The Growing Opposition of Argentina to ICSID Arbitral Tribunals

A Conflict between International and Domestic Law?

Carlos E. Alfaró and Pedro M. Lorenti
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I. INTRODUCTION

On 12 May 2005, an Arbitration Panel of the International Centre for Settlement of Investment Disputes (ICSID) issued its Award in the case filed by CMS Gas Transmission Company against the Argentine State1 related to the suspension of a tariff-increase formula applicable to an Argentine gas company in which the plaintiff had an investment protected by the bilateral investment protection treaty (BIT) executed by Argentina and the United States.2 The Award rendered adjudicated compensation rights in the amount of US$ 133.2 million, almost half of the original claim presented by CMS.

This is the first award rendered in the many arbitration proceedings currently filed with the ICSID in which foreign investors in Argentina are claiming compensation for the measures adopted by the Argentine government to control the 2001/2002 economic crisis. These measures included the freezing of public service tariffs, the mandatory conversion into “pesos”—the local currency—of obligations undertaken in U.S. dollars, etc. Many of these measures were considered a violation of the guarantees granted to foreign investors under various treaties. As a consequence, Argentina is currently facing more than thirty ICSID arbitration cases, most of which it is expected to lose.3

To structure an adequate defense that may diffuse the negative effects of potential adverse awards in the amount of hundreds of millions of dollars is vital for the present Argentine government. Analysing the theories being discussed by government officials seems to be appropriate, particularly because it involves well-established principles of public policy that conflict with accepted international law standards.

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3 Case: CMS Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8. The panel was comprised of Professor Francisco Ortiz Vicente (President); the Hon. Mark Lavenir; P.C., Q.C., Q.C.; and the Hon. Francisco Ruiz-Cas (arbitrators).
4 The Treaty was executed on 14 November 1991 and entered into force on 20 October 1994; full text available at: www.state.gov/c/eb/rls/lna/47325.
This article will analyse the constitutionality of ICSID arbitration and its awards which are being formulated by the Argentine legal strategy. The study of these theories first requires a review of the Argentine Constitutional rules on international treaties as a framework within which they can be properly assessed.

II. THE CONSTITUTIONAL BACKGROUND TO ARGENTINA'S ACCESSION TO THE ICSID CONVENTION

A. THE CONSTITUTIONAL RULES

The Argentine Constitution was enacted in 1853 and received some fundamental amendments in 1860 after a civil war between the Province of Buenos Aires—the country’s most powerful political entity at that time—and the rest of the country, the Argentine Confederation. Buenos Aires’ victory allowed it to dictate the 1860 amendments, a reform that later historians considered the final act of Argentina’s founding Constitutional process. Therefore, reference is always made to the “1853-1860 Constitution” as a single legal document resulting from that process.

Despite other amendments, either minor or not related to the present subject, the 1853-1860 Constitution was substantially amended in 1994. Briefly, the reform focused on updating the regulation of fundamental rights—by adding provisions related to human rights, environmental and consumer rights, privacy protection, etc.—and on rearranging some aspects of the distribution of powers among government branches and between the federal and provincial governments.

In the 1853-1860 Constitution, “treaty-making powers” were regulated in four aspects:

(i) since Argentina is organized as a federal state, the Federal Government is granted the exclusive power to celebrate international treaties of political content, while it shares with the Provinces the competence to execute others in different matters, such as economics, immigration, commerce, culture, etc., effective within the respective jurisdictions;  

(ii) there is a specific mandate imposed on the Federal Government to strengthen the country’s international relations for peace and commerce purposes by means of international treaties that shall be subject to the public law principles set forth in the Constitution.  

* Some of the criteria followed by the Argentine government have been discussed ibid.; and in Carlos Alario, ICSID: Energy-Related Arbitration Cases Against Argentina Revised, Latin America Energy Report, February 2004. 

* Article 22: “The Federal Government is requested to consolidate peace and commerce relations with foreign powers by means of treaties that shall be subject to the public law principles set forth in this Constitution.” Author's translation; the original reads: “El Gobierno federal está obligado a afianzar sus relaciones de paz y comercio con países extranjeros por medio de tratados que estén en conformidad con los principios de derechos públicos establecidos en esta Constitución.”
ARGENTINA AND ICSID ARBITRAL TRIBUNALS

(iii) within the Federal Government, the “treaty-making powers” are distributed as follows: (a) the Executive branch—the President—negotiates and executes treaties; (b) the Legislative branch—the Congress—approves or rejects them; and (c) the President ratifies them, after which they enter into force.7

(iv) as a Constitutional practice, the Congress shall approve international treaties and provide them with internal enforceability by enacting a law.

Though all these rules basically were not amended, the 1994 reform added the following features:

(i) it sets forth as a general rule that international treaties are only subordinated to the Constitution but prevail over the laws—and over any other normative measures8—although Congressional approval through the enactment of a law continues as a formality;

(ii) it indicates that the nation’s international conventions may be (a) celebrated with other States, international organizations and the Holy See and (b) related to or executed with supra-national organizations for “integration” purposes;9

(iii) it grants Constitutional status to some international conventions on human rights already in force while future human rights conventions shall undergo a special procedure, other than the one required for their plain approval, to also achieve Constitutional status;10 and

(iv) it provides for a special Congressional procedure to approve “integration” treaties related to supra-national organizations.11

Though the Argentine Executive branch signed the ICSID Convention on 21 May 1991, the “treaty-making” procedure was not completed until 1994. The Congress approved it by Law 24.353, passed on 28 July 1994, which, in turn, the Executive promulgated on 22 August and published in the Official Gazette on 2 September. The ratification instrument was subsequently deposited on 14 October 1994 and, finally, the Convention entered into force on 18 November.

While the ICSID Convention was being incorporated into Argentina’s domestic legal system, the 1994 Constitutional reform was also being concluded. It was enacted on 22 August 1994 and entered into force on 24 August. Hence, some steps of the ICSID “treaty-making” procedure were completed before the 1994 Constitutional reform

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7 Articles 67.19 and 86.14 of the 1853-1860 Constitution, currently amended by Articles 75.22 and 24, and 99.11 of the 1994 Constitution.
8 Article 75.22, 1st sentence of the 1994 Constitution.
9 Article 75.22 and 24 of the 1994 Constitution.
10 Article 75.22.
11 Article 75.24. In this regard, if the integration is celebrated with other Latin American countries, approval by the absolute majority of both Congressional Chambers—Representatives and Senate—is required. If the integration is celebrated with non-Latin American countries, (i) the majority of the present members of each Congressional Chamber shall state the convenience of entering into the treaty, and (ii) after a 120-day term, it shall be approved, again, by the absolute majority of the members of each Chamber.
entered into force, including the negotiation and execution by the Executive branch and the approval by the Congress, while some others were performed after it, i.e. the ratification by the Executive branch.

Moreover, since the Argentine Constitutional practice of enacting a law with the Congress' treaty approval was followed, some required steps for the due enactment of a law also fell before the 1994 Constitutional reform entered into force—i.e., the Bill's Congressional passing and the President’s promulgation—and some others after it, including the publication in the Official Gazette.

This situation is depicted in Table 1.

<table>
<thead>
<tr>
<th>Table 1: Timing of Argentina's ICSID Accession Process</th>
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<tbody>
<tr>
<td>Completed before the 1994 Constitutional reform</td>
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<tr>
<td>&quot;Treaty-making&quot; requirements</td>
</tr>
<tr>
<td>Negotiation   Execution   Approval</td>
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<tr>
<td>Domestic law enactment requirements</td>
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<tr>
<td>The Bill's Congressional passing   Promulgation</td>
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<tr>
<td>Completed after the 1994 Constitutional reform</td>
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<tr>
<td>Ratification   Entry into force</td>
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<tr>
<td>Publication</td>
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Source: Authors' original

What now follows analyses the consequences that the overlapping of both enactment procedures may—or may not—have for the validity of the ICSID Convention in Argentina.

B. Subordination of the ICSID Convention to Domestic Public Law Principles

We have seen that Article 27 of the Argentine Constitution subordinates the international treaties to "the public law principles set forth in this Constitution". Moreover, in establishing the pre-emptive hierarchy applicable in Argentine law, Article 31 locates the Constitution on top of the so-called "legal pyramid", above international treaties as well as other norms.

It is therefore clear that the validity of the ICSID Convention in Argentina could be tested by ascertaining its compatibility with said "public law principles" of the Constitution. The same rule applies, logically, to the ICSID's products, such as its arbitration awards.

However, what about the Congressional approval during the "treaty-making" process? It is supposed that the Legislative branch should not have granted such approval if anything in the ICSID Convention affected any Constitutional "public law principle".

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12 See supra, footnote 6.
ARGENTINA AND ICSID ARBITRAL TRIBUNALS

Nor should the President have promulgated the approving law, since he or she has veto powers that should have been exercised to prevent a violation of the Constitution. In fact, the President shouldn’t have negotiated and executed such a treaty in the first place.

Though all the above is true, and it is expected that both the Congress and the President will rightly perform their duties, Constitutional control is not entrusted to them but to the Judiciary and, in the last resort, to the National Supreme Court as the head of this governmental branch. This happens also with ordinary laws: theoretically, the Legislature’s products are consistent with the Constitution but, if they are not, the courts can declare their unconstitutionality, assuming that all the requirements to the exercise of this control are met. By filing the proper remedies against any such court ruling, the controversy can be taken to the Supreme Court, which issues the final decision on the subject.

The potential unconstitutionality of an international treaty is not, however, an easy question. Traditionally, Argentina endorsed the “internal monist” theory of public international law, pursuant to which the domestic Constitution—and other norms that it may also indicate—prevails over international treaties. This legal doctrine was shaken by the new rules adopted by the 1994 Constitutional reform, referred to above in Section a of this article, due to the criteria favourable to the international openness of the country at that time. However, the reforms were not radical enough. The Constitution’s supremacy remained seemingly untouched and, thus, it was left to future court precedents and scholars’ work to extricate the proper relationships between international and domestic law.

Legal doctrine after the 1994 reform seems to favor the pre-emption of international treaties. One of the most prestigious Argentine Constitutionalists, Professor Germán Bidart Campos, although acknowledging the Argentine Constitution’s supremacy, stresses that this doctrine is inconsistent with the principles of public international law, according to which a State cannot disregard an international obligation based on any opposing provisions of its domestic law. Moreover, since Argentina is a Party to the Vienna Convention on the Law of Treaties, Article 27 of which sets forth the above rule, said prohibition works as an “external boundary”—i.e., a boundary imposed from outside the domestic legal system—to Argentine Constitutional law. The only consequence that Professor Bidart Campos extracts from this construction, however, is that a future Constitutional reform cannot abrogate an international treaty celebrated under the former Constitutional provisions. He does not object to the courts’ power to hold unconstitutional international treaties not consistent with the Constitution in force at the time they were enacted.12

12 Said requirements are, briefly: (i) a lawsuit filed with the Court, in which unconstitutionality is claimed by a party to the treaty; (ii) the court cannot declare unconstitutional the act issued by the other governmental branches within the scope of their “exclusive” powers—the so-called “non-judiciable questions”, a highly debated matter; (iii) filing of the request in the due procedural form; (iv) that both the plaintiff and the defendant have standing as to the Constitutional question; and (v) that the rights are not affected by a statute of limitations. See Maximiliano Torrielli, El Sistema de Contenimiento Constitucional Argentino, Lexis Nexis, Depalma, Argentina, 2002, Chapter II-10
Another remarkable Constitutional scholar, Professor Néstor Sagües, goes one step further. He notes that, pursuant to Articles 27 and 46 of the Vienna Convention, a Member State cannot disregard international obligations because of contrary domestic law unless there was an open violation of fundamentally relevant competence rules in the "treaty-making" process of the respective international convention. Therefore, the reasoning goes, the unconstitutionality of an international treaty could only be declared in such a case—one involving violation of the competence rules—but in no other.  

The above construction may be consistent with the rule set forth in Article 54(1) of the ICSID Convention:

"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State ...."

If the ICSID's Contracting Parties—Argentina, of course, included—undertook the international obligation of acknowledging the ICSID's awards as valid and enforceable, they should comply with that even if there were grounds to believe that a domestic Constitutional principle would be affected.

Such a bold conclusion, however, is not likely to be accepted by the Argentine courts. On a matter of high-level political relevance such as this, it would be much easier to undertake a "conservative" position rather than to advance new legal theories not yet fully developed.

Up until now, the Argentine Supreme Court has provided nothing but obscure hints about what its position may be. There are two precedents—Elmendjiam v. Sofíaówka 16 and Fibra 17—which seem to support the supremacy of the Constitution, although Sagües considered that the first one's ambiguous wording may have left room for the contrary doctrine.  

We may conclude that, under the current state of Argentine Constitutional law, an international treaty conflicting with the Constitution is more likely to be held unconstitutional and, therefore, null and void. The standard to which such international treaty should adjust, to be held valid and enforceable, is the one provided in the Constitution's Article 27, that is, respect of "the public law principles set forth in this Constitution".

What, then, are those "public law principles set forth in this Constitution" with which international treaties should abide in order to be valid? These principles make reference to the main ideological foundations of the Argentine Constitution, which could be classified as (a) the protection of individual rights and liberties and (b) the

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18 See Sagües, supra, Footnote 15.
representative, republican and federal organization of the government and the State, i.e. division of powers, etc. These two groups of principles, however, should not be understood only in their classic liberal sense, because it is agreed that the Argentine Constitution received ideological influence not only from 19th century liberalism but also from Roman Catholic philosophy—St. Thomas Aquinas and the Greek and Roman classics—and from the “Social Constitutional” movement of the first half of the 20th century.19

The phrase "public law principles set forth in this Constitution", thus, makes reference to the basic foundations of the Argentine legal framework as set forth in its Constitution. International treaties should abide with them to be valid and enforceable within the country.

The above concept resembles another one also of interest here, which is the "matter of public policy". Argentine law defines this as a feature that some laws may have in so far as they regulate matters related to the basic order of society or to the fundamental institutions of the State. Such laws are mandatory and cannot be waived by the citizens' will, although other laws can also be mandatory but not related to "matters of public policy".20

It is clear enough that both the "public law principles set forth in this Constitution" and the "matters of public policy" encompass the same set of founding principles and values of Argentine legal system. Therefore, the requirement set forth in Article 27 of the Argentine Constitution for the validity of international treaties means that they should not violate the "matters of public policy" recognized as such by the Argentine Constitution and by those laws enacted to enforce them.

Argentine law registers the following categories of laws related to "matters of public policy":

- **Constitutional rules and principles**: As stated above, the Argentine Constitution sets forth its own supremacy over international treaties in Articles 27, 31 and 75, 22 and 24, the sole exception being certain international treaties concerning human rights expressly deemed to integrate the Constitution.

- **General legal principles**: Article 14, Section 2 of the Argentine Civil Code instructs judges to recognize foreign court rulings only if they are compatible with the general principles embodied in domestic law—though regulating "civil" (i.e. private law) matters, the wording of the Code is similar to that of Montesquieu and refers to the "spirit" of the law.

- **Good morals and justice standards**: These standards—widely incorporated in

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19 See ibid., Vol. 1, No. 272, and Vol. 2, No. 690.
Argentine law—sometimes make reference to ideals of justice and fairness and sometimes to social values accepted at certain times.

- **Emergency laws**: Through well-known long before that, the enactment of the so-called “emergency laws” became a regular practice in Argentina during the 1990s and has grown ever since. Theoretically, such laws are the State’s ultimate resource to face historical periods of terminal crisis. In the Argentine practice, however, they were transmitted into usual legal tools that the administration in office could use to advance high-impact policy measures. The privatization process of State-owned companies during the 1990s—which, at the time, was revolutionary—was performed under the umbrella of laws of this type, mainly Laws 23.696 and 23.697 of 1989. So were the currency devaluation and the compulsory conversion to “pesos” of U.S. dollar obligations—the so-called “pesificación”—under Law 25.561 of 2002 and Presidential Decree 214/2002. It is a common feature of these “emergency laws” that they declare themselves to be “public policy laws” and that, therefore, their provisions are mandatory and prevail over the remaining legislation and the will of the people.

- **Reform laws**: This category makes reference to certain laws implementing policy decisions deemed of high relevance, due to which the Government wishes to provide them with the features of “matters of public policy”—mainly their mandatory nature—though it cannot be said that they enforce basic legal principles and values. The best example is Law 23.928 of 1992, which regulated the so-called “convertibility” of the Argentine currency and pegged its value to the U.S. dollar at a conversion rate of 1 to 1, finally abrogated by the above-mentioned Law 25.561 of 2002.

It can be seen that the concept of “matters of public policy” has been applied to many different legal principles and rules. The categories “Constitutional rules and principles” and “General legal principles” give acceptable levels of legal certainty, because they make reference to enacted Constitutional clauses and to principles widely analysed by Argentine legal scholars. “Good morals and justice standards” have also been thoroughly studied, but the substance of this category is volatile and evolves with the historical changes in Argentine society. “Emergency laws” and “Reform laws” are the more conflictive, because they rely only on the State’s policy decisions and, in practice, have no other justification than the contingent aims of any given administration.

To complete the picture, the classification of a law as embodying “matters of public policy” is made by the Congress itself, and historically the courts have been reluctant to review such classification, which has been deemed a “political non-justiciable question”. Therefore, in deciding which laws relate to “matters of public policy”, the Government’s will is subject to no check, which explains the widespread use of this qualification since the 1990s.
We may conclude, therefore, that when Article 27 of the Argentine Constitution requires international treaties to comply with the “public law principles set forth in this Constitution”, it is in fact requesting them to abide with the domestic law related to “matters of public policy”. The same compliance is to be expected from ICSID awards as a product of one of these international treaties. The assessment of whether or not any of these awards affects a “matter of public policy” shall be performed by the domestic courts pursuant to the enforcement rules set forth by the very same ICSID Convention.21

III. TWO LEGAL THEORIES FOR THE ARGENTINE GOVERNMENT’S DEFENSE

A. THE INITIAL APPROACH

The position originally adopted—and still held—by the Argentine Attorney General’s Office, which is in charge of the country’s defense at the ICSID, rests on the above-mentioned principle of Argentine Constitutional law that international treaties are subordinated to the Argentine Constitution. It therefore adopts a “conservative” view of the provisions set forth in the Constitution’s Articles 27 and 75.22, 1st sentence, as amended in 1994, thus ascribing to the “internal monist” theory of public international law.

Pursuant to these Constitutional clauses, the ICSID Convention is deemed a treaty with an international organization that shall be subject to Article 27’s “public law principles of the Argentine Constitution”. Its products, such as the awards issued under the ICSID rules, are also expected to abide with those Constitutional principles.

The main consequence of this legal construction is to forswear the ICSID’s principle of requesting the direct enforceability of its awards within the territory of the Member countries,23 because the award’s full accordance with domestic public law principles has to be checked first. The door is open, therefore, for local authorities—in Argentina, the Judiciary—to review the ICSID awards and to decide whether or not they should be enforced. Obviously, “the public law principles set forth in this Constitution”, as Article 27 states, encompass standards closely linked to such concepts as “sovereignty” and “state of emergency”. Legal grounds could be found, thus, to block those ICSID awards that may affect the Government’s decisions adopted within the framework of said concepts.

21 Article 54(3) of the ICSID Convention provides: “Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.” In Argentina, Articles 347 to 349 of the National Civil and Commercial Procedural Code regulate the process to recognize the domestic enforceability of foreign court rulings. These rules avoid the domestic courts the competence to deny the recognition of a foreign award colliding with a “matter of public policy”, but nothing is said about the possibility of declaring the unconstitutionality of the international convention pursuant to which such award has been issued. However, the dynamics of Argentine Constitutional control may provide the opportunity to rule on such unconstitutionality, since Constitutional control is, theoretically, feasible in all court procedures.

22 See Article 54(1) and (3) of the ICSID Convention.
B. The Latest Theory

The most challenging new theory that is being put forth these days establishes that both the treaties that were signed agreeing to submit certain disputes to arbitration and the system of the ICSID itself are unconstitutional as they were approved in violation of the process established in the 1994 reform of the National Constitution. The reasoning of this theory goes as follows.

As was mentioned in Section II of this article, although the ICSID was created in March 1965, Argentina only adhered to it through Law 24.353, which was published in the Official Gazette on 2 September 1994. Therefore, most of the Congressional ratification was made under the procedure set forth in the 1853-1860 Constitution, while its last step, the publication of the approving law, occurred after the 1994 reform entered into force on 24 August 1994.

According to this theory, the acceptance of the ICSID's arbitral jurisdiction means that sovereign competencies have been transferred to it—i.e., jurisdiction—and, therefore, the ICSID Convention has "integration" purposes. If this is the case, the ICSID Convention's approval must be subject to the procedure set forth in Article 75.24 of the Constitution as amended by the 1994 Constitutional reform. We may recall that this norm creates a special procedure for said approval which, as has already been mentioned, entails a complete innovation as compared to the 1853-1860 Constitution.23

Thus, according to this new theory, an unusual legal situation has taken place. Law 24.353 followed the parliamentary procedure set forth in the 1853-1860 Constitution. However, since it was published after the 1994 Constitutional amendment entered into force, it is argued that it did not complete its validity requirements under the new system. Therefore, the assignment of sovereignty implied by the ICSID tribunal powers should have gone through the new process of approval regulated in Article 75.24 of the 1994 Constitution. As that procedure was never followed, any arbitration carried out by the ICSID against Argentina can be declared null and void by a domestic court.

However, this theory also makes another turn of the screw. It also asserts that treaties delegating "competence and jurisdiction" to international bodies—such as the ICSID—executed before the 1994 Constitutional reform have become null and void with the enactment of that reform. The reason is that the new rules set forth to delegate such powers—the two Congressional approvals, etc.—are mandatory. Since the clauses of an international agreement of this kind cannot prevail over an Article of the National Constitution, they became extinguished as soon as the Constitutional Article that contradicts them entered into force.

As a consequence, in none of the current cases is the ICSID empowered to render a valid decision against Argentina. Had the special law required by the 1994 Argentine

23 See supra, footnote 11.
Constitution finally been enacted, it would only regulate future cases and not those already filed.

The fact that said nullity has not been claimed so far does not prevent the Government from invoking it in the future. A nullity is an inherent defect that cannot be cured, and the enforceability of an Article of the National Constitution does not depend on whether the Government argues about it or not.

IV. THE FIRST THEORY: ICSID AWARDS VERSUS ARGENTINE "MATTERS OF PUBLIC POLICY"

According to what we have seen above in Section II of this article, the current state of Argentine Constitutional law will doubtless favor the Constitution's supremacy over the ICSID Convention and, subsequently, the protection of alleged "matters of public policy", even at the expense of denying enforcement to an ICSID award. This is the purpose that the "first theory" seeks to achieve: to ban the award's enforcement by protecting the Government's default in its obligations under the shield of "matters of public policy".

The evolution observed in Argentine Constitutional law, however, may cause some fissures in this shield. First, we analysed the current composition of the Argentine "legal pyramid" under Articles 31 and 75.22 of the Constitution, pursuant to which international treaties supersede domestic laws. The Constitution makes no difference between ordinary laws and those concerning "matters of public policy": all of them are subordinated to international treaties. Thus, from the formal perspective, the latter should prevail. Otherwise, the power to classify laws as concerning "matters of public policy" will, in fact, provide the Government with the magic wand to turn around the Constitutional "legal pyramid". Most importantly, as was noted above, practice shows that the Government decides at its sole discretion whether or not a law embodies such "matters of public policy" and no judicial review is later performed due to the theory of the "political non-justiciable questions". The result of all this will be a straightforward and ongoing violation of the Constitution, which requires, plainly, that international treaties prevail over domestic laws.

It could be argued against the above reasoning that, if a law is truly related to a "matter of public policy", any contrary international treaty is, in fact, not in conflict with such law but with the Constitution itself, in so far as the involved "matter of public policy" flows from the latter. There is a careful distinction to make here, however. Article 27 of the Constitution wisely makes reference to "principles" not to "means". If an international treaty, for instance, provides that the Contracting States are henceforth banned from adopting domestic "emergency" policies, there is no doubt that such a provision would be against one of the "public law principles set forth in this Constitution", i.e. that the State has emergency powers to use in time of national crisis.
However, if an international court—of any nature—rules against a specific policy or measure, we are no longer in the realm of "principles".

The judgment of policies adopted on the grounds of the "public law principles set forth in this Constitution" is not a challenge to the policies themselves but to the laws choosing and implementing such "means". This is again consistent with the "legal pyramid": the Constitution sets forth the "principles"; and the laws provide for the "means". International treaties lie between these—at the "sub-Constitutional" but "supra-legal" level—so that the validity of the "means" adopted at the legal level has to be checked vis-à-vis these treaties.

This reasoning acknowledges the proper place of the rules of public international law accepted by Argentina. We should recall here the references made in Section 11.3, above, to Articles 27 and 46 of the Vienna Convention, which, in essence, contain the "pacta sunt servanda" rule, the main basis for legal relations among sovereign States. In the end, such a rule can doubtless be deemed as integrating the "public law principles set forth in this Constitution". Therefore, domestic "matters of public policy" should be construed in accordance with this rule and not in conflict with it. Moreover, the constitutionality of laws violating such a rule, though enacted on the grounds of "matters of public policy", could be challenged for the purpose, paradoxically, of enforcing one of the "public law principles" embodied in the very same Article 27.

The fact that, at the domestic level, questions raised by "matters of public policy" are deemed "political non-justiciable" by the Judiciary does not affect the former conclusions. The basis of said doctrine is that no governmental branch is entitled to interfere with the others' exclusive Constitutional powers. This may be true—or not—at the domestic level, since the State is organized under the well-known principle of "division of powers"; but the State participates in the international field as a sole legal entity. Thus, a competent international court would not be restricted by similar theories, since the State as a whole—despite its internal divisions—has submitted to its jurisdiction.

The position that will be adopted by the Argentine courts when the moment comes to enforce an ICSID award remains to be seen. The above concepts should then be taken into account, because they will be decisive in achieving the necessary harmonization between domestic and international legal orders, a purpose that should become a main policy of the Argentine State.


The legal feasibility of the second theory requires the prior validity of two premises:

(i) that the ICSID Convention is an international treaty with "integration" purposes; and
(ii) that its publication in the Official Gazette is a requirement for the completion of the law enactment procedure.

For the following reasons, we disagree with both premises.

Public international law acknowledges the existence of two main types of international organizations: those having "co-operation" purposes and those with "integration" purposes. The former constitute the more widespread type and aim to coordinate the actions of the member States to achieve some common goals by creating some institutions in which all of them participate. In this case, no sovereign powers are transferred to the created organization. The latter is the case in which the international organization receives a delegation of powers related to all the superior functions of the member States—executive, legislative and jurisdictional powers—on certain matters and can therefore adopt decisions that are directly applicable within their territories; the main example of this is the European Union.\(^{24}\)

The ICSID Convention clearly has "co-operation" purposes, not "integration" ones. There is no delegation of competencies related to the State’s activities—executive, legislative and judicial—nor is there an organizational structure able to use them. The arbitration panels are integrated \textit{ad hoc} for the specific cases.

The acceptance of international arbitration, or the change of venue, as a way to solve international conflicts—i.e. application of different national laws, parties with different national domiciles, cross-border transactions, etc.—is a feature typical of private international law and is regulated in legal systems worldwide; but it is not related to a transfer of sovereignty to a supra-national organization. On the contrary, it seeks to harmonize the application of different legal systems and prevent conflicts among them, but the respective States remain as sovereign as they were before the conflict.

The fact that the ICSID Convention does not have "integration" purposes bans the application of the approval procedure set forth in Article 75.24 of the 1994 Constitution: no special majority is necessary to approve this Convention; thus, the approval already granted before this reform entered into force remains valid.

Therefore, since no doubt arises as to the "co-operation" purposes of the ICSID Convention, the first premise does not hold.

As to the publication in the Official Gazette, Argentine law provides that it is necessary for legal certainty purposes, i.e., to guarantee due knowledge of the enacted law by those who shall abide by it. Thus, the publication is not a mandatory requirement for the enacted law's validity but a guarantee granted to the citizens to prevent the State from imposing unknown obligations on them.

As a consequence, Argentine legal theorists agree that if a law has not been published but becomes known by the people, they could claim the rights awarded by

\(^{24}\text{Manuel Díez de Velasco, Las Organizaciones Internacionales, Tecnos, Madrid, 2002, Chapter 1.}\)
such unpublished law, while the State—the failed publisher—cannot enforce the
obligations that it may contain until the publication is duly made.23

Moreover, the "second theory" focuses on the nullity of the Congressional stage of
the ICSID Convention’s approval procedure. It holds that because the Congress did not
complete the required steps before the 1994 Constitutional amendment such approval is
not valid, but this is not correct, either. Argentine Constitutional law considers that the
"promulgation" and the "publication" of a law are not Congressional activities but belong
to the Executive branch.26 Therefore, since the Congress’ approval of the ICSID
Convention was completed while the 1853-1860 Constitution was still in force (see Table
1), the new procedure structured in Article 75.24 of the 1994 reform was never required.

No doubt arises that the second premise does not hold, either, thus, the "second
theory" should not be invoked.

VI. CONCLUSION

The denial of an award’s enforcement requested under Article 54(3) of the ICSID
Convention would equal, in practice, rejection of its “validity” or “binding” effects
granted by Article 54(1). In both situations, the plaintiff’s compensation rights
acknowledged by the ICSID Arbitration Panel would be disregarded by the Argentine
State. The political costs would be the same in both, as well.

It should be remembered that the current majority of the Supreme Court—
appointed by this Government—seems to be ideologically inclined to support
government intervention in moments of crisis and peril such as those that Argentina
faced in 2001. Though their judicial background is impeccable, no rulings against the
main policies of the Government are likely to be expected, particularly if the
consequences could entail the disruption of an economic programme that has slowly
taken Argentina out of one of its most severe economic crises.

The sense of being cornered in the ICSID arena could encourage the Administration
to make a blatant move, one that would enhance its domestic popularity as a champion
in “protecting the well-being of its people against the foreign interests”. Success is
measured in politics in the present tense. Potential negative effects would only be
perceived in the long run.

The two theories analyzed in this article, and which were devised as part of the
strategy to fight back against potentially negative ICSID awards, are subject to the above
legal questionings and objections. It remains to be seen whether the debate about the
enforceability of the ICSID awards in Argentina will follow a purely legal path, one
outside the influence of a social and economic framework currently not favourable to
bowing before foreign creditors like CMS.

23 See Rivera, supra, footnote 20, p. 81,
26 See Ricard Campos, supra, footnote 14, Vol. III, Chapter XXXV