Praxis des Internationalen Privat- und Verfahrensrechts

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Flaws and Uncertain Effectiveness of an Anti-Arbitration Injunction *à l'argentine*

by Prof. *Diego P. Fernández Arroyo*, Paris[1]

This article deals with a decision issued by an Argentine court in the course of a dispute between an Argentine subsidiary of a foreign company and an Argentine governmental agency. The court ordered the Argentine company to refrain from initiating investment treaty arbitration against Argentina. This article addresses the conformity of the decision with the current legal framework, as well as its potential impact on the ongoing local dispute. Additionally, it briefly introduces some contextual data related to the evolution of Argentine policies concerning arbitration and foreign investment legal regime.

I. Introduction

In 2019, in a dispute between the subsidiary of a foreign investor and an Argentine State agency, an Argentine court issued an interim measure ordering the company to refrain from initiating an investment treaty arbitration against Argentina. This decision raised some concern within the Argentine and international arbitral community.[2]

This comment lays out the relevant circumstances of the case and analyses the correctness of the decision from a legal standpoint, its practical impact on the concrete dispute, and more broadly the signs that this decision sends to legal and business communities.

II. The circumstances of the case and the decision of the Argentine court

More than 20 years ago, *Cencosud S.A.*, an Argentine subsidiary of the Chilean group *Cencosud*, acquired from the Argentine Government a 20-acre land in the Province of Buenos Aires through a public bid, with the object of constructing an urban development and a commercial center. In 2016, the Argentine State's Asset Administration Agency (the "Agency") initiated judicial proceedings against *Cencosud S.A.* ("Cencosud"), claiming the reversion of the land to the State due to *Cencosud's* lack of progress with the project.[3]

In the midst of a judicial battle before the Argentine courts, *Cencosud* stated in a brief that any arbitrary violation of its rights could make its foreign shareholders file an international arbitration claim before the *International Centre for Settlement of Investment Disputes* ("ICSID"), since they were protected under the Bilateral Investment Treaty between Argentina and Chile (the "Argentina-Chile BIT").[4] In response, the Agency requested the Court to render an interim measure ordering ICSID not to register any claims by either *Cencosud* or its foreign shareholders related to the dispute in question. In April 2019, the Court issued a succinct decision (1) declaring to have exclusive jurisdiction over the dispute, and (2) ordering *Cencosud*, by way of interim measure, to refrain from filing any ICSID arbitration claim.[5]

Regarding its jurisdiction, the Court based its decision on several grounds. The Court considered that the Argentina-Chile BIT was applicable and noted that its article 10(2) contained a fork in the road clause. Pursuant to this kind of clause, the parties to an investment dispute covered by the BIT may submit such dispute to either (1) the courts of the host State (in this case, the Argentine courts), or (2) international arbitration, with one option excluding the other.

The Court further considered that the parties had triggered said fork in the road provision because two signs would prove their intention to submit any dispute related to *Cencosud's* invest-

1 Professor of International and Comparative Law at *Sciences Po*, Paris. Director of the LL.M. in Transnational Arbitration and Dispute Settlement.

2 See *Kaufman*, An Argentine Court Orders a Corporation Not to Initiate Arbitration Before ICSID: Should Investors be Worried?, available at: http://arbitrationblog.kluwerarbitration.com/2019/06/05/an-argentine-court-orders-a-corporation-not-to-initiate-arbitration-before-icsid-should-investors-be-worried/?doing_wp_cron=1595592701.2621099948883056640625.

3 Argentine Federal Civil and Commercial Court No. 5 (hereinafter "the Court"), 11/4/2019, Case No. 65610/2016. It would appear that the sales contract obliged *Cencosud* to make some minimum progress. However, information on the background of the dispute is limited to press sources and the five-page court decision.

4 Bilateral Investment Treaty between Chile and Argentina (1991). Notably, this BIT was replaced by the Free Trade Agreement between Chile and Argentina (2017), although the BIT continues to apply to previously existing investments. See FTA, annex 8.2; BIT, article XI(4).

5 Argentine Federal Civil and Commercial Court No. 5, Decision of 11/4/2019, No. 65610/2016, available at: https://www.iareporter.com/wp-content/uploads/2019/04/656102016.pdf.

ment to the Argentine courts. First, the Court underscored that the bid terms (and therefore the land sales contract) included a choice of forum clause in favor of the Argentine courts. Second, the Court highlighted that *Cencosud* had not raised any jurisdictional objection with its answer to the Agency's claim.

Based on the above, the Court concluded that it had exclusive jurisdiction over the dispute. The Court seemed to extend this finding to any dispute related to *Cencosud's* investment. Having found that it had exclusive jurisdiction, the Court then went on to order *Cencosud* not to file any ICSID claim that would undermine its own jurisdiction.

III. Analysis of the Argentine court decision

The *Cencosud* decision raises two interesting questions: (1) whether the Court's approach was legally accurate and (2) whether the decision has a practical impact with respect to a potential BIT arbitration. A third question, related to the consistency of the decision with current (or, at least, recent) Argentine policies concerning international arbitration and foreign investments exceeds the scope of this comment.

1. Was the decision legally accurate?

The Court held that the Argentina-Chile BIT was applicable simply because the dispute was related to an investment, without further analysis. However, for an investment treaty to be applicable, the investor must qualify as such under the terms of the BIT (*ratione personae* requirement) and must hold an investment covered by the treaty (*ratione materiae* requirement). In the case of the Argentina-Chile BIT, the investor must be a Chilean national with an investment in Argentina, or the other way around.[6] However, the Court rendered its decision without any consideration of said requirements, i.e. whether *Cencosud* qualified as an "investor" and whether it held an "investment" under the BIT. Notably, *Cencosud* itself seems to be an Argentine company and, therefore, would not qualify as an investor under the Argentina-Chile BIT. While some BITs treat local companies as investors due to their foreign control,[7] this is not the case under the Argentina-Chile BIT. In this context, only *Cencosud's* Chilean parent company would seem to qualify as an investor under the BIT.

By deciding to apply an international investment treaty, the Argentine Court opened the door to a universe of complex rules and principles that are not familiar to the Court, which led to a decision without any substantiation under international law.

First, the Court concluded that the judicial action brought by the Agency would trigger the fork in the road provision in the Argentina-Chile BIT. The Court, however, reached this decision without much analysis of the language of the fork in the road provision and how it should operate. While the case law is not binding with respect to the application of BITs, let alone if the case law relates to other BITs, it is a good source of guidance that could have been particularly helpful to a local court which is not acquainted with investment law.[8] Certainly, knowing the case law does not mean accepting its content. The Court could reject the content of those decisions.

The underlying purpose of a fork in the road provision is considered to be twofold: (1) to prevent a claimant from bringing a local as well as an international claim if the first does not succeed; and (2) to avoid parallel proceedings.[9] In the majority of the case law a fork in the road provision is considered to be triggered only if there is a triple identity between the domestic recourse and the international arbitration: (1) the same parties, (2) the same cause of action, and (3) the same type of relief sought.[10] These three elements cannot be presumed and must be cumulatively verified.[11] A minority of the case law follows a broader test and considers that the fork in the road provision is triggered if the "fundamental basis" of the arbitration claim is the same as that of the local proceedings, so that success with the local action would render the arbitration unnecessary.[12]

In determining the appropriate test, the language of the applicable treaty becomes relevant. For instance, in the *Pantechniki* v *Albania* case, the tribunal applied the broad test because the Albania-Greece BIT does not limit the fork in the road provision to the local submission of a "treaty dispute", so it could be interpreted in a way that any investment-related claim triggers the fork in the road provision.[13] But this is not the case with the Argentina-Chile BIT, which expressly states that the fork in the road provision is triggered when a dispute related to an investment "under the terms of the BIT" (i.e. not any investment-related dispute) is submitted to the domestic courts.[14] With said wording, the triple identity test could have served as a guide to assess whether the fork in the road provision in the Argentina-Chile BIT was triggered or not. However, the Court did neither consider these tests nor analyse the wording of the specific clause.

Irrespective of which is the most appropriate test, the analysis of a fork in the road provision is usually conducted when a second claim (usually the international arbitration) is filed and the respondent alleges that a previous choice of forum would prevent that second claim. Only then, the tribunal seized with the second claim must (and can) assess whether its jurisdiction has been excluded due to a previous claim in a different forum. In the case at hand, the Argentine Court advanced this analysis ahead of a potential second claim. Besides this being an unusual approach, the problem is that the Court cannot envisage the exact nature and extent of a future claim related to the same investment (or even whether it will be filed at all), what prevents any assessment of the identity between both claims. Even assuming a standard BIT claim by *Cencosud's* Chilean parent company against Argentina, this would not necessarily meet the triple identity test. This is because (1) the parent company is not a party to the local action, (2) the Agency's local claim against *Cencosud* was brought under Argentine law, whereas the parent company's claim would be

6 Argentina-Chile BIT, article I(4).

7 See for example the BIT between Spain and Venezuela (1995), article I.1(b).

8 While BITs are part of the Argentine legal system and should be known and applied by any local court, there are few instances in which the courts need to apply them.

9 *Hassan Awdi, Enterprise Business Consultants, Inc. y Alfa El Corporation* v *Rumania*, ICSID Case No. ARB/10/13, Award, 2/3/2015, para. 203.

10 *Occidentl Exploration and Production Company* v *Ecuador*, LCIA Case No. UN3467, Award, 1.7.2004, paras. 41–52; *Victor Pey Casado and President Allende Foundation* v *Chile*, ICSID Case No. ARB/98/2, Award, 8/5/2008, para. 486; *Toto Costruzioni Generali S.p.A* v *Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11/9/2009, paras. 213–217. See also *Dolzer/Schreuer*, Principles of International Investment Law, 2nd edition 2012, p. 267.

11 *Victor Pey Casado and President Allende Foundation* v *Chile*, ICSID Case No. ARB/98/2, Award, 8/5/2008, paras. 486, 492. See also *Schreuer*, The ICSID Convention: A Commentary, 2nd edition 2009, p. 370; *Schreuer*, Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road, The Journal of World Investment and Trade 5 (2004), pp. 231, 241.

12 *Pantechniki S.A. Contractors & Engineers* v *Albania*, ICSID Case No. ARB/07/21, Award, 30/7/2009, paras. 61–67; *H&H Enterprises Investments* v *Egypt*, ICSID Case No. ARB/09/15, Award, 6/5/2014, para. 368; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal SA* v *Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment, 3/7/2002, paras. 55–60.

13 Article 10(1) of the Albania-Greece BIT reads: "any dispute between either Contracting Party and an investor of the other Contracting Party concerning investments."

14 Argentina-Chile BIT, article 10(2).

based on an international treaty, and (3) the object of the local action is the reversion of the land to the State, whereas with a BIT claim the parent company would most likely claim economic damages. In addition, the local action was initiated by the Agency and not *Cencosud* or its parent company.

Second, the Argentine Court found that the forum selection clause in the bid terms (and incorporated in the land sales contract) pointing to the Argentine courts would prevent a claim under the Argentina-Chile BIT. But this is not always the case and, here again, the Court could have found some guidance from the abundant case law. Foreign investments are often linked to contracts with the host State or its State entities (e.g. concessions) and contracts are invariably listed as protected investments under BITs. Some arbitral tribunals have concluded that a forum selection clause in the contract underlying the investment does not bar treaty claims, even when resolving the treaty claim requires to analyze the performance of the contract.[15] Likewise, some tribunals have held that the mere existence of a contractual remedy does not exclude a cause of action under an investment treaty for the actions of the State as a sovereign,[16] and that a forum selection clause would only exclude jurisdiction under a treaty if there is a clear indication in the contract that the parties intended to limit the application of the treaty.[17] The *author* does not ignore that some of these precedents have been criticized from different perspectives. Still, the Court would have benefitted from the analysis in those decisions (or even from the analysis in the critics to those decisions) in order to support its own conclusions. But the Court decided not to consider them, which is equally or more questionable.

One of the reasons behind those precedents is that the entity signing the contract (and the forum selection clause) is usually a local subsidiary and not the foreign entity that then pursues international arbitration. In the case at hand, while the forum selection clause would bind *Cencosud*, it would not bind its foreign shareholders, which are separate legal entities. Moreover, the forum selection clause is understood to apply to disputes based on the contract, whereas an investment arbitration is based on violations of a treaty, even when the treaty violations might be linked to the performance of the contract.[18] Some arbitral tribunals have held that when the investor alleges a breach of an investment treaty, there may be a treaty dispute that exceeds a mere contractual disagreement.[19] It goes without saying that the conclusion always depends on the circumstances of each specific case, so it would have been interesting to see the Court's analysis on this aspect.

In addition, the fact that *Cencosud's* investment relates to a contract with the State does not necessarily mean that a potential claim would be based on allegations of a breach of said contract; for instance, arguably, *Cencosud* could allege violations to its property rights over the land.

2. Does the decision have an impact on a potential investment arbitration?

The Argentine Court's decision is not only technically week, but the practical impact of the interim measure is also limited for, at least, two reasons.

First, even though the Agency requested the Court to order ICSID (a third party) not to register any claim (either by *Cencosud* or its shareholders), the Court ultimately ordered *Cencosud* itself not to file a claim. However, being an Argentine company, *Cencosud* would anyway not have standing to invoke the Argentina-Chile BIT itself. Second, the prohibition imposed on *Cencosud* is not binding upon neither ICSID nor *Cencosud's* foreign shareholders, who arguably hold an indirect investment in the land in question. In similar circumstances, foreign shareholders have brought investment arbitration claims for their reflective loss.[20] Some arbitral tribunals have accepted that foreign shareholders have a cause of action separate from that of their subsidiaries,[21] although the admissibility of those claims on the

15 See for example: *AES Corporation* v *Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26/4/2005, paras. 90–97; *AWG Group Ltd* v *Argentina*, UNCITRAL, Decision on Jurisdiction, 16/5/2006, paras. 43–45; *Azurix Corp* v *Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8/12/2003, para. 79; *BG Group PLC* v *Argentina*, UNCITRAL, Award, 24/12/2007, paras. 181–183; *National Grid PLC* v *Argentina*, UNCITRAL, Decision on Jurisdiction, 20/6/2006, para. 169; *CMS Gas Transmission Company* v *Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17/7/2003, paras. 70–76; *Sempra Energy International* v *Argentina*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11/5/2005, paras. 120–122; *Telefónica S.A.* v *Argentina*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25/5/2006, paras. 85–87; *Total S.A.* v *Argentina*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25/8/2006, paras. 83–85; *TSA Spectrum de Argentina S.A.* v *Argentina*, ICSID Case No. ARB/05/5, Award, 19/12/2008, paras. 58–66.

16 *Giovanni Alemanni et al.* v *Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17/11/2014, para. 300.

17 *TSA Spectrum de Argentina S.A.* v *Argentina*, ICSID Case No. ARB/05/5, Award, 19/12/2008, para. 58.

18 Case law considers that for an effective renunciation to the protections of an investment treaty (1) there must be an express waiver and (2) the party who gave the waiver should be identical to the party against whom the waiver is being invoked. *MNSS B.V. and Recupero Credito Acciaio N.V.* v *Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4/5/2016, para. 163; *Ulysseos Inc.* v *Ecuador*, UNCITRAL, Interim Award, 28/9/2010, para. 151.

19 See for example: *Impregilo S.p.A.* v *Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22/4/2005, para. 258; *LG&E Energy Corp. et al.* v *Argentina*, ICSID Case No. ARB/02/1, Decision on Jurisdiction, 30/4/2004, para. 66; *National Grid PLC* v *Argentina*, UNCITRAL, Decision on Jurisdiction, 20/6/2006, paras. 140 and 159–160; *Total S.A.* v *Argentina*, ICSID Case No. ARB/04/01, Decision on Jurisdiction, 25/8/2006, paras. 67–69; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v *Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3/8/2006, para. 43.

20 See for example: *Venezuela Holdings, B.V. et al.* v *Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10/6/2010, para. 165; *Ioannis Kardassopoulos* v *Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6/7/2007, paras. 123–124; *Guaracachi America, Inc. and Rurelec PLC* v *Bolivia*, PCA Case No. 2011-17, Award, 31/1/2014, paras. 348–349.

21 *AES Corporation* v *Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26/4/2005, paras. 86–89; *Casinos Austria International GmbH et al.* v *Argentina*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29/6/2018, para. 195; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v *Argentina*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14/11/2005, para. 90; *Daimler Financial Services AG* v *Argentina*, ICSID Case No. ARB/05/1, Award, 22/8/2012, paras. 83–84; *Gas Natural SDG S.A.* v *Argentina*, ICISD Case No. ARB/ 03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17/6/2005, para. 35; *Hochtief AG* v *Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24/10/2011, paras. 112–119; *Impregilo S.p.A.* v *Argentina*, ICSID Case No. ARB/07/17, Award, 21/6/2011, paras. 137–140; *Salini Impregilo S.p.A.* v *Argentina*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23/2/2018, paras. 179–183; *Siemens A.G.* v *Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3/8/2004, paras. 137–142; *Suez, Sociedad General de Aguas Barcelona S.A. and Vivendi Universal S.A.* v *Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3/8/2006, para. 51; *Teinver S.A. et al.* v *Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21/12/2012, paras. 214, 221 and 225; *Telefonica S.A.* v *Argentina*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25/5/2006, para. 76; *Total S.A.* v *Argentina*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25/8/2006, paras. 77–81; *Urbaser S.A. et al.* v *Argentina*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19/12/2012, paras. 237–249. Some tribunals have allowed shareholder claims on the basis that the applicable treaty expressly covered indirect investments: *Azurix Corp* v *Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8/12/2003, paras. 64 and 74; *Enron Corporation and Ponderosa Assets L.P.* v *Argentina*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 14/1/2004, paras. 27–39; *CMS Gas Transmission Company* v *Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17/7/2003, paras. 55–56 and 68; *Continental Casualty Company* v *Argentina*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22/2/2006, paras. 79–80 and 86. It should be noted, however, that the Argentina-Chile BIT does not expressly contemplate *indirect* investments.

merits is more nuanced, especially when they relate to contract rights of the foreign investor's subsidiary.[22]

In sum, the Court was faced with several international law issues, such as the scope of application of the Argentina-Chile BIT, the operation of the fork in the road provision, and the interaction between a contract forum selection clause and the dispute resolution clause in the BIT. Nevertheless, instead of analyzing the wording of the BIT or seeking guidance from the existing case law, the Court took a rather simplistic approach to conclude that the interim measure was appropriate, despite its little to no practical impact. This begs the question as to whether there was a clear purpose for this decision.

IV. The Cencosud decision within its context

While one can expect (and it is understandable) that counsel will creatively use all available procedural tactics to help their client's case, the courts should be cautious to apply the existing legal norms as they stand, especially when they come from international instruments that govern economic relations with other sovereign States. The courts should also exercise their functions balancing their duties and the limits to their powers, as well as with a view of the effectiveness of their decisions.

In the past, there were precedents where Argentine courts have restricted (at least in part) the use of international arbitration, for instance, through a restrictive interpretation of the arbitration agreement.[23] In addition, Argentine courts have sometimes interfered in international arbitration proceedings, including investment arbitration.

A very similar situation to the *Cencosud* case took place in the *National Grid* v *Argentina* case.[24] The investor had initiated arbitration pursuant to the UK-Argentina BIT. The State challenged the president of the tribunal and the challenge was rejected by the appointing authority, the *International Court of Arbitration of the International Chamber of Commerce* in Paris (the "ICC").[25] The State moved to set aside this decision before the Argentine courts and requested an interim measure to order the arbitral tribunal to stay the proceedings. The Argentine court granted the measure and ordered *National Grid* and the arbitrators to stay the investment arbitration. The arbitral tribunal, nevertheless, continued with the arbitration and issued a final award.[26]

In the *Reef Exploration* case, a dispute arose out of a shares purchase agreement between private companies, related to an oil exploration project in Argentina. Pursuant to an arbitration clause in the contract, one of the parties submitted the dispute to arbitration under the Rules of the American Arbitration Association in Dallas, Texas. In turn, the other party requested the Argentine courts to declare their exclusive jurisdiction over the dispute, what the courts did and ordered the arbitrators to end the arbitration.[27] Ironically, as the arbitral tribunal continued with the arbitration and rendered an award (thus disregarding the court's order), the Argentine courts later accepted to enforce the arbitral award.[28]

In the *Yacireta* case, a binational entity (created by the governments of Argentina and Paraguay to manage the use of the Parana River, which runs as a frontier between both countries) had a contract dispute with a joint venture of private companies, which was submitted to ICC arbitration in Buenos Aires. The binational entity disagreed with the terms of reference and requested the Argentine courts to order the other party to amend them accordingly. In the meantime, it requested the court to order a stay of the arbitration, which the court granted through an interim measure.[29]

Despite these controversial precedents, in the last five years, Argentina has taken concrete measures to foster arbitration. In 2014, Argentina updated its arbitration legal framework with a special chapter in the Civil and Commercial Code inspired by the UNCITRAL Model Law[30] and, in 2018, Argentina passed a standalone international arbitration act mirroring the UNCITRAL Model Law.[31] This has also been accompanied with remarkable pro-arbitration case law. Likewise, Argentina has taken important steps to reconcile with the investment arbitration system, mainly by settling several investment claims.[32] Not less important, while going on with the current international legal context, Argentina is also actively involved in the work carried out by the UNCITRAL on the reform of ISDS.

V. Conclusions

Latin American courts have sometimes been accused of not being sufficiently supportive of arbitration. While this position may be unfair and unjustified considering the entire picture, Latin American courts have sometimes helped this theory with certain decisions. The decision of the Argentine Court in the *Cencosud* case is now added to this list.

The *Cencosud* decision lacks reasoning and its conclusions are questionable, from a legal and practical point of view. The Court unnecessarily raised complex international legal questions, but preferred to neither conduct a detailed analysis of the Argentina-Chile BIT nor seek guidance from the abundance of investment treaty case law. It remains unclear why the Court took this approach. Foreign investors and arbitration users could fear (with or without a reason) that this was due to the Court's intention to help the interests of the State or due to the Court's lack of understanding of the international investment protection system. Either way, this decision could negatively affect Argentina's effort to foster arbitration as a balanced and efficient dispute resolution mechanism.

22 See for instance: *CMS Gas Transmission Company* v *Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17/7/2003, paras. 40, 48; *Enron Corporation and Ponderosa Assets L.P.* v *Argentina*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 14/1/2004, para. 55; *BG Group PLC* v *Argentina*, UNCITRAL, Award, 24/12/2007, paras. 214, 217.

23 See *Fernández Arroyo/Vetulli*, Dogmas frente a sentido común e interpretación correcta de las normas en vigor: una oposición decisiva para la evolución deseable del arbitraje internacional, Revista de derecho comercial y de las obligaciones 274 (2015), 1516.

24 Argentine Federal Court on Administrative Matters, Chamber IV, *Attorney General's Office* v *International Chamber of Commerce*, 3/7/2007.

25 The arbitration was administered by the Permanent Court of Arbitration in the Hague, which designated the ICC as the appointing authority to decide the challenge to the arbitrator.

26 *National Grid PLC* v *Argentina*, UNCITRAL, Award, 3/1/2008.

27 Argentine National Commercial Court, Chamber B, *Compañía General de Combustible S.A. (Amparo)*, 23/9/1999.

28 Argentine National Commercial Court, Chamber D, *Reef Exploration Inc.* v *Compañía General de Combustibles S.A.*, 5/5/2002.

29 Argentine Federal Court on Administrative Matters No. 3, *Entidad Binacional Yacyretá* v *Eriday et al.*, 27/9/2004; Argentine Federal Court on Administrative Matters No. 1, *Entidad Binacional Yacyretá* v *Eriday et al.*, 18/4/2005.

30 See *Fernández Arroyo/Vetulli*, The new Argentinian arbitration law: a train in an unknown direction?, Arbitration International 2016, 1–24.

31 Law 27, 449 (2018).

32 See *Vetulli/Kaufman*, Is Argentina looking for reconciliation with ISDS?, available at: http://arbitrationblog.kluwerarbitration.com/2016/10/13/is-argentina-looking-for-reconciliation-with-isds/?doing_wp_cron=1595594935.1936469078063964843750. Even though a new Government with a different political orientation took over afterwards, this attitude stands so far. At the very moment of concluding this comment hard negotiations about the Argentine debt are taking place within the context of current worldwide economic uncertainty.

Needless to say, states are free to adopt the investment protection and investment dispute resolution policies that they consider most adequate. By the same token, they can legitimately quit any investment protection system or specific treaties. Argentina is not an exception. According to the Argentine Constitution, the definition of the policies on foreign investments and the adoption of the necessary legal framework to implement them depend on the executive and legislative branches. For its part, the judiciary should avoid any temptation to establish its own rules (or bend the existing rules) and should, instead, make every effort to enforce the existing treaties and legal framework, irrespective of the justices' particular visions in each concrete case.

In the current Argentine legal framework, the *Cencosud* decision is simply wrong. Even worse, it sends a confusing message to foreign investors and arbitration users. Hopefully, due to the limited practical impact of the decision, it may end up being an isolated decision that can be left behind, while the Argentine courts continue to build a solid *favor arbitrandum* case law.

Internationale Abkommen zum Internationalen Privat- und Verfahrensrecht

Stand: 11.9.2020 (BGBl. 2020 II S. 473–696)

II. Internationales Verfahrensrecht

1. Das ***Übereinkommen vom 10.6.1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche*** (BGBl. 1961 II S. 121, 122; 1987 II S. 389) ist nach seinem Art. XII Abs. 2 für *Tonga* am 10.9.2020 nach Maßgabe eines bei Hinterlegung der Beitrittsurkunde angebrachten Vorbehalts nach Art. I des Übereinkommens in Kraft getreten (BGBl. II S. 527).

2. Zu nachstehenden Übereinkommen hat *Litauen* am 16.6.2020 gegenüber der Regierung der Niederlande in deren Eigenschaft als Verwahrer eine Erklärung zu der Erklärung der *Ukraine* vom 16.10.2015 (vgl. die Bekanntmachung vom 16.12.2015, BGBl. 2016 II S. 43) und zu der Erklärung der *Russischen Föderation* vom 19.7.2016 (vgl. die Bekanntmachung vom 26.4.2017, BGBl. II S. 601) abgegeben:

- ***Haager Übereinkommen vom 1.3.1954 über den Zivilprozess*** (BGBl. 1958 II S. 576, 577),
- ***Haager Übereinkommen vom 5.10.1961 zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation*** (BGBl. 1965 II S. 875, 876),
- ***Haager Übereinkommen vom 15.11.1965 über die Zustellung gerichtlicher und außergerichtlicher Schriftstücke im Ausland in Zivil- oder Handelssachen*** (BGBl. 1977 II S. 1452, 1453),
- ***Haager Übereinkommen vom 18.3.1970 über die Beweisaufnahme im Ausland in Zivil- oder Handelssachen*** (BGBl. 1977 II S. 1452, 1472),
- ***Haager Übereinkommen vom 25.10.1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung*** (BGBl. 1990 II S. 206, 207),
- ***Haager Übereinkommen vom 19.10.1996 über die Zuständigkeit, das anzuwendende Recht, die Anerkennung, Vollstreckung und Zusammenarbeit auf dem Gebiet der elterlichen Verantwortung und der Maßnahmen zum Schutz von Kindern*** (BGBl. 2009 II S. 602, 603)

[BGBl. II S. 687).

3. Nach Art. 2 Abs. 2 des *deutsch-schweizerischen Vertrags über die Beglaubigung öffentlicher Urkunden vom 14.2.1907* (RGBl. S. 411) wurde im BGBl. II das nunmehr gültige Verzeichnis der deutschen und schweizerischen Verwaltungsbehörden bekannt gemacht, deren Beurkundungen zum Gebrauch im Gebiet des anderen Staates keiner Beglaubigung bedürfen (BGBl. II S. 694).

III. Internationales Schuld- und Wirtschaftsrecht

1. Das *Internationale Übereinkommen vom 23.3.2001 über die zivilrechtliche Haftung für Bunkerölverschmutzungsschäden* (BGBl. 2006 II S. 578, 579) ist nach seinem Art. 14 Abs. 2 für *Oman* am 30.7.2020 in Kraft getreten (BGBl. II S. 475).

2. Das *Protokoll vom 5.7.1978 zum Übereinkommen vom 19.5.1956 über den Beförderungsvertrag im internationalen Straßengüterverkehr (CMR)* [BGBl. 1980 II S. 721, 733] ist nach seinem Art. 4 Abs. 2 für *Serbien* am 17.9.2020 in Kraft getreten (BGBl. II S. 526).

3. Auf Grund des Art. 2 Nr. 2 des Gesetzes vom 7.12.1995 zu dem Protokoll vom 27.6.1989 zum Madrider Abkommen über die internationale Registrierung von Marken (BGBl.1995 II S. 1016), der durch Art. 605 der Verordnung vom 31.8.2015 (BGBl. I S. 1474) geändert worden ist, hat das Bundesministerium der Justiz und für Verbraucherschutz die *Verordnung zu den Änderungen der Gemeinsamen Ausführungsordnung vom 18.1.1996 zum Madrider Abkommen über die internationale Registrierung von Marken und zum Protokoll zu diesem Abkommen* vom 27.8.2020 erlassen. Die Verordnung trat am 2.9.2020 in Kraft (BGBl. II S. 530).

4. Das *Internationale Abkommen vom 25.8.1924 zur Vereinheitlichung von Regeln über Konnossemente nebst Zeichnungsprotokoll* (RGBl. 1939 II S. 1049, 1052) ist am 19.5.2020 von *Peru* gekündigt worden; das Abkommen wird daher nach seinem Art. 15 für *Peru* am 19.5.2021 außer Kraft treten (BGBl. II S. 686).