in the US, likely because of an anti-enforcement agenda in the EU, and the presence of Spanish-government assets in the US.

Q. What steps do parties need to take in relation to structuring their overseas



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investments to ensure they qualify to receive investment treaty protection?

A. Parties looking to structure their investments to receive treaty protection in Spain should first consider whether they already benefit from investment treaty protection. For example, qualifying Mexican nationals and enterprises benefit from treaty protection under the Mexico-Spain bilateral investment treaty (BIT) without special structuring. Investors that are not protected could consider structuring their investment through a special purpose vehicle in a third country that has a treaty with Spain. Several renewable energy investors were able to bring claims against Spain on behalf of a holding entity that had the requisite nationality. In structuring their investment, investors should bear in mind the EU's policy against 'intra-EU' arbitrations and consider restructuring through a non-EU member state. In addition, investors must restructure their assets for investment protection before the government's measures become foreseeable, as



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restructuring after a dispute arises could be considered illegitimate treaty shopping.

Q. What essential advice would you offer to an investor embroiled in a dispute with a foreign government? Do emerging markets pose any particular problems?

A. Investors embroiled in disputes with the Spanish government or any other government should obtain advice from international arbitration counsel as soon as possible. Early advice not only provides the investor a clearer picture of the viability and value of their claim, it also helps them to avoid common pitfalls. For example, depending on the language of the relevant treaty, an investor may waive its right to arbitration if it challenges a foreign government's measures in domestic courts. Moreover, there may be several steps investors need to take before initiating an arbitration; most Spanish investment treaties require the investor to deliver a notice of dispute to the state and engage in a six-month negotiation period. Investors should seek advice in order to avoid unnecessary waivers and delays.

Q. How do you predict the geopolitical and economic outlook will influence investor-treaty claims and disputes?

A. Change is on the agenda. EU member states, including Spain, recently signed an agreement to terminate all BITs concluded between them. We expect that EU member states will create a new ISDS system, which would replace party-appointed, ad hoc panels with a court of standing judges. Separately, the European Commission has announced a proposal to amend the ECT, including by limiting its substantive protections. It remains to be seen how this proposal will be received among non-EU contracting parties to the ECT. Outside of the EU, we expect change to be slower, although amended BITs may limit investors' protections and expand states' rights to sue investors. Nevertheless, we expect arbitration to remain the favoured mode of dispute resolution between investors and states, at least in the near future. The system is sophisticated, has a robust body of jurisprudence, and is superior to any other model for investor-state dispute resolution. □



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LAUREN FRIEDMAN Partner
+1 (212) 790 5350
lfriedman@kslaw.com

ISABEL SAN MARTÍN Associate
+33 (1) 7300 3937
isanmartin@kslaw.com

REGINALD R. SMITH Partner
+1 (212) 556 2200
rsmith@kslaw.com

JAVIER H. RUBINSTEIN Partner
+1 (312) 764 6929
jrubinstein@kslaw.com

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