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ARGENTINA VS HOLDOUTS.
THE COMPLETE SAGA (2005-2016)

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Abstract

This paper provides a deep analysis into the legal dispute between Argentina and the holdouts as a consequence of the 2001 sovereign default. This paper highlights how the legal conflict helped uncover fundamental issues in the sovereign debt restructuring mechanism (SDRM). Questions regarding overarching injunctions, ambiguous interpretation of boilerplate clauses and the arguable judicial overreach of foreign court lead to necessary changes on standard clauses in sovereign debt contracts. A multidisciplinary approach combining aspects of law and economics was applied in order to fully appreciate the complexity of the subject, as well as the impact this particular case had on posterior sovereign debt contracts.

JEL Classification: F34, H63, G01, K00.

Key Words: Sovereign Debt Restructuring, Holdouts, Pari Passu.

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Contents

Introduction

It is hard to pin-point exactly when public borrowing started. Whilst historians track informal debt contracted by ruling institutions to over two millennia ago, modern literature points to 1000-1400 A.D. as a time when borrowing agreements with States were conducted with regularity and debt contracts entered into by sovereigns were increasingly standardized (Stasavage, 2016). Throughout time, sovereign debt has evolved with institutions and markets and, along with global integration, international debt became a clear source of financing for public states.

Sovereign debt has since reached the point that contracts may be issued in different maturities, currencies and even issued under foreign law. Nowadays, States are not the only ones that can get involved in the process; instead international financial organisations and international banks are the protagonists most of the time. History of sovereign debt has its fair share of set backs, including extensive episodes of sovereign defaults and posterior restructurings, which can sometimes lead to financial crisis. Clauses were introduced to protect creditors (pari passu, principal reinstatement clause, negative pledge, etc) as well as clauses designed to smooth out the restructuring process after a default (Collective action clauses, exit consents, etc).

Most of the structural changes in sovereign contracts, either adding new clauses or changing the existing boilerplate language, do not usually come from amicable discussion but rather after an event (mispayments) which triggers one of the parties to exploit aspects of the current boilerplate language to their advantage in a way that it was never intended to be. The case the Republic of Argentina vs NML is perhaps the most exemplary case in recent sovereign debt restructuring literature. Ambiguous interpretation of the law and arguable overreach of foreign courts not only caused this case to be the centre of the political landscape but also captured international attention to the extent that significant changes in the boilerplate language were effected.

The goal of this paper is to provide a deep multidisciplinary analysis of the "Argentina vs Holdouts Saga" (2005-2016) while presenting the facts and different interpretations of them in an orderly manner. To do this, the paper is structured in seven core sections. Section 1 presents a framework for the reader to understand the basic components of this conflict. Including the nature of debt sustainability, a common understanding of the concept of sovereign immunity and a follow-up background on the Argentine restructure; section 2 discusses the discovery case and several attachment attempts from the holdouts to the sovereign. Section 3 discusses the *pari passu* covenant and the implication it had on the Argentine case, the "game changing" injunction ordered by judge Griesa and how that could have be interpreted as an overreach from the court. Section 4 illustrates the international scope of the case, whilst section 5 focuses on the 8th sovereign default, the fall in negotiations and the end of saga amid the change in government. Section 6 discusses the policy implications the case had on the financial system and on the evolution of the boilerplate language of sovereign contracts. Finally, section 7 provides final remarks on the topic.

1 Framework

Naturally, the “holdout problem” emerges as a byproduct of the combination between the sovereign debt crisis and the current sovereign debt restructure mechanism. This section focuses on understanding three fundamental aspects, which together, build the preliminary framework for the entire paper. Firstly, it is important to understand debt sustainability as a concept. Unsustainable sovereign debt paths lead to defaults, while restructures aim to restore debt sustainability. Negotiations between bondholders and sovereigns are predominantly based on the minimum haircut required to restore sustainability. Secondly, most international bonds are issued under strong abiding laws, such as NY law or British Law. This means that missed payments or disagreements during the restructuring process might lead to litigations from bondholders in foreign courts. Therefore, this sections provides the reader with a basic understanding of the concept of sovereign immunity. Thirdly, in order to understand and contextualise Argentina’s complete holdouts saga it is relevant to briefly understand what lead to those litigations.

1.1 Debt Sustainability Analysis

The concepts of sustainability and liquidity are usually confused in sovereign debt restructures as they are not as easy to interpret in the context of sovereign debt (as opposed to corporate debt).

We will consider sustainability as the ability to fulfil the long-term debt path given the current debt position and market prices[1]. On the other hand, liquidity refers to the ability of raising capital to meet the upcoming payment, through using own disposable income or a debt roll-over system (among other mechanisms of financing). Whilst these concepts might seem independent, liquidity and sustainability are intrinsically related; sustainability issues might evolve into liquidity issues and vice versa (Guzmán, 2018).

Although there are institutions that provide debt sustainability analysis (DSA), the primary international institution being the IMF, they are far from perfect (Guzman & Heymann, 2015). DSA

[1] One could interpret this as the government’s ability to satisfy the transversality constraint, given an initial debt position and a predetermined fiscal path.

requires many exogenous assumptions (international market conditions, terms of trade, productivity shocks, etc). It also requires some assumptions on a government's ability to create an adequate fiscal policy, as well as any political costs involved with austerity, the distinction between the willingness to service debt and the ability to do so. Therefore, the "capacity" or "likelihood" of covering payments might vary between the IMF, rating agencies, private researchers, governments and bondholders.

Another source of disagreement is often the *exit yield*. A government may suggest a lower exit yield than the one bondholders consider appropriate so that the haircut seems less than it actually is. Because exit yields are discussed before the issuing of new bonds, there is often room for uncertainty and interpretation. This is important because if sustainability is difficult to quantify and seen as a matter of interpretation then *optimal debt relief* becomes more of a conceptual solution rather than a practical one. This discussion is at the core of sovereign restructures and the main source of disagreement among sides.

Lastly, there may be a group of bondholders that might not accept the proposal presented by the sovereign. They are most likely to disagree with the size of the proposed haircut - or any type of haircut for that matter- and might opt to pursue judiciary actions. These types of bondholders are generally referred to as *holdouts*. Among them there are particular holdouts, often investment funds, who specialise in purchasing distressed or non-performing debt at a significantly cheaper rate, doing so with the purpose of collecting in full mostly through extensive as well as expensive litigation procedures. Holdouts of this kind are generally known as *"vulture funds"*.

Unfortunately, there is no integral and comprehensive international procedure to ensure an appropriate automatic resolution to sovereign debt crises[2]. In fact, what governs is a decentralised market-based approach of constant negotiations between debtors and creditors, under the international law by which the original bonds were issued. Often these mechanisms suffer from frictions and at the cost of the well-known problem *"too little too late"*,

> *"restructurings are often not deep enough to provide the conditions for economic recovery, [...] impeding debtors in distress from escaping from recessions or depressions. Furthermore, if the debtor decides to play hardball and not to accept the terms demanded by the creditors, finalizing a restructuring can take a long time and, as the case of Argentina illustrates, be beset with legal challenges, especially from a small group of non-cooperative agents that have earned the epithet 'vulture funds'."*
>
> (Guzman, Ocampo, & Stiglitz, 2016)

[2]An international bankruptcy code has not been created, even though the ICMA proposed several modifications to their members this are voluntary and not mandatory

This is not a minor issue. An "adequate" haircut may be defined as the minimum haircut that restores sustainability. However, because that figure incorporates the reinsertion in credit markets and fiscal adjustment, if the deal does not materialise in the near future macro-conditions might worsen (due to lack of financial support) creating more macro unbalances. Then, when the deal carries, the haircut agreed upon won't restore sustainability, guiding the economy into another unsustainable path. This also applies for below-"adequate" reliefs. Schröder (2014) show that higher debt relief is statistically, significantly and negatively related to the probability of serial restructurings. This is because the higher the debt relief the easier it is return to a sustainable path.

1.2 Understanding Sovereign Immunity

Most international bonds are issued under strong abiding laws, such as NY law or British Law, which entails waiving sovereign immunity. But what does it mean to waive sovereign immunity?

In order to legitimise sovereignty from a legal doctrine one refers to the principle of sovereign immunity as the undisputed postulate of customary international law. Sovereign immunity shields countries from foreign jurisdictions whose acts outside the borders cause a direct effect on the sovereign, and in addition, protects the government from lawsuits by private citizens without its consent[3]. Traditionally, sovereigns had absolute immunity from law suits and from having their assets seized to satisfy a judgment.

In 1976, the *Foreign Sovereign Immunities Act* (FSIA) was signed[4]. This was perhaps the most important piece in international law, which was then followed by its British equivalent (the *State Immunity Act*) in 1978. In essence, the FSIA agreement acts as a means to prevent lawsuits against a foreign sovereign or its agencies, unless specific conditions are met. Conversely, one could argue that FSIA provides a statutory framework to undermine sovereign immunity. This view later became known as the modern era of "restrictive theory" of sovereign immunity. For instance, a presidential plane is protected by sovereign immunity and can't be seize by a foreign court. However, if the plane carries physical goods, with the sole intention of selling them to a third party, then the sovereign would gain the status of "commercial actor" and so the assets in the matter would be considered part of a commercial process, revoking immunity privileges, and therefore, subject to foreign court. In the context of sovereign debt, actions in international marketplaces such as the issuance of bonds under foreign law implies that the sovereign is waving its immunity privileges on those specific bonds and

[3]In fact, some countries specifically enact law in a way that the State can not be put into trial unless there is a causal relationship between the event and the sovereign responsibility, such as the case for Argentina (see law 26.944)

[4]See *Foreign Sovereign Immunities Act*, Pub. L. 94-583, 90 Stat. 289l, 28 U.S.C. Sec. l330, l332(a), l39l(f) and l60l-l6ll.

may be judged under foreign jurisdiction if taken to court.

This means that plaintiffs in sovereign debt litigations face a dilemma. Even if they win a court judgment, the restrictive sovereign immunity limits the ability to seize sovereign assets in compensation for those -non-paying- bonds. A clear example is when the sovereign holds financial accounts in foreign banks, despite the court rules in favour of the plaintiffs, the accounts can only be seized if they are used for commercial purposes[5].

For instance, after the partial restructures, holdouts such as NML, EM and Aurelius Capital sued Argentina in U.S. courts for breaking its debt contracts and although all of them received favourable court judgments and acknowledgements from the court stipulating Argentina was in breach, the Republic refused to honour those judgments. Only thanks to the FSIA agreement was Argentina able to prevent the holdouts from seizing foreign assets.[6]

1.3 Background on Argentina's debt crisis and debt swaps

After the hyperinflation of the 80's, Argentina was in need of a strong macroeconomic program that would stop hyper -as well as chronic - inflation. The incoming administration -Menem's administration- opted for a hard currency peg system. The exchanged rate was fixed at 1 \$/U\$D (Arg. peso to U.S. dollar), while the Central Bank of the Republic of Argentina (BCRA) was required to back at least two-thirds of its monetary base with hard currency reserves. This effective mechanism to eradicate Argentina's inflation came to be known as *"la convertibilidad"*. One point to take into consideration here is that, when monetary policy is as limited as it was during the 90's, fiscal policy had to be prudent to avoid macroeconomic inconsistencies. During the second half of the 90's fiscal deficit reemerged, in addition to external shocks[7]. This raised concerns and inevitably lead to debt financing, mostly in foreign currency.

Starting in 1994, Argentina issued bonds under New York Law, as well as other foreign legislation, pursuant to a Fiscal Agency Agreement (FAA). After 10 years of *Menemism*, Fernando De La Rúa won

[5]See Aurelius Capital Partner, LP v. Republic of Argentina, 584 F.3d 120, 131 (2d Cir. 2009). In the case the judged affirmed " a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used for a commercial activity'"

[6]NML capital, Ltd. and EM Ltd vs BCRA, 652 F.3d 172, 197 (2d Cir. 2011) (vacating attachment of reserves). Aurelius Capital Partner, LP v. Republic of Argentina, 584 F.3d 120, 131 (2d Cir. 2009) (rejecting plaintiffs' attempt to intercept assets that would be acquired by the Argentine social security system); EM Ltd. v. Republic of Argentina, 473 F.3d 463, 472 (2d Cir. 2007) (affirming vacatur of attachment of central bank reserves to satisfy obligations owed to it). Argentinian courts refused to honor all the previous judgments.

[7]1994 Mexican ("*the tequila*") debt crisis, 1995 currency crisis in Mercosur, 1997 the *"Asian"* crisis, 1998 Russia's default, 1999 Brazilian Real mega-devaluation.

the 1999 elections. By December of 2001, Argentina had an outstanding debt of U$D 144 billion -72% in foreign currency- in addition to an extremely unstable debt-path, poor economic performance and a social and political climate that made De La Rúa resign. About a week later, the interim president Rodriguez Saá announced the suspension of international debt payments and subsequently declared a "temporary moratorium" on its external debt (IMF). The first scheduled payment was missed on January 2002 and days later the first law-suits against the Argentine government were filed in US courts. However, a ramp-up in litigation's started in September 2003 which coincided with informal presentations of the restructuring strategy known as the "Dubai guidelines" at the *Annual Meeting of the Boards of Governors of the World Bank Group and the International Monetary Fund.* With a 75% face value reduction and 90% haircut in net present value (NPV) the proposal met fierce resistance from creditors.

By the end of 2004, debt escalated to U$D 191.30 billion. On January 14, 2005, Argentina presented an exchange proposal including U$D 81.8 billion which involved swapping 152 bonds, including six different types of foreign currency and eight different types of legislation, for only eleven bonds[8].This was conceptually one of the most challenging sovereign debt swaps in history because of the complex debt structure. In the end, Argentina managed to restructure U$D 62.3 billion[9] (76.2%). In 2010, Argentina submitted a second exchange proposal, with almost identical conditions, to try to restructure the remaining 23.8%. The second exchange had a 65.6% adhesion, meaning that out of the U$D 19.5 billion remaining, U$D 12.8 billion were restructured[10]. However, there was a 7.6% (U$D 6.2 billion) of bondholders, *holdouts*, that did not accept the offer and some of them decided to go through with a litigation process in foreign (as well as domestic) courts.

There are three main aspects to consider[11] of both exchanges:

1. None of the bonds issued under the FAA structure had collective action clauses (CAC's) which meant there was no way to force holdouts to restructure.

2. Along with the 2005 proposal, the Argentine congress sanctioned law 26.017[12], better known as the *"Padlock Law"* which prohibited the Executive Power from reopening the exchange process and carrying out any type of transaction with respect to the bonds in default after the closing of the 2005 Exchange. This was an important stick at the time - explicit threat of nonpayment - since it meant that those who did not accept the offer were never going to be offered a second

[8]The options for the new bonds involved four currencies as well as four types of legislation. See appendix 1 for more information on the structure of the old debt and the proposed new structure.

[9]See "liquidación final". June 10, 2010

[10]See "culminación del liquidación final". September 27, 2010

[11]All of these points will be explained in further details in the following sections.

[12]For the specifics of the law check

chance (as long as the law was binding). For the 2010 swap to happen, the government enacted law 26.017 that temporarily suspended the *Padlock Law*.

3. New bonds had a "Rights upon future offers" clause (RUFO)[13]. In contrast to the *Padlock Law*, this was a deal sweetener (a carrot) that meant that if Argentina ever offered a new deal, restructured bond holders would be offered the opportunity to participate in the new exchange if they felt the conditions were better than their original deal.

4. Throughout the years, Argentina kept making payments to restructured bonds but remained unwilling to pay holdout's bonds.

This background on Argentina's debt crisis and both swaps should be sufficient context for the reader to understand the subsequent narrative of the paper.

2 Enforceability of Judgments and Extraterritorial Reach

As presented in section 1.2, the difficulty of enforcing sovereign debt contracts could be considered the *fundamental problem of sovereign debt.* With this in mind, holdouts seek out payments in any possible way, even if that means seizing assets and liquidating them at low prices or holding them as guarantees until payment from sovereigns. However, sovereigns tend to have the majority of their assets located within their borders (protected by sovereign immunity) and most of the remaining assets are diversified all over the world which makes attachment complicated if you only have favourable judgments in one court. This leads to two questions: 1) How does a private plaintiff (such as NML) gather knowledge over the location of these - potentially attachable- assets? 2) Even if the information is available, by which mechanism may the court enforce payments on the sovereign?

2.1 The Discovery Case

The first of the two questions in hand may be analysed by using what is known as the *discovery case* of *NML vs The Republic of Argentina.* NML experienced significant difficulty finding assets against which to enforce the several favourable judgments it obtained since 2003[14]. From March to October 2010, with Judge Griesa's support, NML served subpoenas to non-party banks, specifically: Bank of America (U.S. bank), Bank for International Settlements[15] (Swiss bank) and Banco de la Nación Argentina. NML was seeking to "locate Argentina's assets and accounts" and "learn how Argentina moves its assets through New York and around the world".

[13]This clause clause was valid until December 31, 2014.

[14]The next subsection will focus on those attempts to attach sovereign property.

[15]NML went so far as to sue the BIS in Switzerland, alleging that it improperly allowed Argentina's central bank to maintain up to 90 percent of its foreign reserves on deposit.

The subpoenas in question attempted to search for comprehensive information relating to bank accounts maintained by Argentina anywhere in the world, as well as transaction histories and records of electronic funds transfers involving Argentina as a party, including opening and closing dates, current balances, and so on. Argentina moved to quash these subpoenas. Judge Griesa denied the motion to quash and granted NML's motion to compel. The judge's position was clear: "[the court] intended to serve as a clearinghouse for information [...] that might lead to attachments or executions anywhere in the world". Notice that in that same hearing, Argentina, Bank of America and Banco Nación all argue that the scope of the subpoenas was simply "too broad". There were references made, particularly to *Rubin vs Islamic Republic*, a case in which the plaintiff demanded that Iran turn over all documents, concerning all assets, of whatever nature and kind, that were located within the United States. To that claim, the Seventh Circuit ruled that, under the FSIA, plaintiffs could not request a general discovery, since "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination"[16]. Carmine Boccuzzi, the lawyer representing the Republic, went even further to say that it was a "broad-based open-ended discovery mission [...] It is really a fishing expedition. And that is not proper." However, Griesa's response to the comment was a clear reflection of his position regarding this matter and his sentiment regarding Argentina's behaviour towards the court:

> *"Please don't talk about fishing expeditions. What do you expect these people [NML] to do? They have to engage in these manoeuvres because of your client's behavior [The Republic's]. [...] And, of course, it is a lot of work. Of course, it involves trying to get information in a difficult way, but who is responsible for that? It is your client. This goes on year after year because of your client, and the difficulties are caused by your client."*

NML Capital, Ltd. v. Republic of Argentina, No. 03-CV-2507 (August. 30, 2011)

After Griesa's comment, the result was almost predictable: any actions towards a motion to crush were out of the question,

> *"I am going to grant the order. I am overruling the objections to these subpoenas and I will enforce them. I want to see specific orders drafted, and I want to let the parties comment on the specific orders, but not continue objecting. The objections are overruled."*

NML Capital, Ltd. v. Republic of Argentina, No. 03-CV-2507 (August. 30, 2011)

As expected, the district court approved the subpoenas "subject to the need for counsel to negotiate a more specifically drawn subpoena in each case and subject to a possible application to the Court

[16]See Rubin v. Islamic Republic, 637 F.3d at 796-97.

on the specifics of the subpoenas". The Republic indeed appealed to the Second Circuit arguing that extraterritorial asset discovery infringed Sections 1602 et seq. of the FSIA.

The Second Circuit affirmed the district court's order[17], rejecting Argentina's argument that the FSIA prohibits discovery of immune assets. The first reason was the differentiation between gathering information and acting upon that information. The Second Circuit understood that "[t]he [FSIA]does not attempt to deal with questions of discovery" and insisted that "if and when NML moves past the discovery stage and attempts to execute against Argentina's property, Argentina will be protected by principles of sovereign immunity in this country or in others to the extent that immunity has not been waived." The Second Circuit also argued that the subpoenas were directed at third-party banks, protected by confidentiality agreements with NML, and third-parties are not entitled to claim sovereign immunity.[18]

As a matter of last resort, January 7, 2013, Argentina filed a *writ of certiorari*[19] so that the Supreme Court would review the Second Circuit's judgment. The Supreme Court granted the petition on the following bases:

> *"The Court should grant certiorari because the Second Circuit's decision directly conflicts with decisions of other circuits, this Court's longstanding precedent, and the expressed interests and views of the United States Government, all of which oppose the Second Circuit's holding that the FSIA imposes no limit on a United States court's authority to order blanket post-judgment execution discovery on the assets of a foreign state used for any activity anywhere in the world."*
>
> Republic of Argentina, petition for wit of certiorari (January. 07, 2013)

After the Supreme Court granted Argentina's petition for certiorari, the U.S. government filed an amicus brief where the Deputy Solicitor General appeared at oral argument, in support of Argentina's position[20]. The interest of the U.S. government on "the proper interpretation and application of the FSIA's provisions and in the treatment of foreign states in United States courts" such as in a case like this is evident, given that, an extraterritorial discovery may set a precedent for future sovereign debt crises or other similar borderline cases on matters of sovereign immunity. Even further, the U.S. was concerned that it could bring "reciprocal adverse treatment of the United States in foreign courts

[17] NML Capital, Ltd. v. Republic of Argentina, 696 F.3 d642(2 d Cir. 2012)

[18] This was particularly relevant for Banco Nación who claimed that this was a breach of FSIA terms.

[19] A *writ of certiorari* is a primary means to petition the court for review, in this case to the Supreme Court. The Supreme Court is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonise conflicting decisions in the federal Circuit courts, and/or could have presidential value. See more information at Supreme Court Procedures - Writs of Certiorari (uscourts.gov).

[20] Argentina v. NML Capital, Ltd., No. 12–842, 2014 BL 7274, U.S. Amicus Briefs (10 January 2014)

[...] [and potentially] threaten harm to the United States' foreign relations more generally"[21]. Both governments, the Argentine and U.S., argued that the Discovery Order was overly broad and therefore the FSIA's execution provisions still protected Argentina's extraterritorial property from the Discovery Order regardless of any waiver and by no means this fell under the stipulated exception presented by the Seventh Circuit on the *Rubin case*. In addition to that, the U.S. expressed the disagreement with the Second Circuit, explaining that "the fact that the Discovery Order was directed at third parties does not eliminate international comity concerns".

On June 16, 2014, the Supreme Court ruled in favour of NML Capital on the issue of post-judgment discovery[22]. As explained by Cross (2015), in contrast with the conventional baseline of international law, which presumes a foreign State to be immune from lawsuits unless a statutory exception are proven, in this case because Argentina waived its immunity to a U.S. court, the reverse applies, that is, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA]'s text."[23] The Supreme Court also made it clear that "The Act has no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets." The Supreme Court's decision put an end to the *discovery case* saga. However, the decision of upholding the broad extraterritorial scope of the Discovery Order raises separation of powers concerns. The boilerplate language is vague and the legislative history of the FSIA does not clearly address the extent towards international discovery. In the context of SDR, an interpretation as such would make restructuring processes extremely more complicated and ICSID arbitration an even more attractive option for holdout creditors (Ishikawa, 2015; Cross, 2015). On the other hand, Simon and Crawford (2015a) explains the unintended negative consequences if the supreme court were to have chosen the alternative option, for example, the deleterious effect on international commerce.

2.2 Attachment attempts

Parallel to the discovery order, NML kept its attempts to enforce payment. NML's enforcement tactics included a series of failed execution attempts against The Republic's property and other related entities in the United States (Gelpern, 2012). The list includes Argentina's central bank reserves deposited in U.S. accounts[24], social security deposits based in the U.S.[25], a satellite jointly launched by Argentine space agency, NASA, and other nations' space agencies[26], attachments of diplomatic and military property in Washington, D.C., and Maryland[27].

[21] *Ibid.*

[22] Argentina v. NML Capital, Ltd., No. 12 – 842, 2014 BL 573 (16 June 2014)

[23] *Idem.*

[24] NML Capital, Ltd. v. Banco Central De La República Argentina, 652 F.3d 172, 196 – 97 (2d Cir. 2011).

[25] Aurelius Capital Partners, LPv. Republic of Argentina, 584 F.3d 120, 124, 130 – 31 (2 (d) Cir. 2009).

[26] NML Capital, Ltd. v. Spaceport Sys. Int'l, L.P., 788 F. Supp. 2d 1111,1127 (C.D. Cal. 2011).

[27] NML Capital, Ltd v. Republic of Argentina, Ltd, No. 04-00197 (CKK), U.S. Dist. Lexis 47027 (Aug. 3, 2005).

Without stopping there, NML also pursued unsuccessful efforts to enforce its United States judgments outside the United States, ranging from an attempt to attach taxes owed to the Republic in France[28], to attempts to attach diplomatic bank accounts in France[29] and Belgium.[30] They even tried to embargo a presidential airplane which at the time was stopping in Germany[31] as well as a military ship in Ghana[32]. The latter took political significance given that the ship's name was *"Libertad"* (which translates to *"freedom"*). Cristina Kirchner, the Argentine president at the time, used this event to spread political propaganda arguing the *vulture funds* were attempting to disrupt Argentina's legitimate sovereignty and freedom. In any case, every execution effort from NML was unsuccessful.

An even more ludicrous attempt was to try to enforce their foreign judgments in Argentine courts, through an *exequatur procedure*.[33] There were two instances in 2014,[34] and in each case the Argentinian Supreme Court of Justice rejected the requests for execution of judgments issued by the United States. The Argentinian Supreme Court argued that those U.S. court rulings "did not satisfy the requirement [...] by which they should 'not affect the principles of public order under Argentine law'". The main reason was that the deferral of the payments of the securities in question was part of the emergency measures taken as a result of the serious economic crisis that occurred in the country at the end of 2001. The second reason was that if the Argentinian court were to admit the exequatur, then it would be indirectly validating the creditors' position and disrupting the successful previous debt swaps, throwing Argentina immediately back down a default path once again. The last reason was that it would have set a precedent in the case of future defaults. Because of the ruling made by the Argentine court, execution attempts, once again but now in Argentine territory, were also unsuccessful.[35]

[28] NML Capital, Ltd. v. Republic of Argentina, Cour d'appel Paris, 4e pôle 8e ch., Dec. 9, 2010, No. 10/00390 (Fr.).

[29] NML Capital, Ltd. v. Republic of Argentina, Cour de cassation 1e civ., Sept. 28, 2011, Bull. civ. I, No. 867 (Fr.).

[30] NML Capital, Ltd v. Republic of Argentina, Ltd., Cour de Cassation, Nov. 22, 2012, No. C.11.0688.F/1 (Belg.).

[31] "The Real Story Of How A Hedge Fund Detained A Vessel In Ghana And Even Went For Argentina's 'Air Force One'"

[32] Arg. v. Ghana, No. 20, Order of Dec. 15, 2012. Ghana Told to Free Argentine Ship Libertad by UN Court, BBC NEWS (Dec. 15, 2012), http://www.bbc.co.uk/news/world-latin-america-20743016.

[33] Given that a domestic court judgment does not have a direct effect over a foreign territory, an exequatur procedure is a legal mechanism to make a court order enforceable abroad. That said, it is not merely a bureaucratic procedure but given that it entails a genuine procedure of constitutional review.

[34] CSJN, "Claren Corporation v / Estado Nacional (Articles 517/518 CPCC Exequátur) s / Varios" (judgment of March 6, 2014) and "Crostelli, Fernando y otros c / EN - Ministry of Economy (arts. 517/518 CPCC exequatur) (BNNY) s / miscellaneous "(judgment of March 6, 2014).

[35] Regarding the previous comments on the discovery case, the U.S. also noted that all of these attempts of attachments, including the ones inside and outside the U.S. (even the ones in Argentina) were made without the need of a discovery order, claiming that even though NML was not successful on executing it did not have any issues locating Argentine assets around the globe.

It is worth mentioning that by 2011, Argentina was able to secure one of the greatest debt reliefs in history, which meant recovering access to international markets (so much that rating agencies lifted Argentina from "selective default"[36]). It also made all payments due on its 2005 and 2010 restructured debt and seemed to overcome any significant threats from holdouts by shielding behind the FSIA. On the other hand, a decade later from the default date, holdouts, even with favorable court rulings, were not able to be paid and were exhausting money in lawyers. So far, *vulture funds*' business model does not look appealing.

3 Pari passu covenant and the overarching injunction

This section tries to synthesize perhaps one of the most controversial court rulings and enforcement in modern sovereign debt litigations. We will focus on three topics: 1) Understanding the pari passu clause and the possible interpretations of it; 2) The February 23^{rd} 2012 injunction as a method to enforce judgment; 3) The overarching power of the injunction and how it became a game-changing event in sovereign debt litigation history.

3.1 Summary judgment and the interpretation of the pari passu

The biggest plot twist in the saga started on December 7, 2011, when a judge for the Southern District of New York, Thomas Griesa, granted *NML Capital Ltd*, a *summary judgment*[37]. The judgment in favor of the investment fund claimed that the Republic of Argentina breached the *pari passu* clause enacted in the 1994 Fiscal Agency Agreement (FAA) by *"relegating NML's bonds to a non-paying class"*.

[36]See "Argentina Foreign Currency Ratings Lowered To 'SD' After Holders Of Discount Bonds Did Not Receive Interest Payment," July 30, 2014.

[37]A summary judgment is "a court order ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon certain facts without trial." In other words, it is a situation where the judge rules on a claim without a trial because under his/her opinion there is no need for a jury given that it is obvious who must win. For further information check https://dictionary.law.com/Default.aspx?selected=2063

*1. [...] [T]he motion for partial **summary judgment** pursuant to Rule 56(a) is **GRANTED**.*

2. [...] [T]he Republic is required under paragraph 1(c) of the FAA at all times to rank its payment obligations pursuant to NML.'s Bonds at least equally with all the Republic.'s other present and future unsecured and un-subordinated External Indebtedness.

3. [...] [T]he Republic.'s payment obligations on the bonds include its payment obligations to bondholders who have brought actions to recover on their defaulted bonds

*4. [...] [T]he Republic violates **Paragraph 1(c) of the FAA** [...][therefore][...] **relegating NML.'s bonds to a non-paying class** by failing to pay the obligations currently due under NML.'s Bonds while at the same time making payments currently due to holders of other [restructured bonds].*

*5. [...] [T]he Republic lowered the rank of NML's bonds [...] when it **made payments** currently due under the **Exchange Bonds**, while persisting in its **refusal** to satisfy its payment obligations currently due under **NML.'s Bonds**.*

*6. [...] [T]he Republic lowered the rank of NML's bonds [...] when it enacted **Law 26,017** and **Law 26,547**.*

NML Capital, Ltd. v. Republic of Argentina, No. 08-CV-6978 (Dec. 7, 2011)

Paragraph 1(c) of the FAA refers to the *pari passu* clause which states:

The Securities [i.e., the bonds] will constitute [...] direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.

1(c) in the FAA terms: Pari Passu Clause

The interpretation of this clause was the fundamental piece of the legal puzzle. Its latin origin can be translated as "by equal step", "proportionally, at an equal pace", or even "without preference". The clause serves as a protection against legal subordination and its most conventional meaning is settled in the context of corporate loans. In other words, in the event of insolvency and liquidation, all holders of equally ranked debt will receive an equal share of the proceeds. However, sovereign debt is more complex. Legal subordination has very little meaning in sovereign context, given that they have *de facto* authority to decide whether or not to pay, in addition to the fact that there is no sovereign bankruptcy system to establish legal subordination. Therefore, the real question is how this can be interpreted in the context of sovereign debt? Zamour (2013) discusses the fervent debate involving the genealogy of this covenant.

On one hand, authors such as Buchheit, accepted the legal-subordination interpretation, understanding that it should be seen as a shield in those cases where the sovereign wants to *"legitimize the discrimination"*[38]. This is known as the *"narrow reading"* or *"legal subordination"* interpretation of this covenant. This interpretation does not intend to protect bondholders from *de facto* subordination. On the other hand, authors such as Andreas Lowenfeld,[39] believe in what is known as the "broad reading" or the "ratable payment" interpretation. This latter view goes off the following logic: if, as mentioned previously, the notion of legal subordination does not carry significant meaning in the sovereign debt context, then the pari passu clause must be interpreted to protect against *de facto* subordination (Zamour, 2013).

Some authors interpret that Judge Griesa's *partial summary judgment* constituted as an attempt at reviving the long-dead doctrine of the "ratable payment" interpretation of the pari passu. Griesa claimed that the Republic of Argentina relegated NML to a non-paying class while at the same time paying holders of restructured bonds therefore violating the "equal set" principle of the pari passu clause, consistent with the "broad" interpretation of the clause. However, the summary judgment also states that Argentina lowered the rank of NML's bonds "when enacted the Law 26,017 and Law 26,547" (the Padlock Laws), which is consistent with the "narrow" interpretation of the clause. Judge Griesa did not, at least at this stage, clarify which condition on its own fundamentally breached the pari passu or if it was a combination of both that did. The lack of clarification created more controversy and scandalous debates on international law and economic forums. In addition to that, three months later the court issued an injunction ordering Argentina to make "ratable payments" to holdouts whenever Argentina made payments to restructured bonds[40]. The court phrased this order a "*remedy*" for the breach.

Let's hypothesize what could have constituted the breach from the judge's point of view. If the violation was purely the *Lock law* (and eventually the *Sovereign Payment law*), then any court order should have been directed at the *Lock Law*. In a typical sovereign default case, the plaintiff does not get much more than a recognition of breach of contract against the sovereign, and their right as an unsecured creditor. In this particular case, it would also be logical for the court to order Argentina to revoke the *Lock Law* and perhaps a one-time compensation payment. [41] Therefore, in this context,

[38] Buchheit(1991)

[39] See Andreas F. Lowenfeld sworn statement at Elliott Assocs., L.P. v. Banco de la Nacion de Peru, No. 96 Civ. 7916 (RWS) (Sept. 29, 2000)).

[40] The next subsection deals with the injunction in depth.

[41] But this could only be possible if the enforcement to revoke came from the Argentina Supreme Court or any other inferior national court on behalf of the constitutional power they enhance. Nevertheless, revoking or declaring unconstitutional the *Lock Law* would have been a political matter rather than a legal one. Article 116, Constitución Nacional Argentina.

the ratable payments seems to be an exacerbated punishment.

It seems like payments pro-rata throughout the duration of restructured bonds only make sense if the broad interpretation of the pari passu applies. However, as it will be discussed later on, this was not the way sovereigns, the IMF, and most financial institutions interpreted the pari passu covenant through history (Olivares-Caminal, 2009).

In 2016, the court issued an opinion regarding the nature of the pari passu and the mispayments[42],

> *The Republic's failure to make scheduled payments on its debts was part of this conduct, but it was only one element in a complicated set of circumstances. In subsequent orders, the court emphasized that what constituted breach was the Republic's "entire and continuing course of conduct", including harmful legislation like the Lock Law and incendiary statements by the former administration.*
>
> *In short, the Republic violated the pari passu clause not merely by being a sovereign nation in default, but by being "a uniquely recalcitrant debtor."*
>
> (NY SDC - Opinion - 16-cv-01042-TPG Document 49 - December 22, 2016)

The central argument seems to be that what is really behind the pro-rata remedy is an accumulation of factors that have little to do with the pari passu and more to do with punishing the Republic for systematically undermining the court and specifically the judge throughout the litigation.

3.2 An Injunction as a method to enforce judgments

In addition to the summary judgment, negotiations were going nowhere. Argentina, cornered by the RUFO clause, stood firm on the idea of paying only those exchanged securities, and banked on FSIA shielding its sovereign assets, despite several court orders issued in the past. It was largely evident that the judge wasn't particularly pleased by Argentina's disregard for the court orders and it was made clear through the strong wording by the court "[...] Because the Republic has made clear [. . .] its intention to defy any money judgment issued by this Court [...] [e]quitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness[. . .]"[43]. Griesa (and even the Second Circuit) consistently offered to negotiate the *how and when* Argentina should pay NML, however the Republic kept appealing and denying the possibility of paying the holdouts to prevent the RUFO

[42] To put into context, this statement was issued an year after the Kirchner administration left office. Macri's administration was determined to sort out whatever was left of the holdout dispute. We will cover this in section 5.

[43] One may even say that the general public believed that the dispute slowly displaced from a legal dispute between NML and the Republic of Argentina to perhaps Thomas Griesa against the Republic of Argentina.

clause activation[44]. On February 23, 2012, U.S. federal judge Thomas Griesa presented an ultimatum in the form of an injunction:

> *The Republic [...] is ORDERED to specifically perform its obligations to NML [...] as follows:*
>
> *a) Whenever the Republic pays any amount due [...] the Republic shall [...] make a **"Ratable Payment"** [...] to NML.*
>
> *b) Such "Ratable Payment" [...] shall be an amount equal to the "Payment Percentage" [of what the republic is going to pay to the other creditors] multiplied by the total amount currently due to NML [...] **including pre-judgment interest***
>
> *d) The Republic is ENJOINED from violating [...] [the Pari passu clause] [...], including by making any payment under the terms of the Exchange Bonds without [...] making a Ratable Payment to NML.*
>
> (NML Capital, Ltd v Argentina, No 08 Civ 6978 (TPG) (S.D.N.Y. 23 Feb 2012))

Argentina appealed and was given a stay until October 26, 2012, when the Second Circuit Court of Appeals unanimously upheld that February 23rd ruling.[45]. Between December 2 and 31, Argentina had an aggregate of U$D 3.142 billion on interest payments coming up[46]. On November 21, the court made two important rulings; the amendment of the injunction and simultaneously vacating the March 5, 2012 stay of the Injunctions. Both of them were accompanied by opinions from Judge Griesa [47]. The amendment to the injunction expanded the coercive reach of the Injunctions, bounding specific individual entities that were "participants in the payment process of the Exchange Bonds". In addition to that, the amendment adopted the exact "ratable payment" language used in the original injunctions, and was specified in the letter of opinion that "when Argentina makes the interest payments on the Exchange Bonds, [...] Argentina will be required to pay plaintiffs [pro rata] approximately U$D1.33 billion."[48]

A couple of days prior to that, (November 16, 2012) the attorneys for the Exchange Bondholder Group presented a motion to vacate the injunction given that they were "necessary parties to this action due

[44]It is likely that the economic team were hoping that the ruling would be extended until January 1st 2015 -the day after the RUFO clause expired- in order to be able to make an arrangement with the holdouts without jeopardising the debt restructuring; that is, without risking a 93% turnaround from the already exchanged bonds

[45]NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012)

[46]U$D 42 million on December 2, U$D3 billion on December 15, and U$D100 million on December 31.

[47]NML Capital, Ltd. v. Republic of Argentina, No. 08-CV-6978 (November 21, 2011)

[48]Techincally, "[i]n order to avoid confusion and to give some reasonable time to arrange mechanics, the court specifie[d] that the precise interest payment involved [were to be on] December 15, 2012.".

to the injunction's confiscatory impact on their right to payment under the Exchange Bonds, and their absence at the time the injunction was entered requires modification of the order as it applies to them according to Federal Rule of Civil Procedure 19"[49]. This motion was denied by the court ten days later.

On November 26, 2012, Argentina appealed for an emergency motion to stay to the Court of Appeals for the Second Circuit. Argentina claimed that "[...] absent of stay, the Amended Injunctions will result in increased litigation and inject more confusion and uncertainty into New York's payment system and future debt restructurings"[50]. The next day, the Exchange Bondholder Group also presented an emergency motion to stay and a further one to appear as interested non-parties.

Luckily for Argentina and the Exchange Bondholder Group, two days later, the Court of Appeals for the Second Circuit granted the emergency appeal to delay the implementation of the court order which gave Argentina enough time to carry out its interest payments.

> *IT IS HEREBY ORDERED that the motion by the Exchange Bondholder Group for leave to intervene as interested non-parties for the purpose of appealing orders entered by the district court on 11/21/12 and for the purpose of seeking a* ***stay pending appeal is GRANTED****.*
>
> (Second Circuit - Order - 12-105 Document - 757688)

Although this allowed Argentina to pay exchanged bondholders, by March 1, 2013, the Second Circuit ruled in favor of NML and ordered Argentina to set the conditions to repay the holdouts.

> *[...] it is hereby ordered that, on or* ***before March 29, 2013,*** *Argentina submit in writing to the court the precise terms of any alternative payment formula and schedule to which it is prepared to commit.[...]*
>
> *The court directs that, among the terms specified, Argentina indicate:*
>
> *(1) How and when [amortization and interests]...*
>
> *(2) The rate [...]*
>
> *(3) What assurances, if any, [...] to implement its proposal will be taken, and the timetable for such action.*
>
> (Second Circuit - Order - 12-105 Document - 903 - March 1, 2013)

As expected, this lead to no material progress. The proposal submitted by Argentina ignored the outstanding bonds and offered to reopen an exchange establishing identical conditions to the ones in 2005 and 2010, which seemed as though Argentina was making a mockery out of the Second Circuit.

[49] 08-cv-06978-TPG Document 410

[50] 08-cv-06978-TPG Document 185.

In addition to that, on February 27, 2013 (oral argument), Argentina's layers said that "[Argentina] would not voluntarily obey" the district court's injunctions, even if those injunctions were upheld by this Court. At this point, the conflict escalated politically and Argentina's officials publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagreed[51].

In the end, the Second Circuit "affirm[ed] the district court's orders" and finally the "enforcement of the amended injunctions shall be stayed pending the resolution by the Supreme Court of a timely petition for a writ of certiorari."

3.3 The overarching power of the injunction

Argentina, holding tightly to the RUFO clause, was not flexible when it came to negotiating alternative solutions with holdouts. NML was persistent and Judge Griesa, who was tired of Argentina's (in his opinion) "disregard for the [(his)] court", decided to enforce judicial injunction not only to the sovereign but also their parties involved such as banks and other financial intermediaries:

> *Such Agents and Participants shall be bound by the terms of this ORDER as provided by Rule* 65(d)(2) *and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph* 1(c) *of the* FAA*, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to NML.*
>
> NML Capital, Ltd. v. Republic of Argentina, No. 08-CV-6978 (Feb. 23, 2012)

Section §1069 of the FSIA states that "the property in the United States of a foreign state shall be immune from attachment, arrest and execution". Therefore, when a court of a particular country intervenes in a sovereign debt dispute, it is inherently limited by its jurisdictional scope and its position as a State at the time of judging another equally sovereign State. However, the injunction tread on a thin line because it was not directly referring to property which would be protected under FSIA terms. This particular judicial remedy, as referred in Rule 65 (d)(2) of the *Federal Rules of Civil Procedure*, does not directly apply to objects but rather to subjects. In this case according to Rule 65 "The order binds [...] other persons who are in active concert or participation", which in this case referred to

[51] Argentine President Cristina Fernández de Kirchner was quoted announcing that Argentina will pay the Exchanged Bonds "but not a dollar to the 'vulture funds'", referring to FAA Bondholders such as plaintiff NML Capital, Ltd. Argentina defenestrate 'Vulture Funds' at the G20 Ministerial Meeting in Mexico (see MercoPress, Nov. 4, 2012, Supp. App. 391). Argentina's Minister of Economics Hernan Lorenzino is quoted as echoing that "Argentina isn't going to change its position of not paying vulture funds [...] We will continue to follow that policy despite any ruling that could come out of any jurisdiction, in this case New York".

financial intermediaries.

This could be looked at as a legal loophole perhaps; the court is not violating the FSIA agreement since it is not exercising dominion over sovereign property. As a way of proving this statement, we can use the following logic: Argentina has to provide, at least, proportional payments to holdouts when paying restructured debt, but if the Republic would like to pay all of its debt, neither the injunction, nor any court rulings may oppose that. On the other hand, the injunctions may not confiscate money deposited in banks or trustees in order to pay holdouts (although NML systematically asked the court to do that), it only binds third party transactions to exchanged bondholders. For instance, the court cannot force Argentina to deposit money in order to pay any bondholder any amount of money; nor do they limit the other uses to which Argentina may put its fiscal reserves; it only establishes the payment ratio of old to new securities in case the Republic decides to pay exchanged bondholders.

For these reasons, the District Court, the Second Circuit and even the Supreme Court understand that the injunctions do not transfer any dominion or control over sovereign property to the court. That said, this still presents a technical debate of whether a New York judge, in a patrimonial litigation, may impose an injunction against a State. This question is debated in the literature by Cross, (2015); Gelpern, (2012); Buchheit et al., (2013); Manzo, (2018).

This injunction became a game-changer move for this particular case, but also for the sovereign debt restructure process as a whole Buchheit and Gulati, (2017). This court resolution became historical in terms of sovereign litigations and debt restructures for three reasons in particular: 1) Holdout creditors in a sovereign debt environment were given a new judicial remedy; 2) Questionable jurisdiction over foreign territory; 3) Undermining the principle of sovereignty through economic coercion.

First, the reader should note that there are two main legal forms by which sovereigns delegate the flow of money from their accounts to those of millions of bondholders, either "fiscal agent agreement" (FAA) or a "trust indenture" (TI). The underlying difference rests on the representation[52], this distinction is not a minor issue regarding responsibility (Manzo, 2018). Under an FAA, the fiscal agent serves as an agent of the issuer, and its main responsibility is the making of the principal and interest payments to the bondholders. Conversely, under trust structures a bond trustee acts on behalf of, and has responsibilities to, bondholders as a group[53]. For instance, after the funds are deposited in the trustee's account, they immediately cease to be sovereign's funds, and instead become bondholder money held momentarily by the trustee. In contrast, if funds are wired to a fiscal agent's account,

[52]See Olivares-Caminal et al. (2011)) for a more insightful explanation

[53]See Abbas, Pienkowski, and Rogoff (2019).

they belong to the sovereign until they are deposited to each creditor's accounts. This is relevant because if the trustee's account is within the territory of the issuer State, the State completes the transfer of property of the fund entirely within its own jurisdiction. The latter implies that there should be no risk of embargoes or similar dictated by foreign judges. In those cases where there is a trustee eradicated on foreign territory, even if the judge may impound or freeze the wired money, there is a valid -at the least arguable- point that judicial responsibility of the sovereign culminated after depositing the money into the trustee's account. (Olivares-Caminal et al., 2011; Manzo, 2018).

Going back to the question regarding jurisdiction, the injunction obstructed all payments, not only including the payments that Argentina make to bondholders through U.S. territory, but also other payments that didn't necessarily go through the U.S. Imagine the case of a financial institution that helps Argentina with the payment of its Peso, Yen or Euro denominated bonds, which is subject to either Argentine Law (for example Citi Bank or Banco Nación), Belgian Law (for example the Euroclear Bank) or Japanese law (for example JP Morgan) as a financial institution authorised by the competent authority of said country to operate in its market. If the fiscal agent or trustee is a branch of an international financial institution with headquarters located outside the U.S. or even if the branch is simply legally separated from its U.S. headquarters, it should not be subject to U.S. court ruling and therefore not comprehended by the injunction. Because of the different legislations and currencies on the 2005 and 2010 restructured bonds, the injunction opened up discussions regarding the appropriate universe of bonds that would be affected by the effects of the court ruling, leading to a cascade of motions for clarification from non-interested parties towards the court.[54] There was particular pressure on upcoming payments in June regarding Argentine law bonds issued in dollars. The court issued an order authorising a one and only payment on a case-by-case basis [55] and clarified that "[the court order] does not [...] prohibit payments on the Peso-denominated bonds [...] and governed by Argentine law when issued, and which remain denominated in Pesos". However, for cases regarding foreign law, the judge kept denying Euro Bondholders' motions to clarify that the injunction does not apply to certain third parties because that would (according to the judge) "start making important exceptions to the basic ruling and injunction".[56]

The last reason why the injunction was so relevant was because even when a lack of jurisdiction

[54] 08-cv-06978-TPG Document 545 (Memo of Law of Eurobondholders in support of motion for clarification), 08-cv-06978-TPG Document 572 (JPMorganChase's letter application for guidance with respect to payment of Yen-denominated Exchange Bonds).

[55] 08-cv-06978-TPG Document 683 (the court allows Citibank to process the September 30, 2014 interest payment -approximately U$D 5 million- on the U.S. Dollar-denominated, Argentine law bonds). 08-cv-06978-TPG Document 625 (Further order regarding Argentine Law bonds) 08-cv-06978-TPG Document 627 (The court allows JP Morgan to effectuate the One-Time Payment of the U.S. Dollar-denominated Bonds under Argentine law.)

[56] 08-cv-06978-TPG Document 724 (district Court order denying Euro Bondholders' motion to clarify).

was acknowledged, Judge Griesa implicitly coerced (from both legal and economic perspective) third parties to effectively stop Argentina's outflow to non-holdouts without directly violating the FSIA agreement. First of all, it is understood that a sovereign has a de facto power to pay or not to pay its debt obligation and is also entitled to define the order of seniority by *de facto* (Bolton & Jeanne, 2007). However, by blocking payments[57] to exchanged bondholders Griesa effectively overruled the principle of sovereignty by undermining Argentina's factual ability to decide over sovereign payments.

Let's take the particular case of *Citigroup Inc.* Financial intermediaries, such as *Citibank A*[58], which was legally based in Argentina and to all legal purposes separated from its U.S. counterpart felt legally threatened by the injunction and were forced to choose either to accept legal (and also economic) sanctions from Argentina or potentially from the U.S. on American soil. There were long discussions held regarding whether Citibank could or could not transfer U.S. payments on Argentine law bonds. This statement Karen E. Wagner (Citibank's lawyer at the time) when filing for a stay application clearly reflects the risks Citibank faced by the court's injunction:

> *As Citibank has previously informed this Court,* ***it will not go into contempt.*** *Citibank therefore faces serious harm on March 31, 2015 if no stay is granted because the Republic of Argentina (the "Republic") has publicly indicated that it will continue making payments on the Argentine Law Bonds despite this* ***Court's orders and will penalize Citibank Argentina*** *if it fails to remit payments to its customers, including by* ***revoking Citibank Argentina's license and imprisoning its employees****. [...] These risks are not hypothetical. [...] Citibank will suffer immediate and irreparable injury, including the possible loss of its valuable Argentine banking license. [..] Plaintiffs will not be harmed if Citibank processes the March 31 payment [...] harming Citibank will not cause the Republic to comply with this Court's orders or negotiate with Plaintiffs*
>
> (Citibank's District Court stay application - 08-cv-06978-TPG Document 763)

Legal and economic coercion became evident in this case. The end result was almost predictable: "Citibank has determined to have its Argentine branch, Citibank Argentina, develop, and execute, a plan to exit the custody business in Argentina as soon as possible."[59]

To put it into perspective, a Japanese or European bondholder that carried Argentine bonds issued under Japanese or UK law and currency could not be paid, even when 1) the Republic deposited the money; 2) payments were made through trustee's bounded by Argentine Law; 3) payments were made

[57]Although one could argue that technically he did not block payments, he instead claimed ratable payments to holdouts. But given Argentina's fear of breaching the RUFO clause it was effectively the same.

[58]Citibank A. is a branch of Citibank N.A., located in Buenos Aires and licensed by the Central Bank ("BCRA") and the National Securities Commission (CNV) as an independent argentine legal entity.

[59]08-cv-06978-TPG Document 766 (Letter from Citibank to Judge Griesa informing exiting custody business.)

outside the United States and processed through foreign entities. All of this resulted from a court order from a New York based judge, who was also threatening to enforce the U.S. judicial system on any entities that may challenge their decision.[60]

This was most certainly a creative heterodox alternative designed to pressure the sovereign debtor to pay the creditors. It was not subtle, but it was effective enough to avoid conflicting with FSIA. So far, Griesa's injunction was the most notable victory for a creditor obtained in the context of a sovereign debt litigation and most certainly a game-changer for the international sovereign debt restructuring framework (Weidemaier & Gulati, 2013).

4 The International scope of the case

This case shocked the world. The amount of support (as well as criticism) that the Argentine government received through the restructuring and judicial process was unbelievable. It is hard to find other litigations where the sovereign community were so involved. During the certiorari requested by Argentina, and supported by the Exchange Bondholders Group [61], a series of Amicus Curiae were filed. Aside from the documents presented to the court, Argentina received support from multiple international associations, development banks, sovereign governments and renowned academics.

Extract of the Republic of France's Amicus Curiae:

> *In France's view, the Court of Appeals' ruling is based on an erroneous under standing of the meaning of the pari passu clause, and contradicts the well-settled mainstream market understanding that a pari passu clause does not covenant that all payments will be made by a borrower ratably with the borrower's other unsubordinated debts, but rather provides protection against legal subordination of claims only.*
>
> Amicus Curiae filed by France 03-24-2014

Extract of the Republic of Brazil's Amicus Curiae:

[60] Check the transcript of hearing before Judge Griesa

[61] "Petitioner supports the grant of certiorari that the Republic of Argentina is seeking in this same case.". See petion for a writ of certiorari filed by Exchange Bondholder Group. Docket 13-991

[I]njunctions like those issued in this case are an affront to the sovereignty and dignity of foreign nations [...] The injunctions will undermine the well established informal system that has developed for sovereigns to restructure defaulted debt. That system may benefit from refinement, but it has been an important and necessary feature of the international financial architecture [...] The consequences of this case simply cannot be overstated. [...]

This Court should grant certiorari to rectify the serious and enormously consequential errors below, to preserve settled expectations—of foreign nations and markets alike—regarding the meaning of the pari passu clause,

Amicus Curiae filed by Brazil 03-25-2014

Extract of the United Mexican Sates' Amicus Curiae:

Mexico views with concern the decision of the Court of Appeals for the Second Circuit, pursuant to which a United States court has empowered private bondholders to jeopardize the economy of a sovereign nation. [...]

The decision of the Court of Appeals allows them [Holdouts] to do exactly that [circumvent the FSIA], and places the economic policies of a sister sovereign nation at the mercy of holdout creditors in a way never contemplated under the FSIA.

Amicus Curiae filed by Mexico 03-24-2014

Extract of the ParlaSur Opinion regarding the topic:

El parlamento declara: Su solidaridad con el pueblo y gobierno de la República Argentina y su respaldo al logro de una solución que no comprometa el amplio proceso de reestructuración de su deuda soberana, rechazando el comportamiento de agentes especulativos que ponen en riesgo los acuerdos alcanzados entre deudores y acreedores, afectando la estabilidad financiera global.

ParlaSur Opinion 07-07-2014

Extract from Juan Pablo Bohoslavsky, the Independent expert on the effects of foreign debt and other related international financial obligations of States for the UN:

Vulture funds' disruptive litigation is only one – but probably the most prominent – evidence of the consequences of the global legal void on debt restructurings. The nature and our understanding of sovereign debt problems have changed over the last decade in ways that make a strong case for minimum but legally and economically international rules on sovereign debt restructuring. There are a number of possible options and proposals to fill this void, which might work in complementary way: National legislation, collective action, facility programs in multilateral institutions and soft principles can play, to certain extent, a certain role.

Letter presented by Juan Pablo Bohoslavsky 09-05-2014

The UN Secretary General, Ban Ki-moon, has recognized that:

"[I]nternational ad hoc arrangements for debt crisis resolution have created incoherence and unpredictability. Different courts have very different interpretations of the same contractual clause and can impose a wide array of rulings. Politics and interest groups can impact on the outcome of the rulings and debt restructuring, compromising consistency and fairness. The Republic of Argentina v. NML Capital Ltd. rulings have made future debt restructuring more difficult as debtors are left with only moral suasion and foreign relations as incentives to encourage creditor coordination"

Human Rights Council Advisory Committee of 'vulture funds' and human rights

Whilst the IMF did not present a brief supporting Argentina, they did express to the media how consternated they were on the matter, and presented reports pointing out the several consequences that might happen if the New York Court were to adopt such decisions: "since the type of remedy provided to the holdout creditors in the New York Court Decisions enhances the leverage of holdouts, these decisions have increased the risk that holdouts will multiply, as they now have the ability to extract a preferential recovery outside of a debt exchange"[62].The IMF statement acknowledged how the court ruling effectively changed in the -implicitly understood- set of rules on sovereign debt, giving more leverage to holdouts.

There were also forces going against Argentina on the matter. Holdouts added pressures by assembling a lobby group called the "American Task Force Argentina (ATFA)" headed by politicians, interest groups and other former government officials. For instance, Michael Mukasey, who served as Secretary of Justice at the end of Republican George Bush's term, was commissioned to present a brief in favour of the *vulture funds*. He filed a brief, arguing that the court should not waste their time on Argentina, which "has put itself in the position of a fugitive from justice who eludes law enforcement authorities while seeking to press an appeal"[63]. His opinions were considered as a "high profile" amicus curiae

[62]IMF Report 2014,"Strengthening the contractual framework to address collective action problems in sovereign debt restructuring."

[63]https://www.reuters.com/article/argentina-bondholders-idUKL2N0NU01H20140508.

from the opposing side.

Although the level of international support was something unprecedented in sovereign litigation history, we can't omit how impartial their opinion was. The fact that all sovereigns had stake if the Supreme Court upheld the Second Circuit ruling (given they all had some debt under foreign law subject to potential litigations) should not be ignored. Nevertheless, there is a clear underlining argument presented by the parties that favoured Argentina, expressing that there was a pre-existing scheme completely understood by the market where protection against legal subordination did not imply ratable payments: "While a handful of commentators have supported the interpretation offered by NML, the majority have supported the view that the typical pari passu clause does not require ratable payments, noting that this is consistent with the market understanding of the clause"[64], so the difference between willingness and ability to face the debt is a contract distinction itself. The Court reaffirmed once and again judge Griesa's interpretation regarding payments subordination.

5 The beginning of the end

5.1 The 8$^{\text{th}}$ default, a turning point for the case

To break the cycle of uncertainty, on June 16, 2014, the Supreme Court of the United States refused to review Argentina's appeal[65] and the case returned to the Second Circuit[66]. Two days later stay of enforcement was lifted, affirming the district court's orders which demanded that Argentina comply with the payment of U$D 1.33 billion plus interest to holdouts[67]. Argentina was under pressure from June 30 upcoming payments and announced that it could not comply with the court ruling since that would imply breaching the RUFO clause and potentially jeopardising the whole restructure:

> *"Our conviction [...] is to comply with the successful process of voluntary debt restructuring which was accepted by 92.4% of the bondholders. It should not be tampered by a minority of 1% of the bondholders, thereby striking from a minority position, the collective effort of the Nation and the Argentine people to honour our commitments".*
>
> Axel Kicillof, National Television (June 26, 2014).

Along these lines, on June 26, 2014, Argentina deposited more than U$D 1 billion dollars to U.S.

[64] United Nations Conference on Trade and Development. 2016, October 26. Background Note: Vulture Funds in Action: Economic and Social Impact. Available at https://www.un.org/en/ga/second/71/se2610bn.pdf

[65] US Supreme court, order list: 573 U. S, *certiorari denied*, 13-990 & 13-991.

[66] We will not specifically dive into the reasons for the court denying the certiorari or if in fact the US supreme court should have taken a stand in the matter. Read Simon and Crawford (2015b) for further discussion on this matter.

[67] Second Ciurcuit - 12-105 Document - 1056 (Second Circuit lifted the stay of enforcement).

Banks to settle the maturity due on June 30 corresponding to its restructured debt (no payments to the holdouts were issued). The day after, the money was seized and frozen by the trustees by orders of the U.S. Justice.[68] Of course this meant that the bondholders who entered the 2005 and 2010 exchanges did not receive payment on June 30 starting a 30 days grace period in order to avoid default. Negotiations were held but no settlement was reached since all parties were firm on their position and the issue became rather political.

On July 30, 2014, Standard & Poor's downgraded Argentina to selective default (SD category) and the whole act was popularly described as a *technical default*[69]. Financial observers include some episodes behind this definition and Argentina's case was one of them. The missed payment lead to a credit event. The *International Swaps and Derivatives Association* (ISDA) assembled a committee to define if "a failure to pay credit event occurred with respect to the Argentine Republic"[70]. The "Yes" vote was unanimous, activating the *Sovereign Credit Default Swaps* (SCDS). This caused another controversy given that some of the parties voting in the committee were also involved in the restructuring.[71]

The Argentine President and Minister of Economics kept claiming that there was no default since the money was deposited and therefore Argentina complied with payments, arguing that they were not responsible for the actions taken by the trustee.

> *"To say that Argentina defaulted is an atomic stupidity".*
>
> Axel Kicillof, National Television (July 31, 2014).

> *"Default is to not pay, if someone intervenes and prevents collecting payment then it is not a default.".*
>
> Cristina Fernandez de Kirchner, National Television (July 31, 2014).

From this point onwards, Argentina's approach was drastically different. From a financial market perspective, Argentina had defaulted and was consequently now open to new potential law suits from

[68] 08-cv-06978-TPG Document 633 (the court describes as illegal the payment made by Argentina to BNY and a violation of the Amended February 23 Orders). The original claim from the holdouts asked the court to use the money wired as partial payment for them but it did not carry.

[69] Although it could be argue that in fact it was a "substantial default" (Abbas et al., 2019)

[70] One can find the members of the committee and their respecting votes at Americas ISDA Determinations Committee, Issue 2014073101, August 01, 2014.

[71] JPMorgan Chase Bank, N.A., Citibank, N.A., Elliott Management Corporation. In fact there were discussion on wether Elliott Management Corporation had Argentine SCDS at the time. See Do the Holdout Hedge Funds Hold Argentine Credit Default Swaps?

restructured bondholders. There was no further incentive to negotiate and the political landscape completely predominated. The disregard for the court was absolute and the legal dispute was an effective way to deviate the attention from economic downturn, focusing on the political landscape and polarising the electorate.

Evoking social mobilisation, the Kirchner administration proselytised the slogan "Patria o Buitres" ("homeland or vultures"[72]), a binary definition that suited the barnstorming rhetoric and bent public perception on capitalism and those who supported it. The whole purpose was to change the optics and pushing the idea that vultures and the markets should be considered a threat to economic stability. Kirchnerist militants animated rallies between July and December 2014, which they self defined as "anti-imperialist and anti-oligarchic", in support of President Kirchner and its fight against the vultures. The speeches were intrepid and clearly provocative but above all praising the officialism's strength in the fight against vultures.

> *"Today, with the support of the judicial system of [the US], Argentina is now being assaulted by these vulture funds. [...] These vulture funds also threaten and hold the economy of our country hostage by provoking rumours, slander and libel from the personal to the economic and financial, so that they sometimes act as a destabilizing factor in the economy. Those who set bombs are not the only terrorists; those who destabilize the economy of a country and create poverty, misery and hunger through the sin of speculation are economic terrorists.".*
>
> Cristina Fernandez de Kirchner, 69th session of the UN General Assembly (September, 24 2014).

On September 11, 2014, Argentina enacted the law 26.984, known as the *"Sovereign Payment Law"*, which allowed restructured bondholders to exchange their bonds for other bonds with equivalent terms but issued under Argentine law. The whole purpose was to change the trustee and law that govern the bonds to bypass Griesa's injunction and make payments through the Banco de la Nación Argentina rather than through Bank of New York Mellon. The judge interpret this as an additional attempt to undermine the court and found Argentina to be in contempt[73]. On December 31, 2014, the RUFO clause expired, however at this point it made no significant change given that Argentina was already in default and the matter was completely politicised. On October 22, 2015, Judge Griesa granted the other bondholders who did not accept debt restructuring in Argentina the same rights as speculative funds with judgment in favour in their court[74], costing the Republic another U$D 8 billion dollars. These group of bondholders will later be known as the "me too".

[72] Perhaps a more suitable translation would be "The Republic or the vultures".
[73] 08-cv-06978-TPG Document 687.
[74] 15-cv-02611-TPG Document 22 (District Court Order granting partial summary judgment to additional "me too"

5.2 New government, new approach

On November 22, 2015 the opposing party *Cambiemos* lead by Mauricio Macri won a hard-fought presidential election, changing the dynamics of the dispute. One of Cambiemos' promises was to reinsert Argentina back into the international markets[75]. To do so, it was imperative to close a deal with holdouts, as it was obvious that a *non-paying stance* significantly decreased the likelihood of accessing financial markets.

On January 14, 2016, executives from the new administration had their first meeting with the funds with a clear payment proposal. The offer presented behind closed doors was significantly closer to what the holdouts were expecting, in contrast to the offers submitted by the previous administration. Because of the large sum (approximately U$D 10 billion), in order to avoid a drastic fiscal impact, payments were contingent upon the capacity of the government to issue new debt. However, Argentina would not be able to do so until Judge Griesa lifted the injunction. To overcome the impasse, and prove trustworthiness, Cambiemos gathered approval from Congress to repeal two laws: the Lock Law 26.017 and the 2014 Sovereign Payment Law 26.984 as they both acted as legal barriers preventing any possible restructuring agreement[76]. In just a couple of months, the new administration took significant steps towards global financial integration, hoping this could open the door to foreign financial investment.

Griesa made it clear that he favoured Cambiemos' approach as opposed to how the previous administration handled the judicial process.

> *"As this court recognized earlier this year, the republic's November 2015 election of Mauricio Macri changed everything. [...]"*
>
> *"President Macri's government has consistently declared its desire to resolve the disputes, which marked a turning point in the republic's attitude and actions. [...]".*
>
> *"Under prior Argentine administrations, [...] the Republic never seriously pursued negotiations toward settlement. Instead, the Republic's leadership engaged in rhetoric, calling plaintiffs 'vultures' or 'financial terrorists', while showing open contempt for this court's rulings".*

Judge Thomas Griesa - 11-cv-04908-TPG Document 47.

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plaintiffs) and 14-cv-08601-TPG Document 37 (District Court Order granting "me too" motion for specific performance and injunction).

[75] An attempt on its word was modifying the "*capital market Law*" (law 27.440) back in 2018, attempting to reduce power held by regulatory institutions to avoid arbitrary fiscal persecutions.

[76] Soon after, they enacted Law 27.249, a law that presented a set of steps to encourage amicable negotiations with holdouts.

The end of the saga turned out to be much less exciting as it was all finalized in behind-closed-door negotiations with mediator Daniel Pollack[77]. On February 16, 2016, holdouts accepted a formal proposal made by the Republic, which was close to 75% of the claimed debt, and this included accrued interest from 2001 and lawyer's fees[78].

However, because the offer was contingent on Argentina's capacity to access the market, the Congress held the last piece of the puzzle, as they had to approve the issuance of new debt to pay holdouts. On March 30, 2016, 75% of the senate voted in favour of the proposal (with 54 of votes in favour and 16 votes against), putting an end to the final chapter of what seemed to be a never-ending conflict. New bonds were issued for over U$D 13 billion to make payments. Argentina paid U$D 9.3 billion dollars to creditors, of which U$D 6.2 billion[79] were allocated directly to those who reached an agreement with Argentina before February 29, while the remaining U$D 3.1 billion was transferred to a trust under the Bank of New York to pay those who reached an agreement after that date. In addition, the court unfroze U$D 3 billion to restructured bondholders held by the Bank of New York under orders of the court in 2014. Total payments to bondholders added up to an approximated total of 12 U$SD billion.

Lastly, the injunction was lifted;

> *"Having carefully reviewed the Republic's submissions, the court now finds that the conditions precedent have been met. Accordingly, the injunctions are vacated in all cases."*
>
> Judge Thomas Griesa - 08-cv-06978-TPG.

6 Policy Measures

Setting aside the facts of the case and taking a step back from the never-ending discussion of who was right and who was wrong, perhaps the most prominent aspect of *The Republic of Argentina vs NML capital* was the resulting policy measures that arose from it.

Lucas Llach commented that "If judges reward those who do not accept restructuring deals and ask for the totality of payments, these deals, when faced with bankruptcy, will be impossible." One could argue that the only reason why this was possible in the first place was because there is a flawed sovereign restructure mechanism with vague boilerplate language; Lee Buccheit affirmed in one of his talks that "It doesn't make sense putting [a pari passu clause] in the clauses for sovereign bonds,

[77]Mediations and arbitrations follow a different path; reunions, meeting and documents are to some extend confidential and it is well known to be a more efficient and effectiveness process.

[78]Conditional of getting market funding to pay for it.

[79]Table 1 details individual payments to investment funds.

if you interpret literally the clause means nothing."[80] In the end, this particular case intensifies the long-running debate among multi-national institutions, academics and governments towards some systematic reforms.

One could argue that the Argentine case, along with other cases at the time (Peru and Greece for example) exposed flaws in the system and subsequently lead to four important policy measures impulsed by multilateral institutions but with general market consensus: 1) Nine basic principles on sovereign restructures 2) A change in the boilerplate language of the Pari passu clause 3) An enhancement on the collective action clauses. 4) Correcting the boilerplate language in the RUFO provision. Despite this being a minor policy change in the broader spectrum of reforms, we will mention it as Argentina's biggest constraint.

6.1 Basic Principles on Sovereign Debt Restructuring Processes

On September 9, 2014, the general assembly of the United Nations took a big step "towards the establishment of a multilateral legal framework for sovereign debt restructuring processes"[81] when adopting resolution 68/304 which lead to a series of discussions attempting to define a statutory mechanism to deal with sovereign restructures. Out of the 176 member states that voted, 124 voted in favour, 41 abstained, and 11 voted against. The group of countries that abstained or voted against the resolution included mostly advanced economies. The central point of the resolution was to:

> *"[E]laborate and adopt through a process of intergovernmental negotiations, as a matter of priority during its sixty-ninth session, a multilateral legal framework for sovereign debt restructuring processes with a view, inter alia, to increasing the efficiency, stability and predictability of the international financial system and achieving sustained, inclusive and equitable economic growth and sustainable development, in accordance with national circumstances and priorities."*
>
> Point 5 of the 107th plenary meeting 9 September 2014

A year later, September 9, 2015, the general assembly adopted resolution 69/319, "*Basic Principles on Sovereign Debt Restructuring Processes.*"[82] The approved resolution provided clear guidance on how sovereign restructures should be carried out and contemplated a set of 9 principles that should serve as the basis for any process of this type: *sovereignty, good faith, transparency, impartiality, equitable treatment of creditors, sovereign immunity, legitimacy, sustainability, and majority restructuring.* Out of the 183 countries that voted 136 voted in favour, 41 abstained, and only 6 countries voted against. The latter group included the US and the UK, the two major jurisdictions for sovereign debt issuances by emerging economies, as well as Canada, Germany, Israel, and Japan.

[80] https://www.youtube.com/watch?v=DK-RiSAtjVs

[81] The title of resolution 68/304.

[82] For futher details on the resolution check United Nations Sixty-ninth session of the General Assembly.

The first principle states:

> *"1. A Sovereign State has the right, in the exercise of its discretion, to design its macroeconomic policy, including restructuring its sovereign debt, which should not be frustrated or impeded by any abusive measures. Restructuring should be done as the last resort and preserving at the outset creditors' rights."*
>
> UN - Basic Principles on Sovereign Debt Restructuring Processes

The United States considered that a statutory mechanism for debt restructurings would likely create uncertainty in financial markets and objected to a "right" to restructure sovereign debt expressing concerns that this could undermine the enforceability of contractual terms.

The EU's common position[83] was against the resolution due to four reasons. 1) It noted that the IMF was the "appropriate institution" to host such discussions. 2) The impartially principle, according to the EU, fitted poorly to their institutional setting and its practical situation. 3) They claimed that the equitable treatment principle "denies the customary preferred creditor status recognised to the International Financial Institutions [such us IMF, ESM or similar] when lending to a sovereign in distress, with possible major negative implications on their ability to fulfil their primary mission". 4) The last comment was made on the majority principle. This last principle is arguably the most important of all 9 principles as it emphasises foreign states to focus on the majority of the creditors rather than minorities (most likely holdouts) to prevent cases such as the one for Argentina.

> *"9. Majority restructuring implies that sovereign debt restructuring agreements that are approved by a qualified majority of the creditors of a State are not to be affected, jeopardized or otherwise impeded by other States or a non-representative minority of creditors, who must respect the decisions adopted by the majority of the creditors. States should be encouraged to include collective action clauses in their sovereign debt to be issued"*
>
> UN - Basic Principles on Sovereign Debt Restructuring Processes

The EU felt this statement was problematic given that a very large part of the world's sovereign issuances are issuing under foreign (mainly NY and UK) law. They argued that "foreign jurisdiction does, by definition, involve accepting the competence of the courts of another state", which opposes

[83] despite the fact the EU does not have a vote on its own, their statement is relevant to perhaps understand the reasons behind Germany's and the UK's vote. For the whole comment by the EU read the "EU common position on the UN draft resolution A/69/L.84 on 'basic principles on Sovereign debt restructuring processes'."

the majority principle.

Despite some oppositions from a couple of "big dogs", the UN laid out steps in the right direction. Even though this is far from an international bankruptcy code, it was a sign from most countries as a step towards a solution for an existing problem. Although guidance of this sort was likely to have come eventually, the Argentina case was an eye opener for most sovereigns that issue debt under foreign laws.

6.2 ICMA Pari Passu modification

The Argentina case[84] highlighted the flaws within the boilerplate language that sovereign debt contracts had at that time, creating urgency to avoid a similar holdout investor problem in the future. Perhaps the greatest issue was that despite market consensus over the meaning of a clause, when on trial, a judge could provide a re-interpretation that could radically change the value of bonds in the markets and the way to effectively handle restructuring process. Particularly on the pari passu clause, Buchheit and Pam (2004) said the following,

> *"For several decades, lenders and borrowers in the international capital markets have, by their behavior, demonstrated a collective understanding of the import of the clause [...] Inevitably, there was a risk that the oracular nature of the clause would tempt someone to speculate about alternative meanings. That risk has recently materialised, with potentially serious consequences for both lenders and borrowers."*

On August 29, 2014, the International Capital Market Association (ICMA) released a new set of model clauses for foreign sovereign bond contracts, which included modifications to the language of certain existing clauses such as the Pari Passu clause, in order to prevent courts from ordering debtors to pay holdout investors whenever the debtors are paying holders of restructured debt.

[84] among others like Peru and Greece.

> *"The Notes are the direct, unconditional and unsecured obligations of the Issuer and rank and will rank pari passu, without preference among themselves, with all other unsecured External Indebtedness of the Issuer, from time to time outstanding, provided,* ***however, that the Issuer shall have no obligation to effect equal or ratable payment(s) at any time with respect to any such other External Indebtedness and, in particular, shall have no obligation to pay other External Indebtedness at the same time or as a condition of paying sums due on the Notes and vice versa."***
>
> ICMA standard Pari Passu (August 2014)

The last section proposed by ICMA leaves no room for a ratable payment interpretation. The new model clauses presented by ICMA were also backed by the IMF:

> *"This pari passu clause is designed to make clear that it is only an 'equal ranking' clause that* ***prohibits the sovereign from legally subordinating*** *the indebtedness to other relevant debt. [...] [T]he ICMA Model Clauses make explicit that, while it requires equal ranking of all unsubordinated external indebtedness, it does not require that such indebtedness be paid on an equal or ratable basis."*
>
> IMF (2014)

There is an interesting point to highlight here; Argentina was not the first case that this tangent interpretation was used in, therefore why wasn't the boilerplate language changed after Elliott v. Peru yet it was quickly changed after Argentina v. NML? On this matter, Newfield (2015) made an extremely valid point arguing that after Argentina, the pari passu clause became a "weapon" that holdout investors could use. In Peru, the danger of the Belgian Court's interpretation of the pari passu clause was recognised, but no harm ultimately arose and the decision was considered a one-off occurrence. Choi and Gulati(2006) conducted a set of interviews and found that the market's interpretation in Elliot vs Peru was that the event in question was most likely a one-and-only situation, pointing out that it is unlikely for the "standard-form clauses that were present in every single sovereign debt instrument across the globe to change every time there was an aberrant court decision", mostly due to coordination issues. Despite the lack of market responsiveness in the previous litigation, the sovereign debt community organised itself to produce several amicus briefs, favouring Argentina and opposing the holdout position.

6.3 CAC's enhancement

The second important new model clause published in August 2014 by the ICMA, and then revised in May 2015, was the standard forms for collective action clauses (CACs). The lengthy process, involving two successful restructures, with over 90% of adhesion, was simply not enough for Argentina to end the holdout dispute as the FAA bonds lacked CACs. Throughout Argentina's litigation process, the importance of robust CACs became more and more evident (Stolper & Dougherty, 2017; IMF, 2014). These new standard forms included "aggregation" features to avoid holdouts blocking broader restructures by purchasing above threshold levels on a series-by-series basis. New standardised CACs included additional flexibility, allowing for a "single-limb" or "two-limb" voting procedures. The "single-limb" enables bonds to be restructured using only one condition, either on the basis of single votes across all affected instruments[85] or on an "aggregate" level. The "two-limb" requires two separate majorities (with most likely different thresholds) to approve a change in bond terms: one being a series-by-series approach and one at an "aggregate" level.

Argentina's case was useful for markets to rethink the potential holdout externality and ways to reduce it. The emergence of CACs had massive impacts on sovereign debt restructures and debt markets. For instance, Fang, Schumacher, and Trebesch(2021) argue that "CACs help to reduce holdout rates, especially for bonds with high haircuts." On the other hand, Fang et al.(2021) found that regular CACs lowered the cost of borrowing while enhanced CACs (ICMA sort) are associated with lower bond yield spreads. This is partly because "[CACs] are expected to ensure an orderly and efficient debt restructuring process, [...] benefit[ing] both issuers and investors alike".

6.4 The new RUFO clause

The second discussion one should consider is whether the RUFO clause actually applied in the case of mandatory payments. On the contract terms, one shall find that the RUFO clause stipulates "if [...] the Republic **voluntarily** makes an offer to purchase or exchange (a 'Future Exchange Offer'), or solicits consent to amend (a 'Future Amendment Process')", the question arises whether court mandatory payments fall under the definition of voluntarily. If they do not, then Argentina should be able to comply with court orders and pay holdouts on a ratable basis when making payments to exchanged bondholders. On the other hand, if the RUFO clause was binding, then a breach in the clause due to ratable payments might have opened the possibility for further litigations which could have varied from U$D 240 billion up to U$D 500 billion (Juan Manuel Telechea y Nicolás Todesca).

If payments were mandatory by court, it does not look like they would have been made voluntary by the sovereign, but if one goes back to the principles of sovereign immunity a different interpretation may appear. First, one could make the argument that when the sovereign waived its sovereign immunity, it voluntarily accepted to be at the court's disposal which entails that the RUFO clause is in fact binding. However, this interpretation may seem like a stretch and not an actual claim. The

[85]subject to safeguards designed to ensure inter-creditor equity.

second possible interpretation is that, even if the sovereign waived its immunity to be judged under foreign court as a commercial actor, it does not waive its sovereign immunity over its governmental assets. This means that even if there is a mandatory ruling and the district court finds Argentina in contempt, there is no direct way to enforce payments on the sovereign nor is it possible to seize foreign (non-commercial) government assets since they are protected by the FSIA agreement. This opens the discussion, given that enforceability is in question, as to whether making ratable payments is in fact voluntary rather than mandatory. For these reasons, if there are arguments which would make the RUFO clause potentially binding then the risks were simply, at least from Argentina's representatives point of view, too high to take.

After the event, the following sentence was added to the RUFO clause as a standard practice in any new issuance:

> *"The Republic shall have no obligation to make the offer described if the purchase, exchange or amendment is made in satisfaction of a final, non-appealable court order or arbitral award."*
>
> Argentine bonds indenture 2020

7 Conclusion

As we have shown in this paper, sovereign debt negotiations are complex enough by themselves, let alone when foreign courts intervene. Was Argentina in the wrong when refusing to pay holdouts? Or was the judge wrong when blocking sovereign payments and ordering Argentina to comply? At the end of the day, the question of "right" and "wrong" becomes a matter of perspectives. The core issue is the lack of an efficient international sovereign debt bankruptcy procedure, which tackles the issue of moral hazard as well as adverse selection presented in sovereign debt. For instance, sovereigns would like to access international financial markets at lower interest rates and to do so, they are willing to sign a contract (which is binding under foreign law) where they waive certain aspects of their sovereign immunity. However, because the mechanisms to enforce a sovereign to comply are limited, the sovereign is always tempted to default when facing financial stress. On the other hand, when the sovereign defaults (or is close to) the price of the current bonds drop significantly (given the low probability of payment). This causes an adverse selection problem, because only speculative funds who have the resources and aim for high multiples will purchase defaulted debt. Therefore, the probability of a smooth restructuring reduces very quickly. Finally, when bonds are issued in multiple laws, issues regarding court competency may rise. To illustrate the point, Argentina issued debt in four different jurisdictions, meaning that when Griesa blocked Argentina's payments to European bondholders in order to enforce payment on US plaintiffs he effectively created a dispute over jurisdiction.

Part of why this flawed lending mechanism has prevailed is probably because any other alternative system is complex to structure (Guzman et al., 2016). What continues to happen, and perhaps always will, is that sovereign debt contracts adjust their boilerplate language to adequately reflect the true intentions of all parties. The crucial question here however is: why is the Argentine case so relevant? As exemplified in the events laid out in this paper, Argentina exposed various loopholes in sovereign contracts, which lead to formal changes in the pari passu clause, RUFO and CAC's. Additionally, and perhaps most importantly, it undeniably demonstrated that something that is well understood by the markets is not necessarily understood by the court.

The underlying issue -and part of the reason why this paper was written- is that the unilateral approach to sovereign debt restructuring fails to capture the big picture. For instance, those who focus on the legal approach tend to miss the economic implications on the case. For example, if Argentina accepted to pay in full and the RUFO clause was activated, Argentina could have paid up to U$D 500 billion which is practically equivalent to one year of GDP and about fifteen times the amount of foreign reserves Argentina had at the time. The economic implications would have been colossal in this case, regardless of any potential payment scheme. In addition, how the case was handled proved to be a complete misunderstanding of the financial markets and how the sovereign restructures were previously conducted. On the other had, those who looked at the subject from only an economic standpoint also fail to comprehend how relevant the underlying structure of the contracts was. Economists tend to overlook the specification of contracts until a particular event (in most cases a default) brings them to life. By doing so, hedge-funds, analysts and perhaps rating agencies tend to undermine contractual risks when pricing assets (Blustein, 2006). As mentioned previously, a subtle re-wording of the boilerplate language would have left no room for any "controversial" rulings and possibly making this case just another one of many sovereign restructures in history, proving once again "the devil is in the details".

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Appendix

1) Old vs New debt structure

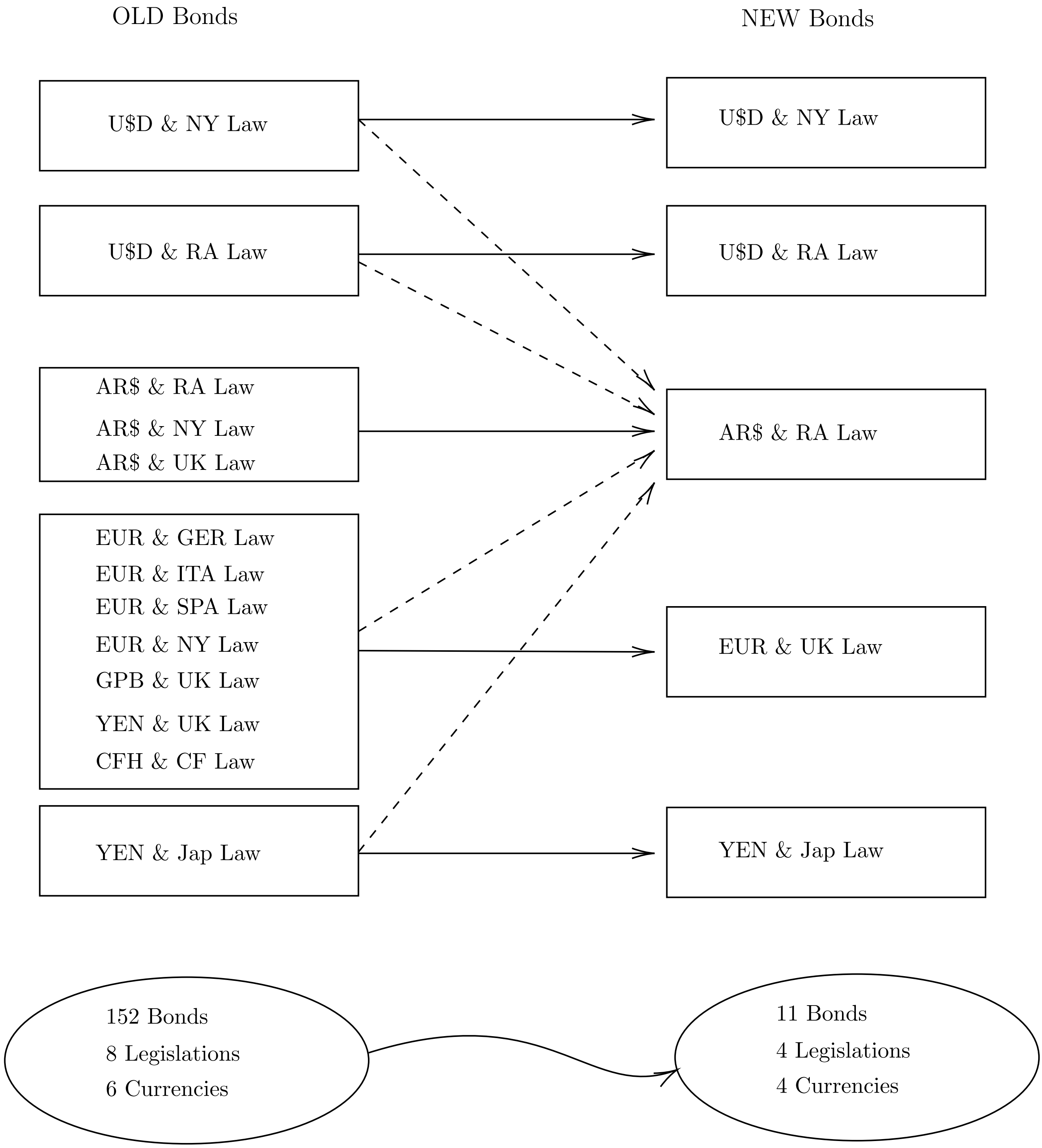

Figure 1: 2005 Exchange - Changes in debt structure

Funds	Pyment	Compensatory Interest	Legal fees
NML Capital, Ltd.	2,390,120,223	10,379,124	26,111,111
EM Ltd.	849,201,747		
Blue Angel Capital I LLC	383,012,907	2,301,391	26,111,111
Aurelius Capital Master, Ltd.	405,464,795	2,900,136	26,111,111
Capital Ventures International, Ltd.	221,833,953		
Aurelius Capital Partners, LP	142,693,987	336,273	26,111,111
Capital Markets Financial Services	110,468,850		
FFI Fund Ltd.	524,216,735	275,936	26,111,111
FYI Ltd.	340,112,111	183,840	26,111,111
Aurelius Opportunities Fund II, LLC	106,949,843	1,164,497	26,111,111
ACP Master, Ltd.	81,655,774	945,090	26,111,111
Procella Holdings, L.P.	37,866,814		
VR Global Partiners, LP	35,508,705		
Group payment	308,560,843		
Lightwater Corp Ltd.	9,634,370		
Olifant Fund, Ltd.	44,023,626	855,764	26,111,111
Rafael Settin	3,235,439		
Old Castle Holdings, Ltd.	963,437		
Paolo Ercolani	1,008,964		
Tortus Capital Master Fund, LP	739,265		
Total	5,997,272,388	19,342,051	235,000,000

The Group payment includes Montreux Partners, L.P., Los Angeles Capital, Wilton Capital Ltd., Cordoba Capital.

Source: Argentina's Cámara de Diputados de la Nación, Report No. 95.

Table 1: Direct payments to funds on April 22, 2016.