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HOT TOPIC

INVESTOR-TREATY ARBITRATION

PANEL EXPERTS

Lauren Friedman
Partner
Kirkland & Ellis LLP
T: +1 (212) 446 4958
E: lauren.friedman@kirkland.com

Lauren Friedman is a partner in Kirkland & Ellis LLP's international arbitration group and is based in New York. She has served as an arbitration lawyer for the past decade, having handled dozens of international arbitration cases, as well as domestic court remedies in support of international arbitration cases, including applications for interim measures, domestic discovery proceedings and proceedings to enforce arbitral awards. She has handled a wide range of commercial arbitrations and investment treaty arbitrations arising out of contractual relationships, such as distribution agreements, production-sharing contracts, licensing agreements, joint marketing agreements and financial disputes.

Chloe Carswell
Partner
Reed Smith LLP
T: +44 (0)20 3116 2861
E: ccarswell@reedsmith.com

Chloe Carswell is a partner at Reed Smith LLP. Her practice focuses on investment treaty arbitration and public international law. She has extensive experience of acting for both investors and states in high value complex arbitrations before major international arbitration institutions in a variety of industry sectors, including natural resources and mining, and also advises clients on investment structures.

Julie Bédard
Partner
Skadden, Arps, Slate, Meagher & Flom LLP
T: +1 (212) 735 3236
E: julie.bedard@skadden.com

Julie Bédard is head of Skadden's international arbitration group for the Americas. She focuses her practice on complex international litigation and arbitration and advises companies and boards on internal investigations and regulatory matters. She speaks English, French, Spanish and Portuguese. She has served as counsel and arbitrator in proceedings held under the auspices of the ICC, AAA/ICDR and ICSID, in addition to UNCITRAL arbitrations.

Luke Sobota
Partner
Three Crowns
T: +1 (202) 540 9477
E: luke.sobota@threecrownsllp.com

Luke Sobota is a founding partner of Three Crowns and managing partner of the firm's Washington, DC office. He represents private and sovereign clients in some of their largest and most important commercial, investor-state and inter-state arbitrations. He also has 20 years of experience litigating international issues in US courts. His practice experience spans the energy, financial, construction and technology sectors, and includes the successful prosecution of one of the largest International Chamber of Commerce (ICC) cases in history. He is co-author of two books on international law and teaches courses on international arbitration at Harvard University, American University, and the University of Miami.

Michael J. Stepek
Partner
Winston & Strawn LLP
T: +44 (0)20 7011 8754
E: mstepek@winston.com

Michael J. Stepek focuses on international commercial arbitration, investment treaty arbitration, and public and private law, with a particular emphasis on disputes involving the control of corporate entities, foreign direct investment, concession agreements, major infrastructure projects and joint ventures.

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

Friedman: Over the past 12 months, the volume of investment arbitration cases increased by more than 10 percent. Unsurprisingly, the number of disputes between European Union (EU) Member States declined, likely because of the Court of Justice of the European Union's (CJEU's) *Achmea v. Slovak Republic* decision, which found that treaties signed between EU Member States are contrary to EU law. This led to the termination of almost 40 intra-EU bilateral investment treaties (BITs), leaving limited avenues for EU nationals to start such claims against EU nations. Globally, Colombia faced the largest number of new claims in 2018 followed by Spain, which continues a recent uptick of cases against those two countries. Overall, Argentina, Spain and Venezuela remain the most frequent respondent states based on historic global statistics. Meanwhile, claimants most often are nationals of the US, the Netherlands and the UK. The prevalence of north-to-south disputes is unsurprising, as it reflects the strong flow of foreign investment from north-to-south globally.

Bédard: The volume of investor-state dispute settlement (ISDS) disputes this year has increased slightly, but significant changes could be on the horizon. Next-generation investment treaties are restructuring the historical relationship between investors and host states. The United Nations Commission on International Trade Law (UNCITRAL) Working Group III is currently developing a slate of ISDS reform proposals, ranging from a permanent standing arbitral body to new rules on third-party funding. The CJEU's recent *Achmea* decision, precluding investor-state arbitration under BITS between EU Member States, has spawned a slew of BIT terminations in the EU, and the newly-minted US-Mexico-Canada Agreement (USMCA) reconfigures ISDS for the North American investment relationship.

Stepek: Without a doubt, there is a trend toward limiting the ability of investors to bring private rights of action as against state actors. This trend manifests in the negotiation or renegotiation of treaties which limit the private rights of action or a private right of action in arbitration, such as in the US-Mexico-Canada Agreement in which private recourse to arbitration is limited, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), which narrowed the use of arbitration and pursuant to which several states executed side instruments, further limiting private recourse to arbitration, or the EU-Japan Economic Partnership Agreement, which does not contain any investor protection provisions, although the parties are negotiating a separate investment agreement, which will likely contain some form of dispute resolution mechanism. The trend is further reflected in recent jurisprudence narrowing the scope of the right to private action under existing treaties, such as the *Achmea* decision in the EU, as well as in domestic legislation, like South Africa's Protection of Investment Act 2015, which came into force in 2018, and which seeks to shift disputes away from arbitration and into mediation and the South African courts.

Sobota: Investor-treaty arbitration is a relatively new phenomenon, and stakeholders are presently considering various ways to improve it. The European Commission (EC), for instance, is pressing to establish a multilateral investment court as an alternative to ad hoc investment tribunals and to allow for greater review of investment awards. UNCITRAL's Working Group III and the International Centre for Settlement of Investment Disputes (ICSID) Secretariat are developing proposals toward making the system more efficient, cost-effective and transparent. Notwithstanding the debate over these and other proposed reforms, which attempt to strike the proper balance of fairness and efficiency, investors continue to invoke the protections afforded by investor-treaty arbitration. ICSID administered 306 cases in 2019, a historic high, and states continue to enter new bilateral and multilateral investment treaties. These statistics indicate that investor-state arbitration has become an important component of international commerce.

Carswell: There has been tremendous growth in investor-state arbitration in recent years. Although more traditional economic sectors, such as energy and natural resources, oil and gas, continue to dominate, newer industry sectors, such as telecommunications, IP, tech and data, and renewable energy, are giving rise to claims against states that are looking for inward foreign investment to drive development and progress. Reform is also the order of the day, coming from all directions, with states pushing to renegotiate outdated treaties and hold investors to account for environmental and human rights violations, initiatives to modernise and reform the Energy Charter Treaty (ECT) and various institutional rules, investors seeking innovative ways to fund and publicise their claims and the disruptive influence of the EU and its censure of intra-EU disputes.

CD: What are some of the common causes of investor-treaty disputes? What role are bilateral and multilateral investment treaties playing?

Bédard: Often, host governments will invite investment in a chosen sector via preset regulatory incentives, such as tax breaks or investment subsidies. Then, intervening developments, such as political pressures, a change in administration or disappointing investment performance, trigger the removal of those incentives. When this happens, international arbitration under investment treaties, both bilateral and multilateral, is available to protect the rights of investors so they do not have to resort to national courts. Spain's 2007 renewable energy premiums are a good example of this. Spain used feed-in tariffs to reward investors for renewable energy activities across the country, then rolled back these premiums between 2012 and 2014, triggering a series of investment disputes under the ECT.

Stepek: Probably the most common cause of investor-treaty disputes remains changes in government and the policies they pursue. These types of changes most often seem to affect both the extractive industries, where projects are often politically sensitive and involve local concerns which may be leveraged as part of the national political process, as well as highly regulated industries providing a fundamental product or service, such as electrical power or water, which thus have a high percentage of state supervision or involvement. The pace of technological change in highly regulated industries is becoming a frequent cause of investor-treaty disputes. Frequently, technology that existed at the time regulations or economic policies were implemented has been surpassed, such that the state is inclined to modify the policy, but which implicates the financial models on which previous investments which are still operating were made. This has been the case, for example, with certain renewable energy support schemes. Bilateral and multilateral investment treaties play a central role as they provide the legal foundation by which an investor that believes it has been wronged can pursue redress, either by way of negotiation with the government involved or by a private right of action or otherwise.

> **"The pace of technological change in highly regulated industries is becoming a frequent cause of investor-treaty disputes."**
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> *Michael J. Stepek, Winston & Strawn LLP*

Sobota: Investor-state arbitration allows foreign investors to challenge measures taken by the host state that allegedly breach the substantive protections provided by investment treaties, investment laws or investment contracts. Typical investor claims against the host state include allegations of direct or indirect expropriation, unauthorised termination of investment contracts, and adverse or discriminatory fiscal measures. Investment tribunals typically engage in a holistic assessment of the challenged measures, considering both the relevant rights of the investor and the sovereign prerogatives of the host state. Most investor-state disputes are instituted under bilateral and multilateral treaties, but similar investment protections can be negotiated and included in investor-state contracts as well. The first-generation investment treaties generally contain broadly worded protections, and some states have attempted to clarify and curtail the scope of investment protection by including more concrete terms in new or renegotiated bilateral and multilateral treaties.

Carswell: The alleged takeover, seizure or nationalisation of investments and termination, non-renewal or alleged interference with contracts or concessions by host states formed the basis for half of the claims registered with the ICSID over the last year. The next most prevalent cause arises out of alleged harassment and criminal prosecution and detention, the latter being used by both investors and states alike to drive or disrupt claims. Another relative newcomer is legislative reform in the renewable energy sector within the EU where individual states have introduced incentives and subsidies to encourage and promote renewable energy investment and development, and where states reneged on those promises. Treaties provide a layer of protection for investors over and above domestic law – allowing for the resolution of disputes and determination of claims against host states outside the state's domestic courts, by facilitating a claim by the investor directly against the state. In many cases they result in an award of damages against a state that is recognised and enforced against a state's assets in most jurisdictions around the world.

Friedman: A few of the most prominent waves of investment arbitrations illustrate how two factors – economic changes and political changes – tend to generate most investment disputes. Economics and politics can create antagonism between foreign investors and the state in which they have invested. For example, in response to high oil prices in 2007, former Venezuelan president Hugo Chávez imposed taxes and expropriated foreign oil companies, which gave rise to over 30 investment treaty cases alone. The origin of the disputes was twofold: a changed price environment and a populist leader who wanted to share in the increased returns. Negative economic changes also breed disputes. Spain recently faced 46 cases because it revoked subsidies it once promised in the renewable energy sector, having apparently miscalculated the cost of such a programme.

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

Stepek: The current investor-state dispute settlement system works well, particularly when one considers the alternatives. It remains a flexible and effective approach to resolving disputes between an investor and state. While it is under heavy criticism in some quarters for a lack of transparency, consistency and accountability, these criticisms have had an effect and to an extent are being addressed. It is difficult to imagine that a critic of the current system several years ago would have thought it likely that the responsibility of investors would become a central concern in the resolution of disputes and would be institutionalised in modern treaties. Yet this is happening. This is not to say the system cannot be further improved – it can. Improvement, though, is unlikely to come through shifting the private right of action to a standing body with members appointed for a set term. While this might be seen to increase legitimacy and help harmonise decisions, it is a less flexible system that may not be able respond adequately or quickly enough to changes in views of their power and purpose.

Sobota: The rapid growth and continued use of investor-treaty arbitration indicates that it is valued by both states and investors. That said, the system of investor-treaty arbitration has only been functioning for about 25 years. Flexibility and adaptability are hallmarks of international arbitration, and it is quite natural that the stakeholders of investor-treaty arbitration are considering areas where the system might be improved. In order to maintain the legitimacy of investor-treaty arbitration, it is particularly important to focus on reforms that promote fairness, economy and efficiency. For example, both states and investors would benefit from further clarity on the rights and obligations set forth in investment treaties. In addition, efforts such as the proposed amendments to the ICSID Rules should help to promote more effective case management by arbitral tribunals.

Friedman: The current investor-state dispute settlement system is remarkable in that it offers investors a powerful avenue to address unfair treatment received at the hands of a foreign government. Without this system, investors in emerging markets would have to vindicate their rights in domestic courts that may be unavailable, due to sovereign immunity or plagued by corruption and delays. However, the system is young and there is room for improvement. While there are many opportunities for improvement, I often recommend reforming the 'cooling-off period', which requires an investor to notify the government of the dispute and then wait several months before initiating arbitration. The original purpose of the cooling-off period was to encourage early settlement of disputes, but it is unproductive, as most parties do not engage in settlement discussions during this period at all. In order to encourage settlement, treaties should require meetings between the investor and the government, leveraging technology like videoconferencing for safety and efficiency purposes.

Carswell: The current ISDS system clearly works. The number of active and new claims is proof of that and there is a greater public awareness of ISDS than ever before. But the system could benefit from an overhaul and some modernisation. It has not kept pace with development and progress in other areas. It is very expensive, with arbitrators overcommitted and the result is that awards can take years to be issued. There is no system of precedent, jurisprudence is inconsistent and there can be a lack of rigorous analysis with little or no oversight and limited opportunities for challenge. Reform is overdue and there is a real appetite for change. Proposals to improve the consistency of awards, the appointment of arbitrators with demonstrable independence and diversity and measures to reduce the cost and duration of proceedings would be welcomed by all interested parties.

Bédard: The current ISDS system is under some pressure, primarily from governments. States generally 'win' ISDS cases more often than investors. According to the United Nations Conference on Trade and Development, states saw 36 percent of cases from 1987-2018 resolved in their favour, compared to 29 percent for investors. The remaining cases were discontinued, settled or generated no damages. But significant changes could still be in the offing. The EU has proposed the creation of a permanent multilateral 'investment court' to replace ad hoc ISDS tribunals. Elsewhere, new model investment treaties highlight state regulation in matters like the environment or human rights while curbing historical investor protections. ISDS tribunal diversity, both of nationality and gender, is on the rise, and new conflict of interest standards for arbitrators are under consideration. As the system

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> *Chloe Carswell, Reed Smith LLP*

changes, ISDS parties, such as states, businesses and arbitration practitioners, must do better at explaining what ISDS does and does not do. To that end, they should promote transparency, outreach and public engagement.

CD: 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?

Carswell: One of the benefits of ICSID arbitration is that awards are subject to limited opportunities for annulment – they are not subject to the vagaries of domestic appellate systems – and they are recognised

and enforceable in each of the 154 contracting states to the ICSID Convention, as if the award was a final judgment of that state. There is a distinction between ICSID awards and other investment treaty awards rendered under other rules and in other fora, and indeed commercial arbitration awards, which have to be enforced under the New York Convention, and are therefore susceptible to the exceptions set out therein. Recent enforcement decisions have highlighted the importance of identifying assets in enforcement friendly jurisdictions and addressing state immunity issues. Investors need to be alive to the very real difficulties of enforcing awards issued in intra-EU arbitrations, within the EU, post the *Achmea* decision, which has rendered a number of valuable awards essentially worthless.

Bédard: As governments sour on ISDS, they are mounting vigorous enforcement defences against ISDS awards. In the US, for

example, EU Member States are raising unique legal issues, such as the intra-EU objection in *Achmea*, during enforcement proceedings, trying to convince US courts they have no business enforcing arbitration awards that purportedly conflict with EU law. Political tumult in other states, notably Venezuela, may also affect the enforcement process. However, many domestic courts are increasingly willing to honour international arbitration awards covered by established international agreements, such as the ICSID, UNCITRAL and the New York Convention.

Friedman: Enforcement of awards against sovereign and state entities is usually straightforward, as states tend to pay voluntarily awards rendered against them. When a state refuses to pay, investment arbitration provides a robust global enforcement mechanism that is superior to domestic judgment enforcement mechanisms. ConocoPhillips recently demonstrated the benefits of an aggressive strategy in enforcing an investment award. Immediately after securing its $1.2bn award against Venezuela, ConocoPhillips seized strategically important assets in the Antilles, which cut exports from several Caribbean facilities. ConocoPhillips leveraged that win to negotiate a settlement with Venezuela for the full value of its award paid in instalments. By making itself a thorn in Venezuela's side, it extracted value for its award, likely preferable to a global asset chase or awaiting a new regime. Multiple claimants having secured awards against Venezuela even before ConocoPhillips have not yet achieved similar success.

"Although the challenges of enforcing an arbitral award against a sovereign can be quite significant, most states comply voluntarily."

Luke Sobota,
Three Crowns

Sobota: In the absence of voluntary compliance, enforcement of an arbitral award against a state can take time. For example, states are more frequently challenging enforcement under the New York Convention, or applying for the annulment of awards under the ICSID Convention. As a result, the rendering of the award is often followed by additional processes before finality is achieved. Where an arbitral award is sustained in annulment or set-aside proceedings, the investor can enforce the awards in the national courts. Recent cases, including *Yukos v. Russia, Rusoro Mining v.*

Venezuela, and *Commisa v. Pemex*, demonstrate how efforts to enforce an arbitral award against states and state entities may be subject to conflicting decisions from different national courts, further complicating finality. In addition, states typically enjoy sovereign immunity over assets held in a foreign country, and investors often need to establish exceptions to this immunity in order to enforce the arbitral award abroad. Although the challenges of enforcing an arbitral award against a sovereign can be quite significant, most states comply voluntarily.

Stepek: Enforcing an arbitral award against sovereigns is potentially challenging. In the first instance, enforcement as against sovereigns may entail compliance with specialised procedural rules in countries of enforcement. These types of procedural rules include those of service. As recently seen in England in *General Dynamics UK Ltd v Libya*, service must be made through diplomatic channels and cannot be dispensed with in enforcement proceedings against sovereign states. Additionally, many countries may have domestic legislation that is obsolete and local courts that may resist enforcement of arbitral awards in general. Furthermore, while the host state or state-entity's agreement to arbitrate claims in certain jurisdictions will often find a waiver of any sovereign immunity defences against the award itself, others may not.

CD: What steps do parties need to take in relation to structuring their overseas investments to ensure they qualify to receive investment treaty protection?

Bédard: As companies consider investing overseas, they should consult counsel early on – they will help to identify source countries that maintain generous BITs with the host country. The 'new generation' of model BITs, such as the new Netherlands Model BIT, for example, imposes strict 'mailbox rules' which demand that investors maintain 'substantial business activities' in the source state if they want to invoke treaty protections for their host state operations. New-era treaties may also trim substantive investor protections, making it more difficult to win relief on certain claims. Consider the USMCA, which eliminates traditional ISDS for all but a handful of investors and re-tools classic standards like most-favoured-nation (MFN) and fair and equitable treatment (FET).

Friedman: The first step is to evaluate whether the investor already benefits from investment treaty protection. If the investor is a 'national' of a country holding a treaty with the country in which it has invested, it need not structure for investment protection. If the investor does not have protection, it likely can structure the investment through a special purpose vehicle in a third country that has a treaty with the country in which it invested. There are important strategic decisions in structuring for investment protection. First, there may be multiple treaties available that may vary in their coverage and protections afforded. Investors should consider the available options, and tax implications, in selecting the ideal avenue. Second, while it is permissible to structure an investment in order to gain access to treaty protection, the investor must do so before the government's measures become foreseeable in order to defend against those measures.

Sobota: There are, of course, numerous issues to consider when structuring investments, but companies should not overlook treaty protection. Treaty planning should occur as early as possible – restructuring an investment to obtain treaty protection after a dispute has materialised could, in some circumstances, amount to an abuse of process. Treaty planning involves understanding the applicable investment treaties, notably the scope of covered investors and investments, the available substantive protections, and the dispute resolution mechanism. For example, the Netherlands is considering a requirement for an investor to have 'substantial business activities' in the home state, which constitutes a departure from the current Dutch BITs. The investor may also negotiate specific investment protections in its contract with the host state, such as a tax stabilisation clause. Given ongoing reforms to investment treaties, parties would be well advised to seek the advice of counsel when structuring their investments.

Stepek: The most important step to be taken is to consider the structure of an investment before it is made to ensure that it receives investment treaty protection. The most effective way to ensure this is done correctly is for the persons and lawyers contemplating and implementing the investment to seek advice from international arbitration professionals as part of their transaction teams at the beginning, not only when a problem arises. Additionally, given the limitations or exclusions of private rights of action that states are currently enacting and favouring, which limit the right of investors to bring a private right of action, it is becoming increasingly wise to enshrine the right to bring such a private action in an investment contract, rather than relying on a right emanating from a treaty.

Carswell: Investors should take full advantage of applicable treaties and domestic investment laws, and secure important concessions and admissions on the part of the contracting state party to satisfy any jurisdictional requirements, particularly in politically unstable or developing countries where there may be a higher risk of government instability and regulatory interference, or when investing in high profile assets. Identify the relevant treaty that applies and ensure that investments are structured to meet the jurisdictional requirements, otherwise a claim will fail before it begins. Investors should know and understand who they are contracting with. If the counterparty is not formally a state body, any conduct giving rise to the dispute will not be attributable to the state and the state will not be accountable. Check whether there is domestic legislation protecting foreign investors and whether it ascribes additional conditions to investments in order for them to constitute investments within the meaning of the law of the host state. Seek advice on how the investment should be structured and what contractual terms should be negotiated. Any restructuring should take place before any dispute is in contemplation.

"If the investor is a 'national' of a country holding a treaty with the country in which it has invested, it need not structure for investment protection."

Lauren Friedman, Kirkland & Ellis LLP

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

Carswell: Investors should ensure that they have complied with all their own obligations and have followed the correct and proper procedures, rules and regulations. Tribunals are increasingly favouring states and investors who can demonstrate good governance and ethical behaviour, and some have criticised investors for the role they have played in the dispute and the wider investment. Retain documents and collate evidence. Engage in early dialogue with the state to seek a resolution. Identify assets available for enforcement of awards. Understand the cultural and geopolitical landscape in the relevant jurisdiction and act or tailor behaviour accordingly. Emerging markets can have immature legal and judicial systems and seemingly lengthy and overly bureaucratic processes and regulations which can give rise to cultural clashes with investors from developed economies that have different expectations of how an investment project should operate.

Sobota: Obtaining advice from international arbitration counsel as early as possible is critical when an investor foresees or is involved in a dispute with a foreign government. Arbitration counsel may be able to assess the viability and value of the claim. They can also assist in diplomatic outreach to the investor's home state, and exploration of amicable settlement with the host state. In addition, there are often several steps investors need to take before initiating an arbitration: investment treaties often require the investor to deliver a notice of dispute to the host state and engage in negotiations during a cooling-off period prior to initiating an arbitration. Irrespective of the host state, anticipating and planning for an investor-treaty arbitration requires considerable effort on the part of the investor and its international arbitration counsel.

Stepek: Investors should think long and hard about bringing an action. Many investors seem to believe that the process will be relatively quick, which will surely result in an award in their favour, with the damages easily recovered. This is not a particularly well-founded belief. Arbitral tribunals on the whole are populated by thoughtful and careful lawyers who are not easily prone to awarding damages to an investor simply because it made an investment that may have lost value. The process is typically rigorous, and states often have compelling reasons for acting the way they have, even if it means that the investment loses value. Further, even if an investor is successful in its claim and recovers an award of damages, the route to recovery of such damages is difficult, long, and can take longer and be more expensive than obtaining the award in the first place.

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> *Skadden, Arps, Slate, Meagher & Flom LLP*

Friedman: First, investors embroiled in a dispute should consider early settlement. Investment arbitration tends to be expensive and can occupy senior management who may be required to appear as witnesses in the arbitration. Many governments also would prefer to avoid arbitration, which generates bad publicity for the state and harms foreign direct investment. We encourage our clients to engage in settlement discussions with the government, led by either international counsel or through retired diplomats. Second, investors should be aware that, depending on the terms of the applicable treaty, they may waive their right to investment treaty arbitration by commencing domestic litigation. If a dispute arises, investors should speak with international counsel before turning to local courts for relief. Investors should make a careful and deliberate choice of the optimal forum for resolving their dispute.

Bédard: Investors should seek sophisticated advice on their possible claims and work closely with counsel to map out a strategy. ISDS proceedings can take years to resolve, so it is best to have airtight legal arguments ready and an enforcement plan in place before initiating arbitration. Investors should also keep track of their initial correspondence with the government, as it will likely form part of the record once the arbitration commences. Investors should also develop a protocol to harvest and secure key company data for use in arbitration. Regulatory landscapes often change quickly, national courts may prove hostile to foreign investor claims, and governments may have limited assets available to attach in other jurisdictions. If investors are looking for third-party funding, they must be sure to factor in enforcement risks.

CD: How do you predict the geopolitical and economic outlook will influence investor-treaty claims and disputes? Going forward, do you believe arbitration will be the preferred resolution mechanism?

Sobota: A change in economic conditions often leads to investor-state disputes. Spain's retraction of regulatory incentives for the renewable energy sector in the face of its financial crisis spawned numerous investment arbitrations against Spain. Geopolitical changes also tend to affect the investment arbitration regime. President Trump's election brought with it a replacement of the North American Free Trade Agreement (NAFTA) with the USMCA, which curtails the scope of investor dispute resolution protections in an apparent bid to induce US companies to invest at home rather than abroad. But where there is international investment, it remains fundamentally important to have a neutral forum in which to resolve investment disputes. If investor-treaty arbitration continues to have the confidence of both states and investors, it should continue to be the preferred resolution mechanism going forward.

Stepek: Geopolitical and economic factors will always influence investor-treaty claims and disputes. This is not surprising, nor is it necessarily undesirable. A feature of using arbitration is its flexibility, and its ability to respond to these and other factors. The parties' ability to each select an arbitrator carries with it an assurance that they have trust in that person to take into account whatever geopolitical and economic views the party believes desirable for their case. Although arbitration is somewhat under challenge these days, it will remain the preferred resolution mechanism. It is difficult to see how a less flexible institutional court will work better than the current system.

Friedman: The geopolitical outlook tends to strain investment treaty arbitration, as politicians see arbitration as a restriction of sovereign rights. EU Member States are currently terminating all BITs concluded between them, in order to transition from ad hoc panels appointed by the parties to a standing court similar to the World Trade Organization (WTO). Thus, arbitration likely will no longer be the preferred resolution mechanism within the EU. For the rest of the world, I believe arbitration will continue to be the preferred resolution mechanism, as it takes significant time and political momentum to change the system. The EU spent more than 10 years studying the system and only now is taking initial steps to implement its goals. Other regions, including Latin America, have tried but failed to introduce similar reforms. Instead, investment arbitration will likely continue to rise in Latin America given increased political tumult in Argentina, Bolivia, Chile, Ecuador, Peru and Venezuela.

Bédard: There may be disruption and uncertainty, but we expect arbitration to remain prevalent, even in the face of nationalist and populist political movements and the global uptick in protectionist trade policies. International arbitration should continue as the favoured mode of dispute resolution between investors and states, at least for the near future. It is a sophisticated system with established patterns and practices, a developed body of jurisprudence and a committed set of stakeholders devoted to its continued reform.

Carswell: Reform, progress and change are all on the agenda. The *Achmea* decision may drive investment outside the EU until there is an established and predictable alternative in place. States are leading the charge, some by withdrawing from the ISDS system entirely, others by renegotiating decades-old basic and poorly drafted treaties and replacing them with sophisticated and complex model agreements that impose obligations on investors and hold them to account by way of counterclaims for environmental and human rights breaches. Claims in so-called newer industry sectors are likely to increase. But when all is said and done, arbitration is here to stay. The increasing number of investor-state claims being registered year-on-year is proof of that. No investor is going to opt for the resolution of a dispute against a state in the courts of that state, over an international tribunal in a neutral forum issuing an award that is enforceable around the world. CD