

Panama defeats Banesco ICSID investment treaty claim over public works bonds

Lalive acted for Panama, with three-member tribunal rejecting the claim

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Panama City

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By



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Swiss disputes firm Lalive has secured a victory for Panama in an ICSID (International Centre for Settlement of Investment Disputes) investment treaty claim brought by disgruntled Spanish investors alleging that state entities breached a bilateral investment treaty (BIT) in their handling of bonds linked to public works contracts.

The claim was brought by Banesco Holding Latino América and Banesco (Panama), advised by Clifford Chance, with a three-member tribunal rejecting the claims.

The award, issued earlier this month, found that Panama had not breached its treaty obligations and ordered Banesco to pay a significant portion of the state's legal costs, following investor-state proceedings brought under the Spain-Panama BIT.

The ruling will be closely scrutinised for its impact on disputes in which investors seek to elevate public contract enforcement issues into treaty claims, arguably highlighting the limits of investment treaty protection when domestic courts have considered the underlying legal issues and when the dispute turns on ordinary commercial risks.

Banesco had sought compensation exceeding \$13.5m – an amount it reserved the right to increase up to almost \$50m. Ultimately, all of Banesco's claims were rejected, and it was ordered to pay Panama a significant portion of its legal costs, which Panama's Ministry of Economy and Finance said separately amounted to \$900,000.

The tribunal was chaired by Franz Stirnimann Fuentes. The claimant-appointed arbitrator was Rafael Rincón Ordóñez, while Panama appointed Álvaro Galindo. Proceedings began in 2023.

Banesco initiated arbitration proceedings, alleging violations of the fair and equitable treatment standard and protections against impairment of foreign investment under the BIT. The case centred on the execution and possible enforcement of bonds related to public infrastructure contracts.

At heart, the claim concerned approximately 70 advance payment and performance bonds issued by Banesco to guarantee 35 public works contracts. Banesco alleged that Panamanian entities acted arbitrarily and discriminatorily, were not transparent, and Panama had violated due process by calling, or threatening to call, the bonds.

The tribunal rejected Banesco's claims in full. According to Lalive, which represented Panama, the tribunal found that Panamanian entities had not acted arbitrarily or discriminatorily. It also found that Panama's Supreme Court had adopted a plausible interpretation of domestic law on the issues before it when the matter was litigated by both sides in that country's national courts.

The tribunal further noted that Banesco had access to domestic remedies and had used them to challenge decisions it disputed. It also held that fair and equitable treatment does not operate as a guarantee against the risks inherent in commercial activity.

Jaime Gallego, the Geneva-based Lalive partner who led Panama's defence alongside fellow partner Domitille Baizeau, said: "The tribunal's unequivocal decision is a major victory for our client and reaffirms Panama's commitment to the rule of law. It also underscores that mere disagreements about the interpretation of domestic law do not give rise to a violation of international law."

Panama's Ministry of Finance also welcomed the decision, saying it reaffirmed the country's commitment to the rule of law and strengthened international confidence in Panama as a destination for foreign investment.

The Lalive team included counsel Luis Miguel Velarde Saffer, senior associate Riccardo Loschi and associate Maël Deschamps. Banesco was advised by Clifford Chance in Madrid, led by Fernando Irurzun Montoro. Neither they nor Banesco offered substantive public comment on the award.

The victory comes as Baizeau, who is well-known in arbitral circles – especially at the International Council for Commercial Arbitration – was appointed co-chair of the Hong Kong International Arbitration Centre (HKIAC). He [succeeds David W Rivkin](#), effective from June. Baizeau, a partner at Lalive in Geneva, has served on HKIAC's council since 2020, among other roles.

The immediate past chair of the Hong Kong Bar Association Victor Dawes SC succeeded the former Justice Secretary Rimsky Yuen SC as the other co-chair. Joanna Lau [is the current secretary-general](#), following Mariel Dimsey's return to CMS.

Thomas Walsh, a Hong Kong-based partner at Clifford Chance and Huawei Sun, senior counsel at Zhong Lun Law Firm in Beijing, are the new vice-chairs, succeeding Nils Eliasson of King & Spalding and Brianna Young of Three Crowns.