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ABSTRACT

The voluminous and protracted litigation and arbitration saga featuring the Republic of Argentina (mostly as defendant or respondent, respectively) has established important legal and arbitral precedents, as illustrated by three cases involving Argentina which were appealed all the way up to the U.S. Supreme Court and were settled in 2014.

At first glance, the scale of Argentina-related litigation activity might be explained by the sheer size of the government's 2001 default, the largest-ever up to that point. However, its true origins are to be found in the unusually coercive and aggressive way that the authorities in that country went about defaulting on and restructuring their sovereign debt obligations.

The mass filing of arbitration claims, in turn, was prompted by Argentina's radical and seemingly irreversible changes to the "rules of the game" affecting foreign strategic investors, which clashed with commitments prior governments had made in multiple bilateral investment treaties.

In sum, a major deviation from best practices as understood and settled in the early 2000s, which codified how economic policy adjustments are to be made in a way that minimizes damage to the investment climate, preserves access to the international capital markets, and promotes rapid and sustainable economic growth, lies at the root of Argentina's litigation and arbitration saga during 2002-2014.

KEYWORDS: Argentina, default, debt, sovereign, litigation, arbitration, investor, holdout, ICSID
JEL CODES: E6, F3, F34, F51, F55, F59, F65, K4, N26

INTRODUCTION

During the past thirteen years, many foreign investors in Argentina, who during the 1990s had purchased equity stakes in local companies, founded affiliates or subsidiaries there, or else had bought government bonds, have been involved as plaintiffs in judicial or arbitration proceedings brought against the government of Argentina.[1] For the most part, these cases have been heard in the federal courts of the United States, or else in arbitral proceedings hosted by ICSID, the International Centre for Settlement of Investment Disputes.[2] Given the sheer number of cases filed and appealed, the substantial sums at stake, and the complexities involved because the defendant is a sovereign state, combined with unwillingness on Argentina's part to settle out of court or to honor judgments and awards rendered against it, the litigations and arbitrations have become veritable sagas.[3]

One benefit of the voluminous and protracted Argentina-related litigation is that by now precedents have been established and legal history has been made. The outcome of three cases involving Argentina which were appealed all the way to the U.S. Supreme Court and were decided in 2014 – all three against Argentina, all three disregarding amicus support for Argentina's position from the U.S. government – serve to illustrate the point.

On March 5, 2014, the Court ruled on a case in which, for the first time in its history, the dispute involved a bilateral investment treaty (BIT) – in this instance, the BIT binding the United Kingdom and Argentina as it applied to a claim that had been won by the BG Group, a British multinational oil and gas company.[4] Overturning an appellate ruling that the investor's failure to fulfil a particular treaty requirement (Article 8) had deprived arbitrators of jurisdiction, as alleged by Argentina, and in spite of an amicus proffered by the United States favorable to Argentina,[5] the Court's seven-member majority ruled for the claimant and effectively reinstated a $185 million arbitral award payable by Argentina to the BG Group.[6]

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[1] Many Argentine investors have also litigated against their government in the local courts, and some have also sought justice abroad availing themselves of legal recourse for bondholders who had purchased Argentine government bonds issued in other jurisdictions and subject to foreign law – overwhelmingly, the United States and New York law.

[2] There have also been proceedings against Argentina under the ICC (International Chamber of Commerce) International Court of Arbitration and under ad hoc tribunals established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL).

[3] As of early 2015, the principal monetary winners of this litigation marathon had surely been the armies of lawyers and experts marshalled – and duly paid – by all sides in order to pursue or defend against lawsuits filed in multiple venues. In full disclosure, this author has served as a remunerated expert witness in one judicial case (Silvia Seijas et al. v. The Republic of Argentina and Banco de la Nación Argentina, USDC SDNY Case No. 10 Civ. 4300 (TPG)) and in one arbitration procedure (Abaclat & Others v. The Argentine Republic, ICSID Case No. ARB/07/5).

[4] BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014), available at http://www.supremecourt.gov/opinions/13pdf/12-138_97be.pdf.

[5] Brief for the United States of America as Amicus Curiae in BG Grp. PLC v. Republic of Argentina, May 2013, available at http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/12-138-BG-Group.pdf

[6] Article 8 specified that investors wishing to arbitrate a dispute with the host country had first to submit the dispute to the country's local court system and then wait for eighteen months. However, the arbitration panel had concluded that it had jurisdiction because, among other things, Argentina's conduct (which included enacting new laws that hindered recourse to its judiciary by firms in BG Group's situation) had excused the claimant from its failure to comply with Article 8's requirement. See Diane Marie Amann, *Opinion Analysis: Clear Statement Ruling in Investor-State*

Two other important cases were decided in mid-June of 2014. In the first, the Supreme Court had been asked to consider how widely and far – including around the globe – investors may go in search of a sovereign's assets when it refuses to pay on its outstanding judgments.[7] Here the petitioner was Argentina and the respondent was NML Capital, Ltd., one of its defaulted bondholders, who had prevailed in eleven debt-collection actions that it brought against the sovereign, and yet it had not managed to collect anything.[8] In aid of executing the judgments, NML sought discovery of Argentina's property, serving subpoenas on two non-party banks for records relating to the sovereign's global financial transactions. The Southern District of New York granted NML's motions to compel compliance, and the Second Circuit affirmed.[9]

Argentina appealed, claiming that the Foreign Sovereign Immunities Act of 1976 (FSIA) does not empower courts to order the discovery demanded by the subpoenas, and that such discovery of foreign-state property would infringe on sovereign immunity and the principles behind it.[10] Asked for its opinion, the Justice Department filed a brief siding with Argentina, expressing concern that permitting such sweeping examination of a foreign state's assets by U.S. courts would risk reciprocal adverse treatment of the United States in foreign courts.[11] In the event, the Supreme Court ruled by another seven-member majority that no provision in the FSIA immunizes a foreign-sovereign judgment debtor from post-judgment discovery of information concerning its extraterritorial assets. It thereby gave a precedent-setting green light for judgment debtors to scour the world in search of potentially attachable sovereign assets.

In the second case decided in mid-June 2014, the Supreme Court had been asked by Argentina to take up a case in which the same NML Capital was the lead plaintiff. NML and other unpaid investors had proven, at least to the satisfaction of the District Court and the Second Circuit, that their bond covenants (from the 1990s) included Argentina's unconditional waiver of sovereign immunity and a particularly creditor-friendly version of the boilerplate *pari passu* clause, according to which Argentina had promised them the same treatment and payment priority as it would afford its other bondholders. Since Argentina had been paying creditors which had agreed to its punishing restructuring terms, but had not paid anything to its lawful restructuring holdouts, NML had

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Arbitration Case Leaves Open Question on U.S. Bilateral Treaties, SCOTUSblog, Mar. 6, 2014, available at http://www.scotusblog.com/2014/03/opinion-analysis-clear-statement-ruling-in-investor-state-arbitration-case-leaves-open-question-on-u-s-bilateral-treaties/

7 Republic of Argentina v. NML Capital Ltd., 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014), available at http://www.supremecourt.gov/opinions/13pdf/12-842_5hdk.pdf

8 NML Capital is a Cayman Islands-based offshore unit of Paul Singer's Elliott Management Corporation. See Georgina Hurst, *New Argentina Debt Crisis Spells Trouble for Custodian Banks*, Inst. Inv., Sep. 23, 2014, available at http://www.institutionalinvestor.com/article/3383263/banking-and-capital-markets-emerging-markets/new-argentina-debt-crisis-spells-trouble-for-custodian-banks.html#.VJb4Af97AA

9 See Lyle Denniston, *Argument Preview: A Global Search for Money*, SCOTUSblog, Apr. 16, 2014, available at http://www.scotusblog.com/2014/04/argument-preview-a-global-search-for-money/

10 Petition for Writ of Certiorari, Republic of Argentina v. NML Capital, Ltd., No. 12-842, Feb. 24, 2014, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-842_pet.authcheckdam.pdf

11 Brief for the United States of America as Amicus Curiae in Support of Petitioner (the Republic of Argentina), Mar. 2014, available at http://www.shearman.com/~/media/Files/Services/Argentine-Sovereign-Debt/2014/Arg4612842petamcuusaauthcheckdam.pdf

requested, and the lower courts had agreed, to remedy the breach of contract with what amounted to an order of specific performance. The District Court had entered, and despite contrary advice from the U.S. Government[12] the Court of Appeals had concurred with, an injunction providing that whenever the Republic pays any amount due under the terms of its bonds, it must also pay plaintiffs the same fraction of the amount due them.[13] In so doing, the courts cleared the way for investors to demand payment on the bonds they held whenever Argentina made any payments to holders of later bond issues which have been honored – a novel form of injunctive relief.[14]

Argentina had then filed a writ of certiorari requesting review on the grounds that the *pari passu* clause should be interpreted by the New York Court of Appeals, since it involved contract language under New York state law, and that the remedy fashioned by the lower courts coerced a sovereign to pay with assets that the FSIA allegedly held immune.[15] However, the Supreme Court denied review without comment,[16] a decision of legal import and immediate financial-market impact: it prompted Argentina to default anew on its universe of foreign-law bonds rather than pay the successful plaintiffs what the courts had deemed they were owed.[17] While so far this novel enforcement mechanism (for a private creditor attempting to collect from a rogue sovereign debtor) has not yielded the desired result, there is no question that the case has set an important precedent.[18]

The voluminous and protracted Argentina-related arbitration saga has likewise established important precedents.[19] The application of the provisions in BITs at times of major economic,

[12] Brief for the United States of America as Amicus Curiae in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing En Banc, Dec. 28, 2012, available at http://www.shearman.com/~/media/Files/Old-Site-Files/NMLCapitalvArgentina20121228BriefofUS.pdf

[13] NML Capital, Ltd. v. The Republic of Argentina, No. 12-105(L) (2d Cir. Aug. 23, 2013), available at http://www.shearman.com/~/media/Files/Services/Argentine-Sovereign-Debt/2013/Arg33_NML_Second_Circuit_Decision.pdf

[14] See Lyle Denniston, *No Relief for Argentina on Debt*, SCOTUSblog, Jun. 16, 2014, available at http://www.scotusblog.com/2014/06/no-relief-for-argentina-on-debt/

[15] Petition for Writ of Certiorari, Republic of Argentina v. NML Capital et al., Feb. 18, 2014, available at http://www.shearman.com/~/media/Files/Services/Argentine-Sovereign-Debt/2014/Arg_44_argentina_petition_for_certiorari_full_021814.pdf

[16] U.S. Supreme Court Order List Jun. 16, 2014, 5, available at http://www.supremecourt.gov/orders/courtorders/061614zor_2b8e.pdf

[17] Fitch Ratings, *Fitch Downgrades Argentina's FC IDR to 'RD'*, Jul. 31 2014, available at https://www.fitchratings.com/creditdesk/press_releases/detail.cfm?pr_id=843318; Moody's Investors Service, *Moody's changes Argentina's Outlook to Negative as Default Will Hasten Economic Decline*, Jul. 31 2014, available at https://www.moodys.com/research/Moodys-changes-Argentinas-outlook-to-negative-as-default-will-hasten--PR_305436; Standard & Poor's, *Argentina Foreign Currency Ratings Lowered To 'SD' After Holders Of Discount Bonds Did Not Receive Interest Payment*, Jul. 30 2104, available at http://www.standardandpoors.com/prot/ratings/articles/en/us?articleType=HTML&assetID=1245372071942

[18] For some early analysis, see Emma Kingdon, *Leveraging Litigation: Enforcing Sovereign Debt Obligations in NML Capital, Ltd. v. Republic of Argentina*, 37 B.C. Int'l & Comp. L. Rev. 30 (2014), available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1730&context=iclr; and Brett Neve, *NML Capital, Ltd. v. Republic of Argentina: An Alternative to the Inadequate Remedies under the Foreign Sovereign Immunities Act*, 39 N.C. J. Int'l L. & Com. Reg. 631 (2014), available at http://www.law.unc.edu/journals/ncilj/issues/volume39/issue-2-winter-2014/nml-capital-ltd-v-republic-of-argentina-an-alternative-to-the-inadequate-remedies-under-the-foreign-sovereign-immunities-act/

[19] According to ICSID, as of end-2014, there were twenty-nine cases concluded in recent years in which Argentina was the respondent (defendant), see https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD28&rntly=ST4. In addition,

political or social crises in host states, and as a basis to challenge measures taken to the detriment of foreign investors, has been raised in virtually every case in which Argentina has had to defend its conduct. Specific clauses, such as Article XI of the United States-Argentina BIT, allowing the exclusion from the coverage of the treaty of measures "necessary for the maintenance of public order, the … maintenance or restoration of international peace or security, or the protection of its own essential security interests,"[20] were routinely invoked by Argentina as valid grounds for policy decisions which had deleterious consequences for international investors.

The different conclusions reached in numerous arbitral decisions involving Argentina suggest that the case law is not yet settled, but it has definitely been enriched.[21] For example, in several instances the tribunals found that Argentina's policies significantly contributed to the crisis and the emergency invoked, and also that the measures adopted by the government at the time were not the only way for it to have safeguarded its interests. Therefore, Argentina could not be exempted from its responsibilities to investors. In other arbitrations, it was deemed that Argentina could rely on the defense of necessity only for a limited period, when there really was a threat to public order and to the government's essential security interests, but not after 2003 when things calmed down. The most recent decision in the stream of investment arbitrations involving Argentina, *El Paso Energy v. Argentina* (concluded in 2011, affirmed after an annulment application was dismissed in September 2014), held that Argentina had contributed to the state of necessity, and thus it could not avail itself of the necessity defense.[22]

Argentina's mistreatment of foreign investors has also elicited the first ICSID arbitral proceedings involving groups of bondholders, marking a major expansion in the role of these arbitrations in determining to what extent states have failed to protect purely financial investors who made loans or purchased bonds (or even financial derivatives), in contravention of whatever commitments had been made in bilateral investment treaties. The ICSID Convention and Rules do not specifically address the use of mass claims processes, and jurisdiction is limited to legal disputes arising directly out of an "investment," but the notion of investment was never defined,[23] such that in all proceedings Argentina has always questioned the proper standing of bondholder groups and the relevance of their "investments."

In February 2007, a group of more than 190,000 Italian bondholders registered a request for ICSID arbitration against the Argentine Republic, relying not on a violation of Argentina's obligations under its bond contracts – a claim that had been pursued without success in the Italian

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twenty-two cases were still pending resolution, see https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD27&rntly=ST4.

[20] Argentina Bilateral Investment Treaty, signed Nov. 14, 1991, entered into force Oct. 20, 1994, available at http://2001-2009.state.gov/documents/organization/43475.pdf

[21] Giorgio Sacerdoti, *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity*, 28 ICSID Rev. 351 (2013).

[22] *Id.* at 381; see also Annulment Proceeding, *El Paso Energy Int'l Co. v. the Argentine Republic* (ICSID Case No. ARB/03/15), Sep. 22, 2014, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4874_En&caseId=C17

[23] Christoph Schreuer, *Investment Arbitration*, in The Oxford Handbook of International Adjudication 296 (Gebare P. R. Romano, Karen J. Alter & Yuval Shany, eds., 2013).

courts[24] – but on its obligations under the Italy-Argentina BIT (*Abaclat & Others v. The Argentine Republic*).[25] In its pioneering decision on jurisdiction and admissibility issued in August 2011,[26] the ICSID tribunal reached the important, if controversial, conclusion that it had the authority to conduct a collective-claims proceeding, and that the bondholders had made a duly protected "investment."[27] The outcome of the claim is expected to be announced during 2015, and the potential award to bondholders could easily run in the billions of dollars – though getting actually paid by Argentina would be quite another matter.[28] Two other (much smaller) groups of Italian bondholders have also decided to pursue arbitration against Argentina under ICSID: *Giovanni Alemanni and Others v. Argentine Republic*, registered in March 2007, and *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, registered in July 2008. Decisions on jurisdiction and admissibility favorable to the claimants have since been issued in November 2014 and February 2013, respectively.[29] In sum, these three arbitration cases, especially if they end up in bondholder victories, have the potential to bring about a notable change in the dynamics of sovereign debt restructurings and in the popularity of the investment arbitration option.[30]

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[24] A precedent highly damaging to Italian creditors had been set by the 2005 Borri v. Argentina judgment by the Italian Court of Cassation, which accorded Argentina immunity because the issuance of bonds was an act performed *jure imperii*, and the rights of the Argentine people had to be balanced against the losses of Italian creditors. See Jürgen Bröhmer, *Immunity and Sovereign Bonds*, in Immunities in the Age of Global Constitutionalism 190 (Anne Peters, Evelyne Lagrange, Stefan Oeter & Christian Tomuschat eds., 2014).

[25] See http://www.tfargentina.it/download/TFA%20Press%20Release%209%20Feb%202007.pdf Claimants are represented in these proceedings by *Associazione per la Tutela degli Investitori in Titoli Argentini*, otherwise known as Task Force Argentina (TFA), a group underwritten by eight Italian banks which had been most active in selling Argentine bonds to their retail clients, see http://www.tfargentina.it/chisiamo.php. TFA had previously filed lawsuits in U.S. federal courts on behalf of Italian investors holding bonds governed by New York law, as well as in various European jurisdictions, alleging Argentina's breach of its contracts. The number of individual Italian claimants in Abaclat & Others has since been reduced to under 60,000.

[26] Decision on Jurisdiction and Admissibility, *Abaclat & Others v. The Argentine Republic* (ICSID Case No. ARB/07/5), Aug. 4, 2011, available at http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf

[27] For some of the controversy generated, see Donald Francis Donovan, *Abaclat & Others v. Argentine Republic: As a Collective Claims Proceeding*, 27 ICSID Rev. 261 (2012); Céline Lévesque, *Abaclat & Others v. Argentine Republic: The Definition of Investment*, 27 ICSID Rev. 247 (2012); Andrea Marco Steingruber, *Abaclat & Others v. Argentine Republic: Consent in Large-scale Arbitration Proceedings*, 27 ICSID Rev. 237 (2012); and Samuel Wordsworth, *Abaclat & Others v. Argentine Republic: Jurisdiction, Admissibility and Pre-conditions to Arbitration*, 27 ICSID Rev. 255 (2012).

[28] Argentina has been requesting continued stays of enforcement of awards claiming that the awards should be subjected to local courts and that placing money in escrow until completion of annulment processes would allow third-party creditors to attach and seize the funds in the banks. See Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID*, 41 Geo. Wash. Int'l L. Rev. 709 (2010).

[29] Decision on Jurisdiction and Admissibility, *Giovanni Alemanni & Others v. Argentine Republic* (ICSID Case No. ARB/07/8), Nov. 17, 2014, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5132_En&caseId=C100; and Decision on Jurisdiction and Admissibility, *Ambiente Ufficio S.p.A. & Others v. Argentine Republic* (ICSID Case No. ARB/08/9), Feb. 8, 2013, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2992_En&caseId=C340.

[30] Joanna Simões, *Sovereign Bond Disputes before ICSID Tribunals: Lessons from the Argentina Crisis*, 17 Law & Bus. Rev. Am. 683 (2011).

I. ORIGINS OF BONDHOLDER LITIGATON

During most of recorded history, private lenders and investors did not have the necessary legal rights to demand, and thus the legal mechanisms to compel, payment from foreign states. Sovereigns accepted that their counterparts could not be held accountable in their domestic courts under what came to be known as the doctrine of "absolute" sovereign immunity. Faced with an event of default, and lacking any legal remedies, private creditors would accept non-payment or else new payment terms decided unilaterally by foreign states; band together to limit a sovereign debtor's access to new capital, thereby gaining some leverage to discuss a settlement;[31] or they would pressure their own governments to take up their cause and negotiate on their behalf, retaliate against the deadbeat sovereign by imposing (usually trade) sanctions, or in the extreme, intervene militarily for the purpose of collecting on unpaid debts – "gunboat diplomacy."

After the end of World War II, governments increasingly sought ways to minimize their being dragged into disputes involving cross-border business transactions, and also ways to start holding accountable the growing number of state-owned enterprises, including Soviet firms, whose legal immunity gave them an unfair advantage over private companies.[32] In 1952, the U.S. Department of State adopted what is nowadays referred to as the "restrictive" theory of foreign sovereign immunity, under which foreign states are entitled to immunity from suit for their sovereign (public) acts but not for their commercial activities – the classic distinction between acts *jure imperii* and acts *jure gestionis*. The State Department retained for itself initial responsibility to decide questions of sovereign immunity using the new immunity framework, but the policy's application left a great deal to be desired, because State did not always issue an opinion on misbehaving sovereigns, or else it was biased by foreign-policy considerations.[33] Moreover, the property of foreign states continued to be absolutely immune from execution to satisfy any judgments obtained through the U.S. courts.

The restrictive theory of sovereign immunity was codified into U.S. law through the aforementioned FSIA of 1976, and shortly thereafter, the United Kingdom passed a similar law, the State Immunity Act of 1978. Many other countries have since followed in their footstep or else their courts have expressly accepted the concept of restrictive (or relative) sovereign immunity – one that the Council of Europe had already adopted via the European Convention on State Immunity of 1972, which became effective in 1976.[34]

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[31] The most institutionalized, powerful, and celebrated such creditor association was the British Corporation of Foreign Bondholders (CFB), established in London in 1868. By approving or withholding access to the London financial market, it was able to negotiate with the governments of Argentina, Brazil, Greece, Mexico, Peru, Spain, Portugal, and Turkey, among others. CFB-type organization were eventually set up in France and Belgium (1898), Switzerland (1912), Germany (1927), and the United States (1933). The CFB and its counterpart organizations in other countries remained active until the 1950s, when most of the sovereign defaults of the 1930s were settled. Federico Sturzenegger & Jeromin Zettelmeyer, *Debt Defaults and Lessons from a Decade of Crises* 11 (2007).

[32] Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 Int'l & Comp. L.Q. 302 (1986).

[33] *Id.* at 303-04.

[34] Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment*, 112 (2011).

The FSIA was passed to provide a statutory framework for resolving issues of sovereign immunity through the judicial branch without reliance on the State Department. The law established the general rule that foreign government property is immune, but setting out exceptions (28 U.S.C. 1330, 1602-1611) under which U.S. courts may exercise jurisdiction over a foreign state (e.g., when it has waived its immunity or engaged in commercial activities) and may subject foreign state assets to attachment, arrest or execution. It was passage of the FSIA and its equivalents elsewhere which gave rise to the first cases of litigation against sovereign debtors in the 1980s, including commercial banks seeking to collect on their defaulted loans to governments or their entities.

A recent, comprehensive study of litigation against sovereigns during the period 1976-2010, focused on foreign commercial banks or institutional investors with claims related to loan or bond contracts, identified 120 instances of legal actions against a total of 25 defaulting sovereigns.[35] Interestingly, 102 of them (85 percent) comprised cases filed in the United States, mostly in the Southern District of New York, suggestive of the dominance of New York law as a venue for contract-writing and the U.S. courts for contract-dispute resolution. Only 30 out of 180 sovereign defaults in 68 countries, or less than one-fifth of total, engendered any litigation at all – half of them a single lawsuit – suggesting that most defaults and ensuing debt restructurings were accepted by the parties involved.

Most relevant to this article, Argentina alone accounted for one-third of the case universe, with 41 commercial-creditor lawsuits filed – and all of them following just one of its four defaults during the 1976-2010 period: the one that took place in December 2001. According to the study, no other country or default has ever attracted anywhere near as much litigation. Argentina's prominence in this arena is particularly evident given the number of lawsuits and class actions filed also by retail investors, as discussed below, which the study excluded from consideration.

At first glance, the scale of Argentina-related litigation might be explained by the sheer size of the government's 2001 default. At the time, it was the largest in history, involving potentially $145 billion in public indebtedness, although it soon became clear that the default would apply to less than $95 billion in obligations largely to non-resident bondholders and to a lesser extent official creditors such as trade-finance banks (e.g., the U.S. Export-Import Bank) and foreign-aid agencies.[36] However, in early 2012, Greece's own default set a new world record with a restructuring involving approximately $265 billion (more precisely, €196 billion) of obligations to domestic and foreign bondholders.[37] The gigantic Greek default attracted not a single lawsuit, nonetheless, even though in

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[35] Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *Sovereign Defaults in Court*, draft, May 6, 2014, available at https://sites.google.com/site/christophtrebesch/research/SovereignDefaultsinCourt.pdf?attredirects=0 Lawsuits filed by retail investors were excluded, as were multiple suits (in different jurisdictions) by the same creditor, and disputes over procurement bills or unpaid checks.

[36] Most resident bondholders had already been subject to a restructuring in November 2001. The official bilateral creditors mentioned were owed less than $5 billion as of end-2001, see Argentina Ministerio de Economía y Producción, Secretaría de Hacienda, *Boletín Fiscal 4to Trim. 2001*, available at http://www.mecon.gov.ar/onp/html/boletin/4totrim01/pdf/fisc25.pdf

[37] Jeromin Zettelmeyer, Christoph Trebesch & Mitu Gulati, The Greek Debt Restructuring: An Autopsy, 28 Econ. Pol 513 (2013).

the days before the restructuring a "wave of potential litigation" reportedly was a threat.[38] This was the case despite the fact that the Greek restructuring imposed even heavier losses on bondholders than did the Argentine restructuring, something which could have prompted the proverbial runs to the courthouse.[39] A single arbitral claim against Greece was lodged with ICSID by a Slovak bank in 2013 in connection with the 2012 debt restructuring, but it was dismissed in April 2015.[40]

There are other factors that provide the best explanation for the origins of the Argentina litigation, and they relate to the unilateral, coercive and aggressive way the authorities in that country went about managing, defaulting and restructuring their debt obligations.

II. DEPARTURES FROM BEST PRACTICE

As detailed below, Argentina's behavior did not conform to best practice as settled already in the early 2000s, by which time plenty of experience had been accumulated from a multitude of sovereigns having encountered debt-servicing difficulties in the 1980s and 1990s. Indeed, it was partly out of concern that Argentina's errant behavior would set an undesirable precedent that the "Principles for Stable Capital Flows and Fair Debt Restructuring" were conceived. They constitute a voluntary code of conduct between sovereign debt issuers and their private-sector creditors that was agreed in the early 2000s, encouraged by the G20 Ministerial Meeting of 2002, and welcomed by the same body in Berlin two years later.[41] Best practices in the early 2000s are also distilled in an informative book published in 2003, which explained how sovereign debt restructurings had been

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38 Sarah White & Tommy Wilkes, *Hedge funds prepare legal battle with Greece*, Reuters, Jan. 24, 2012, available at http://www.reuters.com/article/2012/01/24/greece-hedge-funds-idUSL5E8CN0OR20120124

39 According to rating-agency Moody's, Argentina's restructuring in 2005 imposed losses of 71 percent, and Greece's in 2012 entailed losses of 76 percent, as measured by average issuer-weighted prices of sovereign bonds the day before the close of their respective distressed-debt exchanges. Moody's Investors Service, *Investor Losses in Modern-Era Sovereign Bond Restructurings*, Aug. 7, 2012, available at http://av.r.ftdata.co.uk/files/2012/09/Sovereign-Default-Series-Investor-Losses-in-Modern-Era-Sovereign-Bond-Restructurings.pdf

40 Poštová banka a.s., a Slovak bank that alleged to have purchased Greek sovereign bonds in 2010, and its Cypriot shareholder, Istrokapital SE, filed an arbitral claim with ICSID in May 2013 under the Greece-Slovak Republic and the Cyprus-Greece bilateral investment treaties, challenging measures taken by the Hellenic Republic in 2012 to address its financial crisis. A decision against the claimants was rendered by the ICSID tribunal on April 9, 2015, on the basis that the definition of "investment" in the BIT at issue in this case does not extend to Poštová banka's ownership of Greek government bonds. See Award, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5752_En&caseId=C2823

41 Institute of International Finance, "Principles for Stable Capital Flows and Fair Debt Restructuring," *Report on Implementation by The Principles Consultative Group* 33 (Oct. 2014), available at https://www.iif.com/file/6573/download?token=sVzJwuyF The seed of the Principles was planted in 2001 when Jean-Claude Trichet, then Governor of the Banque de France, floated the idea of devising a code of conduct on sovereign debt restructuring, to be embraced by the public as well as the private sector, see Raymond Ritter, *Transnational Governance in Global Finance: The Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets*, 11 Int'l Studies Persp. 225 (2010).

handled during the 1980s and 1990s by the official and private sectors.[42] It is on the basis of these two sources, plus personal experience,[43] that the following table has been prepared.

TABLE 1: ARGENTINA'S BEHAVIOR RELATIVE TO BEST PRACTICE IN SOVEREIGN DEBT MANAGEMENT

	Best Practice	Argentina
Engage in a regular dialogue with creditors on key economic and financial policies.	Yes	No
Consult with creditors on how to forestall debt-service problems before defaulting.	Yes	No
If a debt restructuring becomes inevitable, enter into timely, good-faith negotiations.	Yes	No
Stop incurring debt when already burdened by too much debt.	Yes	No
Seek debt relief appropriate to the nature of the liquidity or solvency problem.	Yes	No
Recognize interest arrears, and treat them preferentially versus past-due principal.	Yes	No
Seek the financial support and endorsement of multilateral agencies.	Yes	No
Make a good-will, up-front cash payment – especially when circumstances permit.	Yes	No
Aim for 100% creditor participation, in order to minimize a holdout problem.	Yes	No

Starting in 2001, as economic and financial problems worsened, communications with Argentina's lenders and investors broke down just when they should have intensified. The International Monetary Fund (IMF) became Argentina's single-largest creditor in 2001, with net disbursements of nearly $9 billion that year which brought the Fund's exposure to a peak of $14 billion.[44] The authorities took numerous economic measures in 2001 to kick-start the economy, eliminate the fiscal deficit and restore investor confidence under extraordinary powers granted by the Argentine congress, but most of them were announced or adopted without prior consultation

[42] Lex Rieffel, *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery*, 95 (2003).

[43] This author was a senior international economist for various Wall Street firms from 1977 through 2005, and was directly involved in several sovereign debt restructurings during his tenure, see http://www.american.edu/sis/faculty/aporzeca.cfm

[44] The IMF provided five successive financing arrangements to Argentina during 1991-2001. From early 2000 onward, the IMF-supported programs attempted to address the country's worsening recession and, increasingly, the government's inability to access the international capital markets through the provision of substantial funds. IMF Independent Evaluation Office, *The IMF and Argentina, 1991-2001* 9 (2004).

with the IMF – never mind with private creditors.[45] The measures backfired, engendering capital flight, social protests and political instability, which in turn provoked the resignation of President Fernando de la Rúa on December 20, 2001.

There followed two chaotic weeks during which a default on the public-sector debt was announced by Acting President Adolfo Rodríguez Saá. The venue was his inaugural address to the legislature right after his swearing-in, and the justification provided for the moratorium was to redirect debt-service funds to an emergency jobs program and an increase in social spending – a decision greeted by the assembled legislators with a standing ovation.[46] The default was confirmed in early January 2002 by President Eduardo Duhalde, who had been elected by the Legislative Assembly to serve through 2003. There followed a raft of additional economic measures which likewise were undertaken without consulting the IMF, and which not only failed to stabilize the economic situation but complicated the eventual resolution of the financial crisis.[47] In sum, Argentina neither maintained a dialogue with its creditors about its key economic and financial policies, nor did it consult with them on how to forestall a default.

In terms of engaging in timely, good-faith negotiations with its creditors, there was none of that. In February 2002, the then Economy Minister issued a first press release, explaining that the government was "devoting every effort to formulate and implement the various elements of its new economic program" and that it was preparing "plans for a proper basis for engaging in a fruitful dialogue with Argentina's external creditors."[48] It was followed in April by a second communication stating that while Argentina was committed to a dialogue with its bondholders, the government had concluded "that it [is] preferable to initiate such a dialogue once greater certainty has been achieved."[49] Other such press releases followed, yet despite the formation of several bondholder groups ready to advise or negotiate, and the filing of the first lawsuits against Argentina,[50] no dialogue was initiated in 2002 or 2003 – never mind a negotiation. The following is how a recent IMF study summarized the post-default situation:

> [T]he authorities were expected to negotiate with creditor committees that were judged to be representative and formed in a timely manner. Although there were over thirty creditors' committees, the Fund assessed that the Global Committee of Argentina Bondholders (GCAB) represented about one-half of Argentina's external private debt, and was therefore representative for the purposes of [our] policy. In the end, however, no constructive dialogue was observed and the authorities presented a non-negotiated offer, which

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45 *Id.,* 46-47, 60-61.

46 Asamblea Legislativa, República Argentina, Versión Taquigráfica, Sesión 22/23 de diciembre de 2001, available at http://www1.hcdn.gov.ar/dependencias/dip/documentos/asuncion/22.12.01.RodriguezSaa.pdf

47 Christina Daseking, Atish Ghosh, Timothy Lane, & Alun Thomas, *Lessons from the Crisis in Argentina* 38 (IMF Occasional Paper #236, 2004).

48 Argentina Ministry of the Economy and Infrastructure, *Press Release*, Feb. 8, 2002, available at http://www.emta.org/WorkArea/DownloadAsset.aspx?id=3214

49 Argentina Secretary of Finance, Letter to Bondholders, Apr. 10, 2002, available at http://www.emta.org/WorkArea/DownloadAsset.aspx?id=3248

50 For example, an attachment order was issued on July 19, 2002 by a court in Rome against the Republic of Argentina on behalf of a group of individual Italian bondholders. Argentina Ministry of the Economy and Infrastructure, *Press Release*, July 29, 2002, available at http://www.emta.org/WorkArea/DownloadAsset.aspx?id=3246

eventually led to a restructuring of eligible debt and past-due interest of about two-fifths of total debt, more than three years after the default.[51]

It is also good practice for sovereigns claiming to be over-indebted to stop accumulating new liabilities, but the authorities in Argentina did just the opposite. Especially damaging was the government's announcement in February 2002 that banks' assets and liabilities would be subject to an asymmetric conversion from U.S. dollars into Argentine pesos. Their existing stock of dollar-denominated assets and liabilities would be forcibly converted at the pre-existing, one-to-one exchange rate in the case of loans to the private sector but at a different, 1.4-to-one rate for loans to the government and for dollar deposits, which henceforth were also indexed to inflation.[52] The measure was intended to cushion from a devaluation firms and households with foreign-currency denominated debt to banks, by shifting the cost of the devaluation to the banking industry. However, since the banks could not possibly cope and most were rendered insolvent as a result, the burden was ultimately shifted to taxpayers and to the government's creditors, because banks had to be reimbursed for their losses through "compensation bonds" issued by the government.[53] Other policy decisions which added to the central government's debt burden were the takeover of liabilities incurred by provincial governments in prior years and the issuance of still more bonds to settle previously contingent liabilities with pensioners, civil servants, victims of human rights abuses, and others.[54]

Perhaps the one decision on Argentina's part that grated on investors the most was the authorities' demand for massive debt forgiveness despite the fact that, by the time a take-it-or-leave-it restructuring plan was put to them in early 2005, the economy had substantially recovered.[55] In general, governments seek debt relief appropriate to the magnitude and nature of their liquidity or solvency problem, and their calculations are usually vetted by multilateral institutions like the IMF and the World Bank. That way, bondholders have some assurance that the losses (in market parlance, the "haircut") they are asked to take are in accordance with the sovereign's present and potential ability to pay. The irony is that if Argentina had sought major debt relief in 2002, soon after the default and when the economy was in a depression, it probably would have been received with greater sympathy.

But by waiting for three excruciatingly long years to put its restructuring plan forward, giving time for an intervening commodity export boom to power a vigorous economic recovery which

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[51] IMF, *Sovereign Debt Restructuring: Recent Developments and Implications for the Fund's Legal and Policy Framework*, Apr. 26, 2013, 36, available at https://www.imf.org/external/np/pp/eng/2013/042613.pdf

[52] *Se pesifican todas las deudas uno a uno*, La Nación, 3 Feb. 2002, available at http://www.lanacion.com.ar/371402-se-pesifican-todas-las-deudas-uno-a-uno; Sturzenegger & Zettelmeyer, *supra* note 31, at 182-186.

[53] Daseking, et al., *supra* note 47, at 38.

[54] Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 318 (2005).

[55] For example, according to a monthly index of seasonally-adjusted economic activity, Argentina had returned to its pre-crisis high by March 2005. Ministerio de Economía y Finanzas Públicas, Dirección Nacional de Política Macroeconómica, *Nivel de Actividad: Cuadro 1.4*, available at http://www.mecon.gov.ar/download/infoeco/actividad_ied.xls

substantially replenished Argentina's coffers, the authorities undermined their case. For example, the government's tax revenues had already doubled between 2002 and 2004 measured in dollars, and the country's official international reserves had recovered similarly, from under $10 billion in early 2003 to over $20 billion by early 2005.[56] And yet, the forecasting model used by Argentina's economic team to plead poverty to its creditors was never updated to reflect the strong economic rebound underway. It was also loaded with excessively pessimistic assumptions as to what the future would bring in terms of crucial variables such as exports and tax revenues. During 2006-2012, the economy ended up growing twice as fast as the government's forecasts vintage late 2004, with actual export earnings and tax revenues outperforming the gloomy official assumptions by even greater multiples.[57] Therefore, by early 2005, Argentina was positioned to justify only a modest amount of debt and debt-service relief from its creditors – and quite a few of them knew it.[58] Therefore, the impression given by the authorities was that Argentina was suffering from a case of unwillingness more than inability to pay.

Argentina's debt-restructuring proposal of early 2005 departed from best, or even usual, practice in several other ways. While other sovereigns in financial trouble, including Argentina itself in the past, had actively sought to avoid an event of default or had moved promptly to cure any default, in this case the government dragged its feet for more than three years and, adding insult to injury, largely refused to recognize the interest arrears that its own delay had generated.[59] Contrary to other restructurings before, including those of Argentina previously, the 2005 plan was not accompanied by the usual reassuring endorsement – never mind backed with financial support – from the IMF, World Bank, or even a regional development agency like the Inter-American Development Bank.[60] And in another break from tradition, Argentina's 2005 restructuring failed to include an upfront payment to clear a portion of interest or principal arrears, a common "sweetener" to ensure success which the country could afford.[61]

III. THE HOLDOUT PROBLEM

With the benefit of hindsight, probably the most self-defeating departure from convention was Argentina's decision not to aim for 100 percent participation of its bondholders in the debt

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[56] Arturo C. Porzecanski, *Don't Cry for Rogue Debtor Argentina*, The Financial Times, June 12, 2014, available at http://blogs.ft.com/beyond-brics/2014/06/12/guest-post-dont-cry-for-rogue-debtor-argentina/

[57] *Id.*

[58] *Grinding Them Down: Brutal Tactics May Pay Off—For Now*, The Economist, 13 Jan. 2005, available at http://www.economist.com/node/3564904 ("Many bondholders are furious. They say Argentina, whose economy is growing strongly, could pay more;"); see also Andrew J. Barden, *UBS, an Adviser to Argentina, Tells Clients Debt Offer Is Low*, Bloomberg News, 21 Jan. 2005, available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aIUVIh1osg14&refer=news_index (quoting Zurich-based Oussama Himani, head of emerging market research at UBS Wealth Management, as having published that "Argentina's offer to repay bondholders 25 cents per dollar of defaulted debt is below the country's capacity to pay.")

[59] Argentina refused to pay the interest arrears accumulated in 2002 and 2003, whether calculated at contractual or lower interest rates – until that time, the only government to have taken this stance with bondholders. Sturzenegger & Zettelmeyer, *supra* note 31, at 190.

[60] Porzecanski, *supra* note 54, at 325; Sturzenegger & Zettelmeyer, *supra* note 31, at 196.

[61] Porzecanski, *supra* note 54, at 325.

restructuring, or even to set a high bar (e.g., 85 or 90 percent approval) for the transaction to go forth, in order to prevent a holdout problem. In fact, when launching the debt restructuring proposal, Economy Minister Roberto Lavagna went so far as to state that the government would regard any participation rate above 50 percent as having effectively cured the country's default.[62] The clear implication was that even if nearly half of all bondholders failed to accept the terms of the punishing debt restructuring, they would and could be ignored. To ensure the message was heard loud and clear, three weeks into the transaction, the government sent a draft law to the legislature forbidding the Executive from reopening the transaction in the future, and engaging in any dealings with bondholders arising from any court order or otherwise, without prior approval by the legislature.[63] This infamous "Lock (or Cram-Down) Law" was passed within one week. The law thus complemented Argentina's warnings in the deal's prospectus, and in all presentations in the major capitals, that any existing defaulted bonds that were eligible to be restructured but were not tendered would remain in default indefinitely – because the government had no intention of ever resuming payments on those bonds.[64]

A recent scholarly study of sovereign defaults, which provides the first comprehensive and systematic assessment of debtor-government behavior during financial crises, puts the above observations into comparative context.[65] The authors developed an objective index of government coerciveness, capturing confrontational debtor policies vis-à-vis private external creditors in times of debt distress, drawing on criteria suggested by the IMF and the Institute of International Finance, one of the main contributors to the aforementioned Principles. Their sample includes just over 100 restructurings involving commercial banks and bondholders, whether domestic or foreign, during the 1980-2007 period – the universe of sovereign default and restructuring relevant to private-sector lenders and investors. The following is the study's most pertinent result:

> The well-known case of Argentina from 2001 to 2005 displays an exceptional degree of coerciveness, as the government officially declares a default, sticks to the proclaimed moratorium by stopping all payments to its bondholders for four years, freezes foreign assets, and rejects any meaningful negotiations.[66]

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[62] *Lavagna dijo que 'con el 50% de aceptación' se saldría del default*, La Nación, 12 Jan. 2005, available at http://www.lanacion.com.ar/670384-lavagna-dijo-que-con-el-50-de-aceptacion-se-saldria-del-default; and Annabella Quiroga, *Lavagna lanzó el canje y reiteró que no habrá una nueva oferta*, Clarín, 13 Jan. 2005, available at http://edant.clarin.com/diario/2005/01/13/elpais/p-00301.htm

[63] The law (Law No. 26,017, adopted on 9 Feb. 2005) also mandated the government to do everything in its power to delist all bonds not tendered into the exchange, and to unilaterally exchange all bonds tied up in litigation against Argentina into new Par bonds denominated in pesos and maturing in 2038. *Argentina, Addendum to Prospectus Supplement dated January 10, 2005*, Feb. 4, 2005, available at http://www.mecon.gov.ar/finanzas/sfinan/english/download/addendum_feb_4.pdf

[64] Republic of Argentina, *Prospectus Supplement* (to Prospectus Dated Dec. 27, 2004) Filed Pursuant to Rule 424(b)(5), Jan.10, 2005, S-29, available at http://www.sec.gov/Archives/edgar/data/914021/000095012305000302/y04567e424b5.htm

[65] Henrik Enderlein, Christoph Trebesch & Laura von Daniels, *Sovereign Debt Disputes: A Database on Government Coerciveness during Debt Crises*, 31 J. Int'l Mon. & Fin. 250 (2012). The index consists of 9 sub-indicators grouped into two broad categories capturing payment and negotiation behaviors (including patterns and rhetoric employed).

[66] *Id.*, 261.

Argentina's choice to defy convention and rely heavily on a "stick" rather than "carrot" approach to creditor participation in its debt restructuring was a risky strategy. The 2005 restructuring was accepted by a mere 76 percent of total bondholders (namely, the owners of $62.3 billion of defaulted bonds out of a target universe of $81.8 billion), far below the 95 percent average degree of creditor participation registered in 34 sovereign bond restructurings from 1997 through early 2013.[67] On the one hand, the transaction succeeded in erasing $27 billion of principal owed and in achieving also significant concessions in terms of greatly extended maturities, drastically lower coupons, and forgiveness of 2002-03 past-due interest payments incorporated into the $35.3 billion of new bonds issued – all in all, a "haircut" to participating bondholders of at least 70 percent. On the other hand, Argentina created for itself a holdout constituency without precedent: the owners of nearly $20 billion in defaulted bonds accruing contractual interest from December 2001 at high coupons and high penalty rates on any arrears. The holdouts featured mostly foreign investors whose participation rate in the restructuring was much lower (an estimated 63 percent) than among Argentine investors (around 95 percent).[68] These holdouts included institutional and retail investors from all around the world.

Evidently, while the threat of indefinite non-payment for holdouts helped to persuade some bondholders to capitulate and accept the harsh terms on offer, it also motivated others to spurn the deal and either file suit or else await better treatment on the part of some future government. And investors who had purchased any of the numerous bonds that Argentina had issued under New York State law according to a Fiscal Agency Agreement (FAA) structure certainly had strong legal rights: as was typical of indentures up until the early 2000s, the 1994 FAA contained provisions to protect purchasers of its bonds from subordination, and provided that a holder's right to receive payment of principal and interest on their respective due dates could not be impaired without their consent.[69] In the past decade, in contrast, the typical bond indentures used by sovereign borrowers, whether in New York or in Europe, have come to include collective-action clauses enabling a qualified majority of bondholders (typically, 75 percent) to approve payment and other modifications in a vote that binds the minority of dissenting bondholders.

Given that by the time the debt restructuring deal was being formulated the authorities in Argentina knew that a number of investors had already taken the path of litigation, it is surprising that they nevertheless decided to persevere with such a confrontational approach. In the prospectus presenting the debt restructuring offer filed with the Securities and Exchange Commission (SEC) in January 2005, it was disclosed as follows:

> Bondholders have initiated numerous lawsuits against Argentina in the United States, Italy and Germany based on the Government's default on its public debt obligations. In the United States, approximately 39 suits, including one suit certified as a class action and 14

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[67] Moody's Investors Service, *The Role of Holdout Creditors and CACs in Sovereign Debt Restructurings*, Apr. 10, 2013, 32-33, available at https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_150162

[68] Sturzenegger & Zettelmeyer, *supra* note 31, at 192-193.

[69] David J. Johnson Jr., *Some Lessons for Distressed Debt Participants from the Argentina-NML Dispute*, July 3, 2014, available at http://www.omm.com/fcwsite/abc.aspx?url=newsroom%2fpenPDF.aspx%3fpub%3d1495

> suits purporting to be class actions, have been filed since March 2002, and judgment has been entered against the Government in seven cases in a total amount of approximately $740 million. In Italy the total amount claimed in bondholder proceedings against the government is €64 million plus interest, while in Germany the total amount claimed is €58 million plus interest. We can give no assurance that further litigation will not result in even more substantial judgments granted against the Government. Present or future litigation could result in the attachment or injunction of assets of Argentina that the Government intends for other uses, and could have a material adverse effect on public finances and on the market price of new securities we issue in an exchange offer.[70]

In a lengthy insider's account of the transaction by one of its leading architects, the then Finance Secretary of Argentina Guillermo Nielsen, published in March 2006, a year after the transaction closed, he spent more than 5,000 words describing everything that transpired behind closed doors in the run-up to the landmark debt restructuring.[71] Surprisingly, the words "holdout" or "litigation" never even came up in his narrative. Apparently, the Argentine authorities and their financial and legal advisors – mainly Barclays Capital and Cleary, Gottlieb, respectively – must have been persuaded that achieving large-scale debt relief, even if by confrontational means, was a goal worthy of the risk of generating a major holdout problem – possibly because as of that date investor litigation had not caused major headaches for Argentina.[72] Private creditors, after all, faced serious difficulties in executing judgments and collecting assets from Argentina.

In the years following the 2005 debt restructuring, Argentina's economy, tax revenues and export earnings continued to outperform all expectations (except during the global financial crisis, from mid-2008 through mid-2009), greatly enhancing the country's ability to service its debts – including its remaining defaulted obligations. However, despite this improvement in creditworthiness and some intervening changes in political leadership,[73] the government maintained an unyielding attitude toward investor holdouts.

As time passed and it became evident that, whether they litigated or not, holdout investors would neither collect nor get better terms from an intransigent Argentina, most of them gradually came to accept the idea that recovering something was better than nothing. Therefore, upon advice from its leading banks (mainly Barclays Capital, again), in late 2009 the government requested the Argentine congress to temporarily suspend the "Lock Law," so that the debt-restructuring window could be opened anew to bondholders who had rejected the 2005 transaction.[74] Tenders of defaulted

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[70] Republic of Argentina, *Prospectus Supplement*, *supra* note 62, at 27.

[71] *Inside Argentina's Financial Crisis*, 37 Euromoney 64 (2006).

[72] The government at the time, and since then, has not returned to the international capital markets, such that lack of access evidently has not been viewed as a problem worth solving by settling with holdout creditors.

[73] President Néstor Kirchner was in office from May 25, 2003 until Dec. 10, 2007, and he was succeeded by his wife Cristina Fernández de Kirchner.

[74] Later that year, Argentina started informal conversations with member countries of the so-called Paris Club, a gathering of representatives from official trade-finance and foreign-aid agencies, because its obligations to them had remained in default since end-2001. However, it was not until May 2014 that Argentina finally agreed to pay 100 percent of the principal and interest payments it owed its official bilateral creditors, albeit on a 5-year installment plan, and the

bonds were accepted during May-September and again in December of 2010 on slightly worse exchange terms than those applied in 2005.[75] The result was that approximately two-thirds of the holdouts accepted the conditions, such that about $12.4 billion of defaulted principal was tendered in exchange for new bonds. Consequently, the bondholder participation rate in Argentina's restructuring increased from the initial 76 percent to over 92 percent of the universe of defaulted bonds – in other words, the reopening had greatly reduced the holdout universe from 24 percent to just over 7 percent of the original bonds, or an estimated $6 billion plus accrued interest and penalty interest.[76]

The dramatic reduction in the universe of holdouts had mixed consequences. On the one hand, fewer holdouts meant that in 2010 Argentina came closer to achieving its original restructuring objectives – over 92 percent of its 2001 defaulted, bonded debt had been put through the wringer and was now performing – and to normalizing its relations with the international investor community.[77] On the other hand, after spurning two opportunities to take their losses and conform, the remaining holdouts now constituted a committed, hard core of disgruntled investors who were seemingly determined to litigate against Argentina until the bitter end. An illustration of the latter aspect is that in Argentina's Form 18-K Annual Report filed with the SEC in 2011, the authorities had to devote about 4,400 words to describe the litigation challenges they faced in the United States, Europe, and Japan, versus fewer than 200 words devoted to the subject in the aforementioned filing in 2005.

In particular, the 2011 filing detailed litigation in the United States involving over 150 individual lawsuits, on which judgments had been entered in almost 110 cases for nearly $5.9 billion of past-due principal and interest; 18 class-action suits representing groups of retail investors, of which 13 had been certified; and multiple attempts to attach Argentine commercial and other property in the United States. In Germany, nearly 650 legal proceedings had been initiated against Argentina by bondholders, and more than 460 judgments had been rendered against it, for some

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government made its first payment on July 30, 2014, as scheduled. See *The Paris Club and the Argentine Republic agree to a resumption of payments and to clearance of all arrears*, May 29, 2014, available at http://www.clubdeparis.org/sections/communication/communiques/argentine/switchLanguage/en

75 In 2005, past-due interest for 2014 was paid in cash; in 2010, past-due interest since 2003 was paid with bonds.

76 Argentina Ministry of the Economy and Public Finance, *Debt Report*, Sep. 30, 2010, available at http://www.mecon.gob.ar/finanzas/sfinan/english/download/informe_deuda_publica_30-09-10_english.pdf, and Dec. 31, 2010, available at http://www.mecon.gob.ar/finanzas/sfinan/english/download/informe_deuda_publica_31-12-10_ingles.pdf

77 A reflection of this progress is that in the wake of the successful 2010 reopening, Fitch Ratings upgraded Argentina's long-term, foreign-currency rating to 'B' from 'RD' (Restricted Default), see Fitch Ratings, *Fitch Lifts Argentina out of Default to 'B'; Outlook Stable*, July 12, 2010, available at https://www.fitchratings.com/creditdesk/press_releases/detail.cfm?pr_id=599659; and Standard & Poor's followed with an upgrade of its long-term, foreign- and local-currency credit ratings on Argentina to 'B' from 'B-', see Standard & Poor's, *Ratings on Republic of Argentina Raised to 'B'*, Sep. 10, 2010, available at http://www.emta.org/WorkArea/DownloadAsset.aspx?id=6127

€240 million in principal plus interest. The government also had to contend with ongoing litigation in Belgium, France, Italy, Japan and Switzerland.[78]

It is some of this litigation that would come to haunt Argentina in recent years, as explained at the outset of this article.

IV. ORIGINS OF INVESTOR ARBITRATION

During the 1990s, government policies established a very business-friendly investment climate in Argentina by means of an ambitious campaign of economic liberalization, deregulation and privatization, combined with a drastic anti-inflation program and various other structural reforms.

The government also broke with nationalistic traditions and sought out foreign investment by partnering up with foreign countries interested in signing bilateral investment agreements, to the point where Argentina signed and ratified more BITs than any other nation in Latin America. Between 1990 and 2001, Argentina signed 58 different BITs, of which 55 were ratified and entered into force by 2001 or shortly thereafter. In contrast, even by early 2015, countries such as Chile and Peru had ratified fewer than 40 BITs; Mexico and Venezuela fewer than 30; and Colombia five and Brazil zero – just to mention the larger countries in the region.[79]

Furthermore, Argentina firmly accepted recourse to international arbitration, a major about-face because the country previously always had been opposed to signing any agreements containing international arbitration clauses out of its adherence to the Calvo Doctrine and its commitment to insert "Calvo Clauses" in investment contracts. Named after a 19th century Argentine diplomat and jurist, Carlos Calvo, the Doctrine stated that legal disputes regarding foreign (private) investors should be adjudicated and resolved by the local courts of the host country, rather than by international legal remedies entailing an unacceptable surrender of national sovereignty.[80]

This new attitude and business climate enticed many multinational corporations to set up affiliates or purchase existing concerns in the country, and it also persuaded foreign portfolio investors to buy stocks issued by local companies as well as bonds floated by private and government issuers. During the period 1992-2000, a cumulative $74 billion of foreign direct investment came into Argentina[81] as did an additional $85 billion of foreign portfolio investment[82] – by far the largest amounts of such capital inflows in so short a period in the country's history.

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[78] Republic of Argentina, *Form 18-K Annual Report* (filed with the U.S. SEC), Sep. 30, 2011, 181-188, available at http://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.htm

[79] UNCTAD, International Investment Agreements Navigator, Bilateral Investment Agreements, available at http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (accessed Apr. 13, 2015).

[80] Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID*, 41 Geo. Wash. Int'l L. Rev. 718 (2010).

[81] Argentina Instituto Nacional de Estadística y Censos de la República (INDEC), *Estimación del Balance de Pagos: Inversión Extranjera Directa en Argentina, Cuadro 9*, available at http://www.indec.mecon.ar/ftp/cuadros/economia/sh_bal_anual_cuadro09.xls

[82] Argentina INDEC, *Estimación del Balance de Pagos: Inversión de Cartera en el País, Cuadro 10*, available at http://www.indec.mecon.ar/ftp/cuadros/economia/sh_bal_anual_cuadro10.xls

Early on, the authorities engaged in a remarkable privatization program: within a few years (mainly the early 1990s), the government sold off virtually all of its state-owned enterprises (e.g., the leading oil company plus electricity generation and gas distribution firms, as well as its telephone company once split into two entities), or else invited private investors to bid for the right to operate them (e.g., railways, airports, and water and sewage services) under long-term concession agreements. Proceeds from privatizations during 1990-1999 totaled almost $24 billion, and the majority of the funds for investment in previously state-owned entities were provided by foreign lenders and investors.[83]

In the wake of the privatizations and concessions, new regulatory structures were created with a mandate to set utility rates and other prices at levels that were "fair and reasonable" and allowed for a "reasonable rate of return."[84] Investors, most of them foreign, came to benefit from a number of guarantees, measures, or mechanisms: for example, public-utility rates were to be set for five-year periods, at the end of which they would be reviewed and adjusted according to the aforementioned criteria. Investors subject to the regulatory process had a right to calculate prices in U.S. dollars and then convert them to Argentine pesos at the time of billing. They also had a right to a semi-annual rate review based on inflation in the United States. The government could not rescind or modify licenses granted without the consent of the licensees. Utility rates and prices were not to be subject to any other controls, and in the event that any such controls were imposed, the government was to compensate the licensees fully for any resulting losses.

Other relevant reforms included passage of the 1991 Convertibility Law, which provided for the free exchange of the Argentine currency which was pegged to the U.S. dollar on a one-to-one basis, an arrangement which foreign investors found particularly convenient – at least during the decade while it lasted – because it was perceived to minimize exchange-rate risks.[85]

However, the investment climate changed abruptly in early 2002, when the Duhalde Administration confirmed the debt default and passed the Public Emergency and Exchange Rate Reform Law No. 25.561 (the "Public Emergency Law"), in an attempt to end an economic recession and defuse social tensions by making major adjustments to economic policies. This law abolished the peg of the Argentine peso to the dollar, opening the way for a severe devaluation of the peso.[86] It also decreed the compulsory switch from dollars into pesos, at the old exchange rate of one-to-one, in the denomination of all existing loan contracts with financial intermediaries of up to $100,000 – effectively, most such dollar contracts outstanding, including credit-card debt and mortgages; all contracts entered into by the public sector in connection with the delivery of public services; and also all contracts entered into in Argentina among private parties.

Moreover, the law terminated the right of privatized public utilities to rates calculated in dollars and adjusted according to U.S. inflation, and required the renegotiation of agreements to

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[83] Republic of Argentina, *Prospectus Supplement*, supra note 64, at 68.

[84] José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in Yearbook on International Investment Law & Policy 2008/2009, 379 (Karl P. Sauvant ed., 2009).

[85] *Id.*

[86] Kasenetz, *supra* note 80, at 709.

adapt them to the new exchange-rate system. In the weeks that followed, many other arbitrary economic measures were adopted. For instance, dollar-denominated deposits, which represented three-quarters of total deposits as of end-2001, were ordered frozen until at least 2003. To dampen inflationary pressures, rates charged by public (but privately owned) utilities (e.g., gas, electricity, telephones and water) were frozen indefinitely at their new peso equivalents. Companies were also affected by restrictions on foreign-exchange transactions that prevented them from making dividend and capital-repatriation transfers abroad. Moreover, the government rescinded certain contracts and the legislature approved an emergency law that severely curtailed creditor rights, in order to forestall a potential wave of liquidations.[87]

V. DEPARTURES FROM BEST PRACTICE

Argentina's radical and unilateral changes in the "rules of the game" affecting foreign strategic investors broke with good practice as settled already in the early 2000s, by which time ample experience had taught how to foster a good business climate in order to promote private-sector investment, job creation, and economic growth.

While the authorities claimed at the time – and have done so ever since 2002 – that the many measures taken were absolutely necessary to resolve their economic emergency, the policy mix as a whole was understandably regarded by most foreign investors as akin to an expropriation without adequate compensation. And indeed, a comparison of how Argentina behaved in the face of its economic and financial woes versus how other countries did so during the 1980s and 1990 is instructive, as it reveals the extent to which the authorities in Buenos Aires departed from best practices in investment-climate promotion.[88]

[87] *Id.* See also William R. Cline, *Restoring Economic Growth in Argentina* 91 (World Bank Policy Research Working Paper #3158, 2003), available at http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3158.

[88] World Bank, *Governance and Development* 22 (1992); World Bank, *World Development Report 1997: The State in a Changing World* (1997); World Bank, *The Practice of Regulation* 83 (in Doing Business in 2004: Understanding Regulation, 2004); World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (2004); Gudrun Kochendörfer-Lucius & Boris Pleskovic, eds., *Investment Climate, Growth, and Poverty* (World Bank, 2005); Sunita Kikeri, Thomas Kenyon & Vincent Palmade, *Reforming the Investment Climate: Lessons for Practitioners* (World Bank, 2006); and World Bank, "Improving the Private Investment Climate for Recovery and Growth," *Global Monitoring Report: A Development Emergency*, 51 (2009).

TABLE 2: ARGENTINA'S BEHAVIOR RELATIVE TO BEST PRACTICE IN INVESTMENT CLIMATE PROMOTION

	Best Practice	Argentina
Break contracts allowing for price increases in line with currency depreciation.	No	Yes
Apply selective price controls.	No	Yes
Force the currency redenomination of financial assets and/or liabilities.	No	Yes
Establish a contract renegotiation process closed to firms in litigation or arbitration.	No	Yes
Apply controls on capital inflows and/or outflows, affecting remittances and other.	No	Yes
Impose a blanket freeze on bank deposits.	No	Yes
Suspend the application of bankrupcty and/or foreclosure laws.	No	Yes
Claim that the state of public emergency continues despite the passage of time	No	Yes
Seek debt relief beyond the nature of the liquidity or solvency problem.	No	Yes
Refuse to pay court and arbitral awards.	No	Yes

The aforementioned measures adopted under the Public Emergency Law, which invalidated contracts and gravely affected the financial well-being especially of foreign investors, amounted to a complete dismantling of the legal, economic and financial framework put in place in Argentina during the 1990s to attract precisely those investors. And while a state of economic emergency ("necessity") may justify the temporary suspension of investor-friendly policies and the adoption of discriminatory and arbitrary measures, what unfolded in Argentina starting in 2002 was the *de facto* permanent abrogation of rights previously granted to investors.[89]

The Public Emergency Law as passed was scheduled to sunset at the end of 2003, but successive administrations in Argentina have requested time and again that the legislature pass replacement laws extending the deadline for the expiration of their emergency powers. By now 9 different laws have been passed over the years prolonging the state of public emergency and the powers conferred on the Executive, with the latest version approved in October 2013, keeping the status quo through the end of 2015.[90] By that time, Argentina will have spent 14 years under an uninterrupted "emergency," despite the principle, expressly stated in Argentina's Constitution and in

[89] Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. Int'l Arb. 265 (2007).

[90] María Lorena Schiariti & Enrique V. Veramendi, *A New Extension of Emergency Powers*, Marval O'Farrell & Mairal, Oct. 31, 2013, available at http://www.marval.com.ar/publicacion/?id=6027

precedents from its Federal Supreme Court, according to which emergency powers must be of a transitory, non-permanent character.[91]

Argentina's claim that a state of economic emergency justifying its trampling over investor rights has continued unabated for over a dozen years certainly rings hollow on economic grounds. After nose-diving in the first half of 2002, the Argentine economy hit a bottom later that year, and the exchange rate and other financial variables began to stabilize, albeit at very depressed levels. As discussed previously, the economy's rebound began in 2003 and gathered strength in 2004 and subsequent years. To cite but one indicator, per capita income measured in current dollars had climbed to almost $9,000 per annum prior to the 2001-2002 crisis, but then it sank to as little as $3,000, only to skyrocket to almost $15,000 in 2012-2013.[92]

Since there have not been any emergency economic circumstances for many years now, it would appear that the state of public emergency and the extraordinary powers conferred on the Executive have been renewed mainly to excuse why Argentina has yet to restore investor rights and repair broken contracts – or at least pay compensation for the grievous losses inflicted.

The state of economic emergency and its continuous renewal discouraged strategic investors and curtailed their rights in various ways. In this connection, the aforementioned case of the BG Group is illustrative.[93] In the early 1990s, the BG Group had participated in a consortium that purchased a majority interest in MetroGAS, an Argentine gas distributor that was privatized. The company was awarded a 35-year exclusive license to distribute natural gas in Buenos Aires, and the government at the time passed legislation that provided for gas prices to be calculated in U.S. dollars set at a sufficient level to assure a reasonable return to its owners.

In early 2002, however, under the state of economic emergency, the government decreed that gas prices would henceforth be set in Argentine pesos which would soon be worth a fraction of their former exchange value, such that MetroGAS saw its gas input prices tripling (in reflection of the currency's initial devaluation) while its output prices were frozen in place – and in pesos. This measure turned MetroGAS from a modestly profitable into a money-losing operation – potentially, permanently so.

Argentina subsequently established by statute a renegotiation process for contracts like the one with MetroGAS, but simultaneously barred any firm from participating in that process if it was litigating against Argentina in court or in arbitration. This caught the BG Group and many other investors between the proverbial "rock and a hard place." Under the Argentina-UK BIT, parties could not have recourse to international arbitration unless they had submitted their dispute to a local Argentine court and had been handed a final decision within 18 months. As was eventually established by BG Group without contest by Argentina, the impact of the government's decree was to nullify the ability of a local Argentine court to conduct the process envisioned by the BIT within

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91 *Id.*

92 IMF, *World Economic Outlook Database October 2014*, available at http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/weorept.aspx?pr.x=59&pr.y=7&sy=1998&ey=2014&scsm=1&ssd=1&sort=country&ds=.&br=1&c=213&s=NGDPDPC&grp=0&a=

93 BG Grp. PLC v. Republic of Argentina, *supra* note 4.

the specified timetable, and instead created what was characterized as an "absurd and unreasonable" process whereby the BG Group would never be able to complete the 18-month process so as to be able to proceed to arbitration.[94]

When the company nevertheless initiated the arbitration claim, Argentina contended that the tribunal lacked jurisdiction to hear the dispute, because the BG Group had failed to comply with the first step in the process, namely, litigating the dispute initially in Argentina's courts. In the event, the arbitration panel was sympathetic to the BG Group's dilemma, and so years later was the U.S. Supreme Court, ruling that the arbitrators had authority to determine in the first instance whether the matter was properly submitted to arbitration, thus reversing the U.S. Court of Appeals for the District of Columbia Circuit.[95]

VI. THE ARBITRATION OPTION

It turns out that many multinational companies came to Argentina during the 1990s under the umbrella of dozens of bilateral investment agreements that were signed and ratified by Argentina and their own governments. Consequently, in the wake of adverse events in 2001-2002, they could do more than merely lick their financial wounds and lobby for compensation: they could file requests for international arbitration alleging breach of contract under their respective country's bilateral investment treaty. As time passed and it became clear that the Argentine authorities would neither restore the investment climate nor compensate for damages caused, a growing number of arbitrations were indeed sought, with ICSID as the preferred or specified venue. As of mid-2002, two new cases against Argentina were registered with ICSID relative to mid-2001, bringing the total to 4; by mid-2013, the number of cases was up to 16; by mid-2014, to 29; and the peak was reached in mid-2005, with 37 cases registered – the most ever against a single member from among the nearly 160 countries which have ratified the ICSID Convention.[96]

Most claimants would allege that the emergency measures taken in 2001-2002 were inconsistent with the fair and equitable treatment standards set forth in various bilateral investment treaties to which Argentina is a party. Frequently challenged were the suspension and eventual elimination of various rate-indexing mechanisms provided for in the contracts for public utilities; the forcible conversion into Argentine pesos of certain contracts and of rates charged by public utilities;

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[94] BG Group PLC v Republic of Argentina, UNCITRAL, Final Award, § 147 (2007): "Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation [that local remedies prevented access to arbitration] would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication." For additional background, see Lionel M. Schooler, *Arbitrators as Gatekeepers in International Investment Dispute Arbitration Involving a Sovereign State: BG Group PLC v. Republic of Argentina*, 23 Alternative Resol. 31 (2014).

[95] The D.C. Circuit had held that the issue of jurisdiction, namely, the impact of the local litigation requirement, was a matter for courts to decide de novo, and further that the circumstances in question did not excuse BG Group's failure to comply with the treaty's requirement. See Andrea K. Bjorklund, *Case Comment: Republic of Argentina v BG Group PLC*, 27 ICSID Rev. 4 (2012).

[96] ICSID, *Annual Report*, various issues, available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Annual-Report.aspx

the restrictions on foreign exchange transactions that prevented them from making dividend and other transfer payments abroad; and the unilateral termination of their contracts to operate in Argentina.

Argentina's prospectus presenting the debt restructuring plan filed with the Securities and Exchange Commission (SEC) in January 2005 greatly understated the extent to which recourse to arbitration was becoming an issue to be reckoned with at the turn of that year:

> Several arbitration proceedings have been brought against Argentina before the International Centre for the Settlement of Investment Disputes (ICSID) challenging some of the emergency measures adopted by the Government in 2001 and 2002 and seeking compensation for damages. These proceedings have been brought primarily by foreign investors in a number of privatized entities under various bilateral investment treaties. We can offer no assurance that the Government will prevail in these claims. Rulings against the Government in these proceedings could have a material adverse effect on our finances and our ability to service our public debt, including any new securities we issue in an exchange offer.[97]

It is probable that this understatement was related to Argentina's determination to fight every claim every step of the way, questioning the scope of the jurisdictional phase and the admissibility of the claim, the arbitrators' qualifications, the admissibility of documents for witness and expert examination, the conduct and language of the proceedings, and everything else right up to and including post-award annulment proceedings.

It was likely also reflective of Argentina's determination not to pay any awards against it. Early on, Argentina took the position that, under Articles 53 and 54 of the ICSID Convention, all award holders must submit to the authority of a national (Argentine) court, and follow the formalities applicable for collecting on a judgment against Argentina in Argentina – a back-door return to the Calvo Doctrine. This is a unique interpretation of arbitral award enforcement which does not enjoy any international support – especially not from ICSID, one ventures to guess, since if ICSID were to allow local review of its final decisions, it would become nothing more than an arbitrator without any real enforcement authority.[98]

In this regard, Argentina's rogue behavior in connection with the payment of arbitral awards has run parallel to its dogged refusal to pay foreign court judgments, as detailed previously, despite surrendering its immunity and committing itself to be bound by foreign judicial rulings.

Six years later, in Argentina's Form 18-K Annual Report filed with the SEC in 2011, the authorities would find it advisable to devote nearly 1,350 words, rather than 105, to describe the arbitration challenges they faced.[99] These included 45 claims filed before ICSID against Argentina, of which 11 proceedings had been discontinued or the claims withdrawn. That brought the total

[97] Republic of Argentina, *Prospectus Supplement*, *supra* note 62, at 28.

[98] Kasenetz, *supra* note 80, at 739-742; Tsai- Yu Lin, *Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?*, Cont. Asia Arb. J., Vol. 5, 2012, 1-22.

[99] Republic of Argentina, *Form 18-K Annual Report*, *supra* note 78, at 190-192.

number of ICSID claims against Argentina to 34, involving an approximate total amount of $13.6 billion, but at the time 9 of the proceedings were suspended to allow for settlement negotiations with the government. Eight adverse awards against Argentina had already been entered, involving an aggregate award amount of slightly above $900 million.[100] Argentina would always apply for the annulment of awards against it on some allowed basis or another (as per Chapter VII of the ICSID Arbitration Rules), and by 2011 it had succeeded in overturning two awards and in persuading one successful claimant to renounce its award, for a combined savings of $452 million.

Of the ICSID arbitrations in the pipeline, the most monetarily significant was the previously discussed case involving Italian retail bondholders – initially more than 190,000 individuals with claims of approximately $4.4 billion, later reduced to some 60,000 investors with claims then estimated at $1.3 billion.[101] An award of $405 million was reportedly granted to claimants Suez (France) and Aguas de Barcelona (Spain) in April 2015, involving damages caused to these two water companies, though the authorities in Argentina immediately announced that, as usual, they would be filing for an annulment proceeding.[102] In addition to the ICSID claims, Argentina faces investment disputes under UNCITRAL arbitration rules, of which two (including the one involving the BG Group, discussed earlier) have already rendered awards against Argentina totaling $238 million.[103] These arbitrations are likely to haunt Argentina in the near future.

CONCLUSION

In sum, it is our contention that the origins of Argentina's litigation and arbitration saga during 2002-2014 are to be found in the country's aberrant behavior both at home and abroad.

For ideological reasons, successive governments in Buenos Aires have refused to follow the well-worn playbook of how economic policy adjustments are to be made in a way that minimizes damage to the investment climate, preserves access to the international capital markets, and promotes rapid and sustainable economic growth. They chose quite deliberately to sacrifice the strategic, portfolio, and other investors who entered into Argentina during the 1990s and helped to catapult the country into the modern era – and did so in accordance with a nationalist and populist ideology according to which the income and wealth of investors ought to be redistributed mainly to urban consumers, via energy and other subsidies and artificially low prices for public utilities.

While a benefit of the voluminous and protracted Argentina-related litigation and arbitration that has transpired is that by now precedents have been established and legal history has been made, the costs have been enormous legal expenses, the frustration of judicial and arbitral vehicles, a

[100] Three awards in favor of Argentina had been entered in 2008, but the amounts involved were not disclosed. *Id.*, 191.

[101] Abaclat & Others v. The Argentine Republic, supra note 25.

[102] The case is Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic (ICSID Case No. ARB/03/17). See Florencia Donovan, *Condena el Ciadi al país por US$ 405 millones*, La Nación, Apr. 10, 2015, available at http://www.lanacion.com.ar/1783236-condena-el-ciadi-al-pais-por-us-405-millones; and *La Argentina apelará el fallo del Ciadi por el caso de Aguas Argentinas*, La Nación, Apr. 10, 2015, available at http://www.lanacion.com.ar/1783304-la-argentina-apelara-el-fallo-del-ciadi-por-el-caso-de-aguas-argentinas.

[103] Republic of Argentina, *Form 18-K Annual Report*, *supra* note 78, at 191.

besmirched national reputation, and a mountain of unpaid claims and other obligations. One can only hope that Argentina's electorate will choose better leadership the next time that it goes to the polls, in October 2015, so that the saga will soon come to an end.