VULTURE FUNDS

THE LAWSUIT AGAINST ARGENTINA AND THE CHALLENGE THEY POSE TO THE WORLD ECONOMY

AUTHORS:

ROMINA KUPELIAN AND MARÍA SOL RIVAS

TRANSLATED BY:

Walter Kerr

Mariano De Antón

Diego Figallo

Marina Barrón

Rodrigo Forcada

Working Paper Nº 49 - February 2014 -

CENTRO DE ECONOMIA Y FINANZAS PARA EL DESARROLLO DE LA ARGENTINA

CEFID AR

We are grateful to Eduardo Barcesat, Pedro Cardone Rico Roca and Federico Larrosa for their comments.

Table of contents

Introduction

After the sharp downturn of the Argentine economy in 2001 that culminated in the default on its external debt in December of that year, the Government, as part of the economic recovery process, offered in 2005 a swap of its defaulted debt with the aim of normalizing its situation. The restructuring process was successful, on the one hand, because of the haircut on the principal amount of its debt and the extension of terms that were agreed upon and, on the other, due to the level of acceptance obtained, which subsequently increased, in 2010, when the exchange was reopened, leading to the participation of over 91% of the total number of eligible creditors. The remaining 9% that chose not to enter into the negotiation is represented by bonds held by private investors, holdouts and vulture funds that waited out the restructuring process only to reject it and bring legal actions demanding full payment of those bonds.

That is precisely how vulture funds operate, as they are high-risk investment funds that deliberately purchase debt securities from economies that are weak or on the verge of collapse, at very low prices, and later demand in court the full value of those bonds plus any accrued interest. A distinction should be drawn between those funds and holdouts, which are merely creditors who, for different reasons, do not accept the restructurings but do not speculate about bringing legal actions.

A part of those legal actions is currently being dealt with by Argentina and, in this case, they represent 0.45% of the debt defaulted on in 2001. This dispute is on everyone's lips, since the decisions to be made by the US courts will have significant implications at a global level.

In this context, as a result of the smear campaign orchestrated by those speculation-driven funds in order to obtain favourable judgments, 3 myths about the country have been cultivated: 1) that Argentina refuses to pay its debts; 2) that the country made an unfair offer to its creditors; and 3) that it does not comply with its obligations or the judgments passed by foreign courts.

The first such myth loses credibility upon analyzing the situation of Argentina at the time of the default. Between 1998 —the year in which a deep recession began— and 2000, the country experienced a drop in GDP of more than 20% and an unemployment rate of 25%, while half of the population was below the poverty line. The second myth is questionable, since in the two swaps the Government made a commitment to the bondholders to share the benefits of any future growth and thus succeeded in obtaining a significant haircut. This is shown in the estimates included throughout this paper.

Finally, even though in the two years following the default 41 proceedings were filed against the Argentine Government, as of the date of completion of this paper, according to data from the Argentine Embassy in Washington D.C., in 21 of those proceedings, the country won, settled them by mutual agreement, obtained their annulment, or they were waived or suspended, and the International Centre for Settlement of Investment Disputes found against Argentina in only four proceedings (the other 16 are pending). In those cases, in accordance with Article 54 of the ICSID Convention,[1] the enforcement of awards must be carried out in accordance with Argentine legislation, which provides for a specific administrative procedure that has not been accepted by the beneficiaries of the awards; therefore, that judicial step cannot be completed. Still, it is argued that the country is responsible for disobeying courts´ resolutions.[2]

The aim of this paper is to debunk those myths, warn about the risks posed by an adverse ruling against Argentina to the global architecture of debt restructurings, and stimulate debate on the need to fight these practices throughout the world, as they cause serious harm to the people of indebted Nations. For that purpose, the paper is divided into three chapters. In the first chapter, we describe the main features of vulture funds and their *modus operandi*. In the second chapter, we refer to the legal issues that surround this activity and facilitate its consolidation. Furthermore, we address the landmark cases as regards sovereign debt issuance and the lawsuit currently faced by Argentina as a consequence of the claims brought by vulture funds. In the third chapter, in an attempt to determine the events that culminated in the 2001 default and the necessary restructuring that led to the litigation, we analyze the Argentine debt accumulation process and the changes in the global financial systems that resulted in the adoption of these measures. In addition, we analyze the outcome of the debt restructuring offers made by the country and the economic consequences, at both domestic and international level, of the rulings issued thus far.

---

[1] Article 54 of the ICSID Convention sets forth that "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State (…)"; and "(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought".

[2] After the closing of our research, in October 2013, the administration of Cristina Fernández reached an agreement with the beneficiaries providing for the following: waiver of ICSID judgements and acceptance of local jurisdiction for claims; a nominal haircut of USD 171 million, or 25% of the claim amount; delivery of two US dollar-denominated government bonds (Bonar X and Bonden 15) to pay for principal and interest; and an investment of 10% of the original award, approximately USD 68 million, in Baade bonds. Lukin, Tomás. "El CIADI empieza a ser historia antigua". Diario Página 12 newspaper. 19 October 2013. Available at: http://www.pagina12.com.ar/diario/economia/2-231598-2013-10-19.html

1. Vulture funds – General aspects

Vulture funds are high-risk investment funds that purchase, at default prices, debt securities issued by companies and, especially —since the 1990s— by States with agonizing economies, with the aim of obtaining, through litigation, amounts considerably higher than those originally paid by them. As described by economist Alfredo Zaiat, they are not "bona fide creditors or players interested in taking part in the game of the [financial] market, where participants win or lose with gambles involving higher or lower risks through the ups and downs of quotations (…) rather, the method [they use] in order to make substantial profits consists in (…) resorting to the courts"[3].

In line with such description, it is worth mentioning that, in the world of finance, there are certain indicators that make it possible for any investor to measure the risk that they face when acquiring a bond. The interest rate of sovereign debt incorporates the so-called "country risk" premium, which is determined by the market's assessment of the likelihood that a debt will not be paid —mainly due to the possibility of default—. A high rate entails a high return, as well as a high uncolllectibility risk. Vulture funds purchase debt securities with a high interest rate even though they know their chances of recovering their investments are slim, since —to paraphrase the words of Zaiat— they do not gamble on the market, but rather obtain their return by resorting to courts that ensure the elimination of that risk. This is possible —as will be explained below— with a scantily regulated system and a judicial and political power that legitimizes this type of behaviour.

The 'vulture' metaphor refers to the fact that the strategy of those funds, when it comes to sovereign debt, lies in waiting for a country to go through an economic crisis and be unable to pay its debts. Then, they quickly descend upon their dying prey by acquiring devalued sovereign bonds at an extremely low price and later, through court proceedings and different pressure tactics —ranging from placing attachments and engaging in lobbying to organizing press campaigns to discredit debtor States— they force governments to pay the full value of the securities acquired, plus all accrued interest.

The term "vulture" is used to refer to "someone who preys on other people's misfortunes or takes advantage of property belonging to someone else". This is the name globally used to dub these high-risk funds, because they operate in the context

[3] Zaiat, Alfredo. "Carroñeros". Página 12 newspaper. 27 August 2013. Available at: http://www.pagina12.com.ar/diario/elpais/1-227688-2013-08-27.html

of debt crises faced by countries and take advantage of the despair of the rest of the creditors who, in an attempt to recover part of what they invested in their holdings, seek to sell them at bargain prices.[4]

Following this logic, they do not acquire the sovereign bonds in the primary market, but purchase them in the secondary market when the indebted country is either close to default or has already defaulted on its debt, at which moment their price falls to minimum levels. Subsequently, they lay back and wait for the government to restore its payment capacity and announce a restructuring plan. It is at that exact point in time when —using the metaphor once again— they lunge at their victim. After refusing to participate in those plans, they start filing court actions —while, at the same time, putting pressure on the country through all sorts of ruses— claiming million-dollar sums as payment for their holdings. This is how they operate, without bringing wealth, employment or any other value to the real economy. Their extreme speculation and enrichment practices do nothing but hinder and prevent the economic recovery of countries, thus causing significant damage to the development and well-being of the population.

Prior to the 1990s, the practices of vulture funds were confined to the private sector. Until then, sovereign debt was owed to banks under syndicated loans. Under this system, it was unusual for claims to be brought against States due to failure to pay. Creditor banks were not looking for short-term returns; it was a typical banking business, in which those entities also speculated about the possibility of continuing to do business in the indebted countries. In this context, the practice of putting pressure on the country through court actions was not in the bankers' plans; profits were made through other means and, therefore, resorting to the courts was not only unnecessary, but it could also hinder their ability to obtain the return intended.

That scenario prevailed until the Latin American debt crisis, which broke out in 1982 with Mexico's default. As a consequence, a restructuring period commenced which, far from fighting the recession, ended up aggravating the economic situation of affected countries. In this context, the Brady Plan was implemented in 1989. Broadly speaking, that plan consisted in the exchange of syndicated loans for debt securities that could be freely traded in the stock market. Thus, the debt of States became just another asset subject to financial speculation. It was precisely at that moment when vulture funds entered the sovereign debt business.

[4] Laudonia, Mara. "Los buitres de la deuda". Publisher: Biblos. Buenos Aires, Argentina. 2013

Nowadays, far from being an exception, these economic agents represent a significant share of global financial markets and cause serious harm to indebted States. They operate with the complete freedom and impunity offered by a neoliberal system which, in the absence of any regulation, allows —or, even worse, stimulates— their practices, which have no other purpose than to obtain the highest possible return at the expense of the most vulnerable countries.[5] We should not overlook the fact that their prey of choice has long been the so-called "Highly Indebted Poor Countries" (HIPCs)[6]. Throughout the 1990s, they especially devoted their efforts to moving against States such as Zambia, Cameroon, the Democratic Republic of the Congo, Nicaragua and Ethiopia, among others. In these cases, they speculated on the financial aid and debt relief policies of the International Monetary Fund (IMF) and the World Bank (WB). They waited for the launching of relief plans and then brought claims before European and US courts demanding multimillion-dollar payments on their holdings. Upon obtaining favourable judgments, on many occasions, the money earmarked for poverty reduction programmes ended up in the hands of vulture funds.[7] There is no doubt that the worst consequence of the fact that these actions are not punished by the law is that they cause millions of persons to live in extreme poverty. In this regard, it should be noted that these activities can be carried out with the complicity of politicians and judges who, instead of working for the well-being of peoples, defend private interests and, instead of making the decision to fight against those conducts, end up legitimizing them.

The owners of these investment funds are often difficult to identify. In general, their domiciles are established in tax havens and they assume the nationality and legal capacity that best suit them for the purpose of their business activities. The investment funds are frequently created with the sole objective of going after a specific debt and are later dissolved. Moreover, even though a long list of them could be made, on many occasions, they belong to the same members and their composition varies only slightly.

---

[5] According to data provided by the NGO Jubilee Debt Campaign, in recent years, vulture funds have brought approximately 54 court proceedings amounting to a total of USD 1.5 billion in 12 of the poorest countries in the world.

[6] They are a group of countries with high poverty levels which are eligible for financial assistance from the International Monetary Fund and the World Bank. The list is made and updated by those organizations and other non-governmental organizations. Currently, 39 nations are classified as HIPCs.

[7] The most representative case in this regard is that of Zambia. In 1979, the Romanian Government extended a USD 15 million line of credit to the Government of Zambia for the acquisition of agricultural machinery that Zambia was later unable to pay. After this, the two countries held talks in order to agree on a renegotiation. As they were finalizing the details of a debt relief agreement that would enable the Zambian Government to implement health programmes aimed at preventing the AIDS virus (almost 20% of the population is affected by that virus), the Donegal International vulture fund purchased that debt in exchange for USD 3.5 million and demanded the payment of USD 42 million before the British courts. In the end, the UK Supreme Court awarded Donegal USD 15 million. The government of Zambia recognized the judgment and allocated the funds originally earmarked for the health programmes to the payment of such judgment. See Laryea, Thomas. "Donegal v. Zambia and the persistent debt problems of low-income countries."[online],scholarship.law.duke.edu,2010.Available at:
http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1593&context=lcp

The main members include, among others, Paul Singer's NML Capital and Kenneth Dart's EM Ltd.

Singer is the founder and chief executive officer of the Elliott Management investment fund, which controls NML Capital, the financial vulture that brought the highest number of actions against Argentina. In addition, it filed lawsuits against Panama, Ecuador, Peru, the Democratic Republic of the Congo, Poland, Côte d'Ivoire and Vietnam. He is the main financier of the Republican Party of the United States; for example, he was the greatest contributor to the presidential campaigns of George W. Bush and Mitt Romney. It is clear that these contributions grant him an enormous lobbying power, as well as a substantial ability to obtain political and legal cooperation in order to carry out his operations.

In the private sector, one of his first victims was the staff of the American company Owens-Corning, which was an asbestos factory on the verge of going bankrupt due to the costs it had to cover after having been sued by a vast number of employees who had contracted diseases as a result of the working conditions to which they were exposed.[8] Singer acquired Owen-Corning with the plan of reducing the number of complaints and, thus, increasing the company's value, with a view to selling it later and boosting his profits considerably. The George W. Bush administration (2001-2009) helped in different ways in order for the transaction to be carried out as Singer expected. For instance, in January 2005, the former US President held a press conference together with a renowned physician, who stated that over half a million persons who had sued the company were in fact liars and that, if they had trouble breathing, it was not because of the asbestos. These attacks certainly undermined the accusations made by the workers and Singer managed to close his business transaction successfully.[9]

In 1995, when the Republic of Panama was at the last stage of its debt restructuring process, Singer, through Elliott Associates LP, decided to get into the sovereign debt market by purchasing debt securities issued by that country in exchange for approximately USD 17 million. Following the usual methodology of these financial agents, Elliott refused to take part in the payment rescheduling plan and, in 1996, sued the Panamanian Government before the New York courts claiming the nominal value of

[8] Exposure to asbestos causes various diseases, such as lung cancer, mesothelioma and asbestosis (pulmonary fibrosis), as well as pleural plaques and pleural thickening and effusion. It has also been proven that it causes larynx cancer and other malignant tumours. According to information provided by WHO, every year at least 90,000 persons die due to asbestos exposure for occupational reasons.

[9] Palast, Greg. Vulture's Picnic. In Pursuit of Petroleum Pigs. Power Pirates and High-Finance Carnivores. BBC. 2012

those bonds. In the end, the Court hearing the case ruled in favour of Elliot and ordered the payment of USD 57 million.[10]

The second country to suffer the speculative manoeuvres of these vultures was Peru. On that occasion, the operation was also carried out through Elliott Associates LP. The conflict between the Peruvian Government and Paul Singer lasted for several years, during which successive legal actions were brought and attachments were placed. This dispute culminated in a payment to Elliott in the amount of USD 58 million for bonds it had acquired in exchange for USD 11 million. It should be noted that Singer managed to collect that payment thanks to the fact that he cooperated actively with the former president of Peru, Alberto Fujimori, so that the latter could flee the country on board of an airplane that was made available to him in order to be able to escape the actions taken by Peruvian courts which accused him of having committed crimes against humanity. Of course, that favour was paid for by the Peruvian people. In consideration for that aid, the abovementioned head of State, one week before leaving the country, ordered that the payment of USD 58 million be made.[11] Fortunately, in spite of this evasive action to avoid being tried, in 2007, the defendant —Fujimori— was sentenced to 25 years in prison after he was found criminally liable for the violation of the human rights of hundreds of individuals between 1990 and 2000, when he served as President of Peru.

Kenneth Dart is not to be outdone. He is the owner of Dart Management, through which he controls the EM Ltd. Fund. In Argentina, his name became known when, in 2010, he had a Federal Judge of the State of New York —Thomas Griesa— rule in his favour and place an attachment on USD 105 million deposited in the accounts held by the Central Bank of the Argentine Republic at the Federal Reserve Bank of New York.[12] The countries sued by Dart, in addition to Argentina, include Brazil, Turkey, Peru and Poland.

The origins of his fortune can be traced back to the 1950s when his father, William Dart, founded the thermal container manufacturing company Dart Container. Since then, the company has managed to position itself as a leading firm in the sector. Currently, its annual turnover amounts to USD 1.1 billion and it employs 5000 workers

[10] Saskia Sassen. Territorio, autoridad y derechos: de los ensamblajes medievales a los ensamblajes globales. Katz. Serie conocimiento. Buenos Aires, Argentina. Madrid, Spain. 2010

[11] Palast Greg. Vulture's Picnic. In Pursuit of Petroleum Pigs. Power Pirates and High-Finance Carnivores. BBC. 2012

[12] This ruling was appealed by the Argentine Central Bank and the Argentine Republic and, in July 2011, the US Court of Appeals for the Second Circuit vacated it. That decision was based on the fact that the judgment was unlawful as a result of the protection given to central bank deposits against executions or attachments. Finally, in June 2012 —after an appeal filed by Dart— the Supreme Court of Justice of the United States ordered that the attachment be lifted.

distributed across 17 plants located in Europe, Australia and the Americas. One of those plants is located in Argentina, at the Pilar Industrial Park, in the Province of Buenos Aires.[13] [14] The family business made it possible for Kenneth Dart to take part in the stock trade game —in 1986— and he soon dazzled the world of finance with his ability to generate substantial profits.[15]

The first country to be sued by Dart was Brazil in the 1990s. Some time before the Brazilian government engaged in the renegotiation of its debt, he purchased 4% of all the bonds to be restructured in exchange for USD 375 million, although their nominal price was USD 1.4 billion. Then, he sued the State for the total value of those debt securities. Finally, he managed to obtain USD 908 million, i.e., 161% more than the amount invested.

Later on, he focused on the business of the large-scale privatizations of post-communist Russia, while he pursued the defaulted debts of Peru and Poland.[16]

Currently, Dart resides in the Cayman Islands, where he is a prominent member of the community and takes an active part in business chambers, which gives him great power when it comes to making political and economic decisions in that society. He succeeded in positioning himself as the owner of the Dart Management holding company and Camana Bay —known as Dartville in the Islands— which is a major real estate development that was built as a type of gated community and includes residential units, offices, stores, movie theatres and restaurants.[17]

Since 1994, Dart has been a Belizean national, after he renounced his American citizenship in order to avoid paying millions of dollars in taxes. At that time, the family's fortune amounted to approximately USD 3 billion. Moreover, as he had not given up his intention to live in the United States, he requested the then Prime Minister of Belize, Manuel Esquivel (1993-1998), to nominate him to serve as Consul in the State of Florida. Even though Esquivel granted such request, the appointment was rejected by the administration of former president Bill Clinton (1993-2001). It should be noted that Clinton used the following words in a letter published in his internet blog when referring to a cash donation made by Dart's wife to the Democrat Party:

---

[13] This plant is currently being investigated by the Argentine justice on suspicion of tax evasion and flight of foreign currency.
[14] Carrillo, Cristian. "Rapaces…". Cash Supplement, Página 12 newspaper, 2 September 2012. Available at: http://www.pagina12.com.ar/diario/suplementos/cash/17-6240-2012-09-02.html
[15] Argüello, Jorge. "Radiografía de un fondo buitre ensañado con Argentina". [online], embajadaabierta.com, 3 March 2012. Available at http://www.embajadaabierta.com/?p=1883
[16] Idem.
[17] Laudonia, Mara. "Los buitres de la deuda". Publisher: Biblos. Buenos Aires, Argentina (2013).

"(…) Mrs. Dart is a big Democratic donor, but I can't go anywhere near her or her husband (…) He himself renounced his citizenship during my presidency and went offshore to avoid [paying] hundreds of millions in taxes (…) A few weeks after he renounced his citizenship, we received a letter from the government of Belize asking us permission to open a new consulate in Florida for their new consul Kenneth Dart. Obviously I said no. It was just another of Dart's tax dodging schemes (…) Apart from that Kenneth Dart is one of the most hated businessmen in South America [He is what some might call] a vulture fund (…) He buys large amounts of government debts of third world countries at 20 cents a dollar and forces the governments to pay up dollar for dollar. He almost bankrupted the Brazilian economy (…) His latest venture is to force the government of Argentina to pay the debt it defaulted on. Again he paid dimes on the dollar for the debt and wants the Argentineans to pay him the face value of the debts he holds. Argentina is bankrupt at the moment. Half its population is living below the poverty line. I don't know what he is up to now by donating money to our party, but I don't want to go anywhere near this guy".[18]

In light of these words and the brief description of the persons behind the vulture funds and the way they operate, there is no doubt that these practices must be considered criminal acts and must be condemned and fought against by means of regulations aimed at preventing them, since they hinder the economic recovery of States and jeopardize the development of nations. This will be discussed in the following chapter.

[18] Clinton, Bill. "Kenneth Dart, citizenship and Tax havens". [online], billclintondailydiary.blogspot.com.ar, 12 February 2005. Available at: http://billclintondailydiary.blogspot.com.ar/2005/02/kenneth-dart-citizenship-and-tax.html

2. Legal aspects of the phenomenon; the most representative cases.

This chapter seeks to analyze the legal issues and spark off a debate on the activity of vulture funds. In this regard, it describes how the international legislation passed simultaneously with the changes in the financial system that determined the conduct of business in the public debt sector was in fact designed in such a way that it ended up favouring the proliferation of these practices. Furthermore, it shows how American courts hearing the legal actions filed have been making a peculiar interpretation of the legal instruments, which culminated in the annulment —in proceedings relating to the issuance of debt securities— of the right to sovereign immunity enjoyed by States, and the scant existing regulation designed to prevent this type of behaviour. For this purpose, the chapter is divided into three sections, which summarize the three legal rules which are —and have been— considered as the most important in relation to this phenomenon and which have been discussed in the most emblematic cases and in the literature on this subject. The first section refers to the exceptions to immunity from jurisdiction defined by the Foreign Sovereign Immunities Act[19] (FSIA) of the United States and the *Republic of Argentina v. Weltover, Inc.* case (1992), the resolution of which was a decisive factor in the expansion of vulture funds. The second section refers to the Champerty doctrine, which precludes the purchase of debt with the aim of bringing legal claims relating to such debt in the State of New York —i.e., the jurisdiction that generally arbitrates in disputes over public debt— and the *Elliott Associates, LP. v. the Republic of Peru* case (1998), where a judgment was passed that virtually undermined that doctrine. The last section deals with the current dispute between *NML Capital ACP LLC II LLC. and the Argentine Republic* concerning the *pari passu* clause, and analyzes the consequences for the country and the global architecture of sovereign debt restructuring that would arise if the Supreme Court of the United States were to uphold the ruling issued by the Court of Appeals for the Second Circuit (New York) or reject the appeal filed by Argentina

[19] In Spanish, Ley de Inmunidad Soberana Extranjera.

2.1. The exceptions to immunity from jurisdiction under the Foreign Sovereign Immunities Act and the *Republic of Argentina v. Weltover, Inc.* case.

As an introduction to this topic, we will briefly go over the principle of sovereign immunity, whereby —under the medieval axiom of equality between empires and non-subordination— States enjoy two forms of immunity: immunity from jurisdiction and immunity from execution. The first concept alludes to the fact that foreign governments cannot be brought to trial before the courts of other States. The second concept refers to the fact that the assets of a foreign country cannot be affected by measures for the execution of orders or by the enforcement of judicial or administrative decisions by the authorities of another Nation.

Throughout history and as countries started to become more heavily involved in international trade, the idea of sovereign immunity gradually transformed from a broad notion to an increasingly limited concept. Until the early 20th century, the absolute doctrine was applied. Under this approach, States were given complete immunity irrespective of the action adopted by them. Over time, the restrictive doctrine gradually began to prevail. According to this doctrine, the immunity right must only be recognized where governments act in the exercise of their public authority and must be denied where governments act as any private person might. This means that, under this approach, the principle of the double personality of the State fully applies. Such principle provides that the acts performed by a State may be divided into *iure imperii* or public acts —which are considered as sovereign acts subject to the benefits of immunity— and *iure gestionis* or commercial acts —*i.e.*, acts performed by the government as principal, dealer or businessperson, which are deemed private in nature and, as a result, do not enjoy any benefits with regard to jurisdiction or execution—.

The laws of most countries in the world were gradually established along these lines. These laws include, among others, the European Convention on State Immunity (1972), the Foreign Sovereign Immunities Act (FSIA) of the United States (1976) and the State Immunity Act[20] of Great Britain (1978). For the purpose of this paper, emphasis will be placed on the FSIA, as it is the law under which Argentina is being tried in the proceedings currently pending against it before the US courts.

In general, the international community chooses the tribunals United States District Court for the Southern District of New York and the courts of the city of London to settle

[20] In Spanish, Ley de Inmunidad Estatal.

any issues relating to the financial responsibility of States. The New York tribunal hear cases dealing with the issuance of bonds denominated in US dollars, while English courts hear disputes over loans in Eurocurrencies. This is not only due to the currency in which the debt has been issued, but also because of the fact that those cities are the two most important financial centres in the world and, thus, the agents designated to handle such debt usually have their domiciles in London and New York. The applicable jurisdiction is set forth in the debt issuance agreements.[21]

The FSIA, was approved by the US Congress on 21 October 1976 during the Gerald Ford administration (1974-1977). This law, which is composed of 11 sections, establishes the circumstances under which a foreign government does not have sovereign immunity rights in the United States. Sections 1605 to 1607 —which are the provisions that we will address herein— list the cases in which a foreign State may be sued before the courts of the United States. More specifically, out of all the exceptions to immunity from jurisdiction contained in those sections, we wish to highlight those referring to the express or implied waiver of immunity —Section 1605(a)(1)— and to the performance of a commercial activity —Section 1605(a)(2)— for the purpose of this study.

We will first analyze Section 1605(a)(2), which establishes that:

"(…) A foreign state shall not be immune from the jurisdiction of courts of the United States (…) in any case (…) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States".

In this respect, Section 1603(d) of the FSIA defines "commercial activity" as follows:

"A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose".

[21] Cámpora, Mario (h). "Notas sobre la jurisdicción de los tribunales de Nueva York en operaciones de crédito público de la República Argentina". Revista de Derecho Público (journal). Infojus. Year I, Issue I, 2012, pp. 81-100.

One of the main criticisms levelled at this Law is that it has countless *lacunas*. As may be seen in the Sections cited, the definitions provided are extremely ambiguous. This deliberate vagueness has caused international private litigation in the United States to be an area replete with practical difficulties for those representing the interests of a foreign State. In particular, the definition of the term *"commercial activity"* is very broad and general. The fact that what determines whether an act is *iure imperii* or *iure gestionis* is the nature of a given conduct and not its purpose has led US courts to consider many activities performed by governments as being commercial. They have only recognized the existence of a public act in few cases.[22]

In line with this approach, in a decision that set a precedent, the US courts in *Republic of Argentina v. Weltover, Inc.* (1992) held that the issuance of public debt in the United States is a commercial activity.

During Argentina's last military dictatorship (1976-1983), the country's external debt level increased significantly. In this context, in 1982, with a view to avoiding a default and maintaining the economic openness policy pursued by the Military *Junta*, the minister of economy, Jorge Wehbe (1982-1983), issued debt securities denominated in US dollars known as "Bonods". Subsequently, in 1986, when those bonds were close to maturity, the Raúl Alfonsín administration (1983-1989) declared that the country did not have enough reserves to pay the Bonods. Then, a presidential decree was issued extending the date of payment and a restructuring was offered to holders. Two Panamanian companies and a Swiss bank rejected the offer and sued the State before the New York courts demanding the nominal value of the securities held by them. The Argentine government invoked the right to sovereign immunity in its defence. Nonetheless, the District Judge, the Court of Appeals and the Supreme Court of Justice of the United States ruled against Argentina and the country was deprived of immunity. In the ruling cited below, the tribunal stated the reasons upon which the decision was based:

"(…) The issuance of the Bonods was a 'commercial activity' under the FSIA, and the rescheduling of the maturity dates on those instruments was taken 'in connection with' that activity within the meaning of § 1605(a)(2). When a foreign government acts, not as a regulator of a market, but in the manner of a private player within that market, its actions are 'commercial' within the meaning of the FSIA (…according to…) Cf. Alfred Dunhill of London Inc vs. Republic of Cuba, 425 US 682, 695-706 —1976— (plurality

[22] López Velarde Estrada, Rogelio. "Algunas consideraciones en materia de inmunidad soberana a la luz del Derecho Positivo norteamericano" Revista Jurídica (journal). Anuario del Departamento de Derecho de la Universidad Iberoamericana, No. 21. Mexico. 1992.

opinion). Moreover, because § 1603(d) provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives [but] whether the government's particular actions (whatever the motive behind them) are the type of actions by which a private party engages in commerce. The Bonods are in almost all respects garden-variety debt instruments, and, even when they are considered in full context, there is nothing about their issuance that is not analogous to a private commercial transaction. The fact that they were created to help stabilize Argentina's currency is not a valid basis for distinguishing them from ordinary debt instruments, since, under § 1603(d), it is irrelevant why Argentina participated in the bond market in the manner of a private actor. It matters only that it did so. (…) The unilateral rescheduling of the Bonods had a 'direct effect in the United States' within the meaning of § 1605(a)(2). Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in this country: Money that was supposed to have been delivered to a New York bank was not forthcoming. Argentina's suggestion that the 'direct effect' requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to this country is untenable under Verlinden B. V. v. Central Bank of Nigeria, 461 U. S. 480, 489 -1983)".[23]

As may be seen from the decision cited, the manner in which the US courts interpreted the concept of commercial activity is highly questionable. Under the objectivist interpretation approach adopted by the US courts, virtually all actions carried out by a State could be considered commercial. We should not overlook the fact that, in general terms, the defence of lack of jurisdiction due to sovereign immunity is very strictly defined in the United States at federal, state and municipal level.[24] From the perspective of the judges of a society having a liberal tradition —as is the case with the United States— there are only few areas that could be described, by a process of elimination, as being *iure imperii* in nature.[25] This definition of "commercial activities" leaves foreign Nations continuously exposed to potential lawsuits, since it is currently

[23] Republic of Argentina v. Weltover, Inc. Supreme Court of Justice of the United States. Decision, 12 June 1992.
[24] López Velarde Estrada, Rogelio. "Algunas consideraciones en materia de inmunidad soberana a la luz del Derecho Positivo norteamericano" Revista Jurídica (journal). Anuario del Departamento de Derecho de la Universidad Iberoamericana, No. 21. Mexico. 1992.
[25] Id.

very difficult for a government in exercise of its public authority not to carry out activities that could be performed by a private person. However, the difference lies in the fact that the conduct of a private person has a profit motive, whereas the conduct of a State normally has the aim of fulfilling uniquely sovereign objectives. This issue, which was considered "*irrelevant*" by the Supreme Court in the ruling cited above, should be essential when it comes to determining whether a State's immunity right should be recognized or not.

Moreover, in relation to the issuance of debt securities, we should also analyze whether —as held in the abovementioned ruling— *"there is nothing about their issuance that is not analogous to a private commercial transaction"*. There is a substantial difference between the circumstances surrounding corporate debt and sovereign debt. At a corporate level, when a firm is on the verge of bankruptcy, it begins a reorganization process and the proceedings brought against the debtor are automatically paralyzed, since the creditors are required by law to accept the restructuring plan resulting from the process. In contrast, in the case of public debt, the insolvent State only has the alternative to enter into voluntary negotiations with the holders of securities and is exposed to the possibility that claims may be brought by those who opted not to accept a rescheduling of payments.[26] In view of this inconsistency, the analogy on which the US Supreme Court of Justice relied in order to determine that the issuance of debt by a government is an *iure gestionis* act becomes untenable. There is no doubt that companies are driven to incur debt by purely commercial motives, whereas governments incur debt for reasons of public need. Sovereign debt should never be legally analyzed in comparison to private debt, let alone be defined on the basis of that analogy as a commercial activity.

We will now address the exception to sovereign immunity due to express or implied waiver. Section 1605(a)(1) sets forth that:

"(…) A foreign state shall not be immune from the jurisdiction of courts of the United States (…) in any case (…) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver".

[26] Lau-Tám Oyafuso, Alfredo. "La interpretación restrictiva de las leyes de inmunidades soberanas en el Derecho Internacional Económico". ITAES Virtual Newsletter. Universidad de San Martín de Porres. La Molina, Lima, Peru. [online], derecho.usmp.edu.pe, April, 2012. Available at: http://www.derecho.usmp.edu.pe/Itaest_Articulos_Estudiantiles/04-2012_La_Interpretacion_Restrictiva_En%20Las_Leyes_De_Inmunidades_En_El_Derecho_Internacional_Economico.pdf

In general, agreements for the issuance of public debt contain these types of provisions which require States to waive sovereign immunity. Faced with the need to receive financing, governments are virtually under an obligation to accept this condition because, otherwise, their access to funds would be at risk. Nevertheless, this contractual provision is inconsistent with the principle of law whereby a party cannot waive a right if that would be against the public interest. Following this line of reasoning, courts hearing cases involving sovereign debt should declare these types of provisions null and void. There have been cases in which US courts have issued their ruling relying upon this principle. In *Selzer v. Baker*, the Court decided not to confirm some orders for the attachment of public goods —even though there had been a contractual waiver of immunity from execution— because *"(…) the general rule (provides that) a party may waive a statutory or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved".*[27]

In spite of the fact that the US courts have —wrongly— held that the issuance of public debt is an activity falling within the scope of private law, the waiver of sovereign immunity should not be valid either. Such was the decision of New York District Judge, Robert W. Sweet, in *Elliott Associates, L.P. v. the Republic of Peru (1998*) *"(…) a right conferred by statute upon a private person but which affects the public interest may not be waived".*[28]

Even though criticism may indeed be levelled at the extremely restrictive interpretation of sovereign immunity that US courts have been making, when compared to other jurisdictions, the fact that New York courts rule in favour of vulture funds when they carry out activities that are not permitted by the laws of that State is even more controversial. This is established in Section 489 of the New York Judiciary Law[29] (N.Y. JUD. LAW § 489: NY Code – Section 489) —known as the "Champerty doctrine"— which will be discussed in the following section.

---

[27] New York Supplement, vol. 295, pp. 145, 149-50; North Eastern Reporter, vol. 65, second series, pp. 752, 753-54 (1946). See Elliott Associates, L.P. v. the Republic of Peru. LEXIS 12253, United States District Courts, 6 August 1998.

[28] See Elliott Associates, L.P. v. the Republic of Peru. LEXIS 12253, United States District Courts, 6 August 1998.

[29] In Spanish, Ley del Poder Judicial de Nueva York

2.2. The Champerty doctrine and *Elliott Associates Inc. v. the Republic of Peru*

Section 489 of the New York Judiciary Law sets forth that:

"(…) no person or co-partnership (…) and no corporation or association (…) shall (…) buy (any) thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon".

On this point, reference should be made to the landmark case *Elliott Associates Inc. v. the Republic of Peru* (1998), where a New York District judge ruled in favour of Peru because he found that Elliott had violated the Champerty principle.

In March 1983, the Fernando Belaúnde Terry administration (1980-1985) considered that Peru did not have enough foreign exchange reserves to repay its external debt and, therefore, entered into negotiations with the Bank Advisory Committee for Peru (CAB in the Spanish acronym) —a body made up of the representatives of the main commercial creditors— with a view to designing a new schedule of payments. Although the negotiations resulted in a series of refinancing agreements, the fulfilment of the obligations under those agreements was interrupted in 1984 when the State, in response to the economic situation the country was in, implemented policies that imposed restrictions on the payment of its external debt. Peru went into default and was sued by several creditors. However, by virtue of an agreement entered into in October 1990 between the Alberto Fujimori administration (1990-2000) and CAB, many of those lawsuits were suspended[30] and negotiations were held that led to the execution of a restructuring agreement between Peru and the IMF, in September 1991. Nevertheless, in 1992, the country once again went into default. Then, in 1995, the State and CAB signed a preliminary agreement for the rescheduling of payments, which resulted in the 1996 Financial Plan of the Republic of Peru —known as the "Brady Agreement"— which was approved in June 1996 by Supreme Decree No. 072-96-EF.

Peru's Brady Agreement established a procedure for recalculating interest and exchanging overdue debt for new debt securities —Brady bonds— designed with the agreement of CAB and the support of the IMF, the World Bank and the Inter-American Development Bank.

[30] As a result of this agreement, by 1994, all of the creditors who had filed lawsuits against Peru had withdrawn their claims, with the exception of the Pravin Banker Associates Ltd. investment fund.

In that context, between January and March 1996 —6 months after the government began the negotiations for the Brady Agreement— Elliott Associates purchased Peruvian external debt securities held by Swiss Bank Corporation (SBC) and ING Bank, NV, whose nominal value was estimated at USD 20.7 million, in exchange for USD 11.4 million. Upon announcement of the Plan, Elliott refused to accept the restructuring and filed legal actions against the Peruvian Government before the United States District Court for the Southern District of New York demanding payment of the nominal value of the instruments acquired plus compound interest. It should be noted that, out of the approximately 180 creditors eligible to participate in the swap for Brady bonds, only Elliott and Pravin Banker Associates Ltd.[31] refused to do so.

In *Elliott Associates Inc. v. the Republic of Peru*, the counsel for Peru stated that *"(…) although the debt is valid and the agreement has been breached, Elliott's claim must be dismissed because the assignments violate New York Judicial Law § 489, which makes unlawful the purchase of debt 'with the intent and for the purpose of bringing an action or proceeding thereon'".*[32]

In this respect, the company argued that "*(…) as a factual matter it did not purchase the debt with the requisite 'intent and purpose,' and as a legal matter the statute does not sweep as far as to render unenforceable their claim against Peru*".[33]

Finally, the District Judge, Robert W. Sweet, agreed with Peru. The judgment —which is cited below— provides an account of the events and the reasons that led the Tribunal to dismiss the claim brought by Elliot.

"(…) Elliott purchased the Peruvian debt with the intent and purpose to sue. This purpose and intent can be determined from Elliott's investment strategy [which from the very beginning was directed at the filing of claims] (…) (1) Elliott's admission that [if it was not] paid in full [it would] sue [Peru][34] *(…)equated to an intent to sue*[35]*, (2) Elliott*

[31] Pravin Banker Associates is an investment fund that purchased USD 1.425 billion (nominal value) in Peruvian external debt securities issued in 1983 and, upon refusing to accept the 1991 restructuring plan, sued the Peruvian Government in New York requiring full payment of the bonds it held. Pravin was the only creditor that did not agree to withdraw its claims after an agreement was reached between CAB and the Government of Peru. The conflict came to an end when, after two judgments were passed against it – by the District Court and the Second Circuit—, the Republic of Peru executed the Settlement and Release Agreement with Pravin establishing similar payment terms and conditions to those of the Brady Plan. Thus, it was guaranteed that there was no special treatment as compared to that accorded to the creditors who did accept the 1996 Financial Plan.

[32] See Elliott Associates, L.P. v. the Republic of Peru. LEXIS 12253, United States District Courts. 6 August 1998.

[33] Id.

[34] During the proceedings, the CEO of Elliott Associates, Paul Singer, made the following brief statement: "Peru would either ... pay us in full or be sued". See Elliott Associates, L.P. v. the Republic of Peru. LEXIS 12253, United States District Courts, 6 August 1998.

hired [Jay] Newman and [Michael] Straus to guide their investments in Peruvian debt, both of whom had recent experience suing Sovereigns[36] *(…) Their involvement with Elliott is highly probative of Elliott's intent [that resulted in the purchase]; (…) (3) Elliott delayed the closing of its Peruvian debt trades until after the Second Circuit denied Peru's motion for a stay pending appeal in the Pravin Banker litigation;*[37] *(and) (4) Elliott's purported alternative investment strategies [as was convincingly demonstrated by the evidence produced] either were not seriously considered prior to deciding to purchase the debt, or were not reasonable given its profit expectations. [The fact that no other option was seriously considered proves that Elliott's sole purpose was to sue Peru.] (…)*

[In view of the foregoing, it is clear that] although no New York case squarely holds that [Elliot's] practice is prohibited,[38] *it is undoubtedly within the language of the statute and the mischief the statute was intended to remedy (…)The legislative concern [when Section 489 was drafted] was 'to prevent the resulting strife, discord and harassment which could result from permitting attorneys and corporations to purchase claims for the purpose of bringing actions thereon' (…) On these facts, but for Elliott's practice, no litigation would have ensued from any party other than Pravin Banker, who purchased their debt before the agreement in principle was reached (…) 'The resulting strife, discord and harassment,' which resulted [from Elliott's practice] is the type of mischief the statute was enacted to avert (…)*

---

[35] Judge Sweet reasonably held that "Under the circumstances as they existed in January 1996, when Elliott began its assembly of Peruvian debt, the only credible way that Elliott could achieve its goal of full payment was by bringing an action." See Elliott Associates, L.P. v. the Republic of Peru. LEXIS 12253, United States District Courts, 6 August 1998.

[36] Jay Newman entered the sovereign debt business in the year 1983 when he began to work for Lehman Brothers in the Third World Debt Area. He was part of the staff of the company until 1988. In the following years, he worked for several investment funds specialized in the purchase of debt securities issued by emerging economies —including Dillon Reed, Morgan Stanley and Percheron Fund. In 1993, he began to work as advisor to Water Street Bank & Trust Limited and invited Michael Straus to participate. Until then, Straus had worked as trial counsel to different firms involved in about thirteen lawsuits relating to sovereign debt. Following Newman's and Straus' recommendations, Water Street purchased debt issued by Poland, Ecuador, Côte d'Ivoire, Panama and Congo. Then, it filed lawsuits against each of those States demanding full payment of the securities bought. In 1995, Water Street was liquidated. After that, not willing to abandon the business, Newman approached Paul Singer —founder and CEO of Elliott— and suggested that the company take part in that market. Singer agreed and Newman and Straus were retained by Elliott Associates. An investment team specialized in public debt was thus created. See Elliott Associates, L.P. v. the Republic of Peru. LEXIS 12253, United States District Courts, 6 August 1998.

[37] In Pravin Banker Associates v. the Republic of Peru, Peru appealed the judgment passed by the District Court in favour of Pravin and moved to stay execution of the judgment without posting any bond. The Second Circuit denied the motion. Elliott —as explained by Judge Sweet in Elliott v. Peru— intentionally delayed the closing of the assignments until the Second Circuit in the Parvin case had clarified the risks to which it could be exposed if it filed a claim. See Elliott Associates, L.P. v. the Republic of Peru. LEXIS 12253, United States District Courts, 6 August 1998.

[38] In the history of sovereign debt lawsuits, this is the first case where a court dismissed the claims because it —correctly— considered that the plaintiff had engaged in the practice of Champerty.

[As a consequence] the Court is compelled to conclude that Elliott's purpose here violated the statute. Elliott formed the intent to sue Peru before it decided to purchase the debt. Its purpose was to stand apart from the lenders who had agreed to the Brady restructuring, and to use judicial process to compel full payment. Thus, Elliott's sole or primary purpose was to bring the lawsuit".[39]

Even though the abovementioned judgment describes Elliott's strategy in detail and clearly demonstrates that such strategy is based upon the purchase of defaulted securities with the intent of suing the debtor for their full value, it is worth highlighting that, except for this case, in the history of sovereign debt disputes —including the proceedings to which Elliott has been a party— the New York courts have not found that the actions taken by vulture funds amount to the practice of Champerty and have dismissed all the claims made by States invoking violations of Section 489.

Furthermore, in relation to *Elliott v. Peru*, in spite of the judgment passed by the District Court, the United States Court of Appeals for the Second Circuit, on 20 October 1999, reversed that decision and provided its own interpretation of the law of Champerty. It is well known that, after filing its appeal, Elliott began to lobby for the New York State Legislature to approve a series of amendments to the rule in question. As soon as it learnt of this manoeuvre, Peru rapidly sought support from other countries and different organizations so as to prevent the Legislature from approving those amendments. Even though the reform of the statute was finally prevented, the decision rendered by the Second Circuit effectively annulled the application of Section 489 of the New York Judiciary Law in litigations concerning sovereign debt.

The Court of Appeals for the Second Circuit overturned the judgment passed by Judge Sweet and held that Elliott's practice is not unlawful because *"(…) the acquisition of a debt with intent to bring suit against the debtor is not a violation of [Section 489] where, as here, the primary purpose of the suit is the collection of the debt acquired (…) Any intent on Elliott's part to bring suit against the Debtors was 'incidental and contingent' (…) because, as the district court acknowledges, Elliott's 'primary goal' in purchasing the debt was to be paid in full. That Elliott had to bring suit to achieve that 'primary goal' was therefore 'incidental' to its achievement (…) (and was) contingent on the Debtors' refusal [to make the payment] (…) The Debtors could have paid but chose not to pay in order to avoid jeopardizing Peru's Brady Plan (…) Section 489 is 'violated only if the*

[39] See Elliott Associates, L.P. v. the Republic of Peru. LEXIS 12253, United States District Courts, 6 August 1998.

primary purpose of taking the assignment was to commence a suit' and not 'where some other purpose induced the purchase'".[40]

In addition, the Second Circuit asserted that, in its decision, it considered the "(…) *significant harm [that Judge Sweet's judgment would cause] to Peru and other developing nations. The district court's interpretation (…) could even make loans to [these nations] unobtainable. (…) High-risk debt purchases would be particularly affected [by an expansive reading of Section 489]*[41] *because of the increased likelihood of non-payment. [If the judgment is not reversed, a] well-developed market of secondary purchasers of defaulted sovereign debt would thereby be disrupted and perhaps destroyed".*[42]

There is no doubt that the position adopted by the Court of Appeals and the arguments on which it is based are highly questionable. It is clear that the primary objective of any person who files a lawsuit claiming payment of a debt is to collect on it. Asserting that the essential requirement for the Champerty rule to be violated is that the action be brought for no other purpose than the litigation itself lacks any logic. Under the interpretation of the Court of Appeals, the rule loses all legal significance because, if that were its meaning, no one would be covered by it, since virtually all persons who appear before the courts demanding payment do so expecting, essentially, to collect such payment.[43] It is evident that, in cases involving sovereign debt, the American case law has deliberately endeavoured to interpret the law with the sole aim of favouring the interests of these financial speculators.

Likewise, the reliance by the Court of Appeals, in its decision, on the harm that could be caused to Peru and developing countries by what it refers to as an "*expansive reading of Section 489*" is untenable because —as will be discussed in more detail in the next chapter— the practices of these vultures clearly have extremely detrimental consequences for the economies, the development and the well-being of the people of indebted States. Furthermore, the judgment referred to the risks that Peru would have faced if it had accepted Elliott's claim; the phrase *"the Debtors could have paid but*

[40] See Elliott Associates, L.P. v. Banco de la Nación and the Republic of Peru. United States Court of Appeals for the Second Circuit, 5 May 1999.
[41] It should be noted that they are high-risk debts precisely because, as any broker acquiring securities in the secondary market at default prices knows, the investor runs the risk that the debt may not be collectible.
[42] See Elliott Associates, L.P. v. Banco de la Nación and the Republic of Peru. United States Court of Appeals for the Second Circuit, 5 May 1999.
[43] de Sagastizabal, Raúl. "¿Qué son los fondos buitre?". [online], rebelión.org, 25 December 2011. Available at: http://www.rebelion.org/noticia.php?id=141733

chose not to pay in order to avoid jeopardizing Peru's Brady Plan"[44] shows that what was at stake was nothing less than the restructuring of the debt and the financial stability of Peru. Still, the Court of Appeals for the Second Circuit did not deem that this was a relevant factor when it made its decision. Contrary to what the ruling asserts, the manner in which Section 489 was interpreted by that Court of Appeals not only fails to prevent the significant damage arising from these activities –which is what the statute actually seeks to preclude— but it also promotes and legitimizes them and abrogates the few existing regulations that attempt to limit these actions. As a matter of fact, the judgment passed by Judge Sweet did not jeopardize the development of the secondary market for sovereign debt, but the business of birds of prey such as Elliott. That is certainly the reason why the district court's judgment was reversed and the Court of Appeals made such an objectionable interpretation of the statute.

After the Court of Appeals for the Second Circuit issued its ruling, the case was remanded to the District Court in order for it to calculate damages. This marked the beginning of a protracted stage during which the Peruvian government unsuccessfully attempted to have the Second Circuit's decision reversed. In June 2000, the court ordered the Republic of Peru to pay USD 56 million to Elliott, while the amount of compound interest still remained to be determined, which could entail a USD 16 million increase. In addition, the decision stated that Elliott could enforce the judgment against the assets of Peru and Banco de la Nación used for commercial activity and located in the United States. Even though the defence filed motions against the judgment, they were all denied. In the face of these circumstances and the various writs of attachment issued against the Peruvian Government in different countries,[45] and taking into account, especially, that Elliott had obtained orders of restraint on the funds earmarked for the payment of interest on the Brady bonds, the Peruvian Ministry of Economy and Finance (MEF) —headed by Carlos Boloña Behr— saw it fit to initiate talks with Elliott with a view to negotiating a sum to be paid and having that firm withdraw the legal actions. The sum agreed upon was USD 58 million in total. On 30 September, the payment was authorized by means of Supreme Decree No. 106-2000-EF.

Both this agreement and all phases of the Elliott case were denounced by the Inter-American Platform for Human Rights, Democracy and Development (PPDHDD) and

[44] If Peru had decided to pay Elliott, it would have faced the risk of going into default and being unable to meet its obligations to the other holders of Brady bonds, thus exposing itself to various claims by those creditors. Moreover, it should be highlighted that the Peruvian Government had agreed with CAB that it would not accord preferential treatment to any creditor or make payments to bondholders filing lawsuits, and that, if it did, the claims against the State that had previously been withdrawn would be restored.

[45] In violation of the court order that only authorized enforcement of the judgment against the assets located in the United States, Elliott placed attachments on assets belonging to the Peruvian Government that were located in Germany, the Netherlands, Belgium, England, Luxembourg and Canada.

investigated by the Area for Economic and Financial Crimes of the Investigation Committee of the Peruvian Congress.

During the Alberto Fujimori administration there was an extremely corrupt management of external debt aimed at advancing the interests of private creditors. In particular, during the court proceedings in the *Elliott v. Peru* case, high officials disclosed confidential information to the investment fund regarding the status of the debt and the actions that the government was to adopt. The most famous case was that of Jaime Alberto Pinto Tabini, who, after working as a legal advisor to the MEF —between 1992 and 1996— acted as Elliott's attorney in 1998. Moreover, while he was in charge —due to his official position— of supervising SBC's agreements at the time of the assignments, he allowed such transaction to be completed even though that Bank was breaching the exclusivity agreement it had entered into with the Peruvian Government, whereby those securities could only be sold to Peru.[46] [47] In addition, as previously mentioned, it was revealed that Fujimori authorized the payment to Elliott so that, in return, the CEO of that firm would help him to flee the country and thus escape the trials that he had to face for crimes against humanity. It should be noted that the management of Peruvian debt during that period and, especially, the transactions with Elliott have been considered by various Human Rights organizations as one of the most representative cases of violations of Economic, Social and Cultural Rights (ESCR). While the poorest sectors of the population suffered the serious consequences of adjustment programmes, public officials and rich businesspersons sought to make substantial profits through the indebtedness of the State and to the detriment of the people.

Apart from the considerable economic and social costs that the Peruvian people had to pay as a result of the court decisions in favour of Elliott, at a global level, rulings such as these increase the possibility of litigation and interfere with the global architecture of restructuring processes. This has already been noted in various studies conducted by

[46] With regard to these denunciations, see final decision in "Audiencia Pública Nacional Tribunal Ético de la Deuda Externa Peruana y su impacto en la realización de los DESC. Caso Elliott", [online] available at: https://www.google.com.ar/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.selvas.eu%2Fdownload%2FFSA%2FSentenciaTribEticoLima.doc&ei=44snUpewGIP89QSsIIGgDw&usg=AFQjCNHBYYLAOUFoPFexzFpVLxfeo2EI3Q and "Caso: Elliott Associates, LP". Comisión investigadora encargada de cumplir las conclusiones y recomendaciones a las que arribaron las cinco comisiones investigadoras del período legislativo 2001-2002. Área de delitos económicos y financieros. Área: deuda externa. Congreso de la República. Lima, Perú". [online], congreso.gob.pe, July 2003. Available at: http://www.congreso.gob.pe/historico/ciccor/infomin/min_deuda.pdf

[47] It is worth mentioning that, in spite of these denunciations, Jaime Pinto Tabini —between 2001 and 2005— was appointed by Peru, Colombia and Chile to serve as executive director of the Board of Directors of the Inter-American Development Bank (IADB) and of the Inter-American Investment Corporation (IIC), based in Washington DC.

the IMF[48] some time after the dispute was settled. Nonetheless, at that time, the issue was not considered important in the international community because, until then, this problem only affected developing countries. Nowadays, Europe is threatened by the activities of vulture funds. It is a well-known fact that a significant share of the public debt securities issued by European governments —in response to the debt crisis that the region is currently experiencing— has been purchased by financial vultures. As a result of this situation, the issue is no longer a matter of concern to peripheral countries only. The IMF, the World Bank and core countries have warned about the danger of these practices and suggest regulations to prevent them. In this context, the case brought by the funds NML Capital Ltd (owned by Paul Singer), Aurelius Capital Master Ltd., ACP Master Ltd., Blue Angel Capital I LLC and Aurelius Opportunities Fund II LLC. against the Argentine Republic becomes relevant. Such case will be discussed below.

2.3. The *pari passu* clause and *NML Capital ACP LLC II LLC. v. Republic of Argentina*

To introduce this section, we must go back to the year 1994, when, by virtue of a Fiscal Agency Agreement (FAA)[49] entered into between the administration of former Argentine president Carlos Saúl Menem (1989-1999) and the Banker Trust Company —an American banking company— the Argentine Government issued, through that institution, a series of public debt securities. Following a declaration of default by the then interim president Adolfo Rodríguez Saa (23/12/01 – 30/12/01) in 2001, part of those bonds were acquired by the vulture funds that are currently pursuing claims against the country, which intended to wait for future restructurings to take place only to refuse to participate in them and thus have the possibility of going to the courts seeking million-dollar payments.

That moment came with the two restructurings offered by the State, first in 2005 and again in 2010. This part of Argentina's external debt history will be elaborated further in the second part of this paper. At this stage, it should be noted that —in accordance with the estimates provided in the next chapter— about 91% of eligible creditors accepted the swap offers. The high level of participation is a reflection of the positive

[48] These studies include the paper entitled "Crisis Resolution and Private Sector Adaptation", prepared by IMF economists Lipworth, Gabrielle and Nystedt, Jens, and published in June 2001. Available at: http://www.imf.org/external/pubs/ft/fandd/spa/2001/06/pdf/lipworth.pdf

[49] In Spanish, Acuerdo de Agencia Fiscal.

terms established under those plans. The remaining 9% is represented by private investors, holdouts and vulture funds that have brought legal actions against the country on different occasions and whose holdings in this case represent no more than 0.45% of the total restructured debt.

Ever since the restructuring processes began, the Argentine Government has duly complied with its obligations under the terms of the agreements for the issuance of the 2005 and 2010 Exchange Bonds. Both prospectuses included a section entitled "*Risk Factors*", which states that "*(…) eligible Securities that are not tendered may remain in default indefinitely*". The 2010 prospectus added that "*in light of its financial and legal constraints, [the Argentine Republic] does not expect to resume payments on any Eligible Securities in default that remain outstanding following the expiration of the Invitation. [Furthermore,] Argentina will oppose vigorously attempts by holders who do not participate in the exchange offer to collect on their debt through litigation and other legal proceedings*". Therefore, the financial transfers made from 2005 to this day in order to make payments on debt securities have not included holders who did not accept the offer.

Within this context, the vulture funds have resorted to the New York courts seeking the payment of the nominal value of their bonds plus compound interest —estimated at USD 1.33 billion, i.e. an amount about 1,380% higher than the sum paid by them—[50] and stating that the government's decision not to include in its payments any holders who did not participate in the swaps violates the equal treatment —*pari passu*— clause contained in the 1994 Fiscal Agency Agreement, under which the securities concerned were issued.

Before analyzing the *pari passu* clause and the interpretation made by US courts, we should refer to the provision of the FAA establishing that the Argentine Republic surrenders its sovereign immunity from the jurisdiction of any state or federal court in the city of New York. The first case of delegation of legal sovereignty in the country was Law No. 21,305 passed by the military government on 20 April 1976 (i.e. the same year when the United States approved the FSIA), the sole section of which allowed jurisdiction to be extended to foreign courts.[51] Even though this law was abrogated by the *de facto* government in 1981, in doing so, that government introduced an

[50] In particular, NML Capital demands payment of USD 720 million in defaulted Argentine debt that it purchased in 2008 in exchange for USD 48 million, as reported at a press conference held on 30 March 2013 by the Argentine Vice President, Amado Boudou, together with the Minister of Economy, Hernán Lorenzino, and the Secretary for Economic Policy and Development Planning, Axel Kicillof.
[51] Asiain, Andrés. "El fallo Griesa y la operación buitre". [online], Argentina, infobae.com.ar, 9 September 2013. Available at http://opinion.infobae.com/andres-asiain/

amendment to the Argentine Code of Civil and Commercial Procedure, which allows the extension of territorial jurisdiction "*(…) except in those cases where Argentine courts have exclusive jurisdiction or where the extension of jurisdiction is forbidden by Law*". In line with this approach, despite the prohibition of the Argentine Constitution, the 54 bilateral investment treaties concluded between 2005 and 2010 and the successive issuances of exchange bonds, even in 2005 and 2010, contained clauses establishing the waiver of sovereign immunity in foreign and international courts.[52] As previously noted, this contractual provision is covered by the principle that a party cannot waive a right if considerations of public policy or morals are involved. There is no doubt that the issuance of sovereign debt involves considerations of public interest, even though the US courts, in this case, have not taken this view. Therefore, despite the provisions of the FAA, the New York court should not exercise jurisdiction. In addition, as we have just noted, any provision that establishes a system for delegating jurisdictional powers to foreign courts and international arbitral tribunals is against the Argentine Constitution, which is all the more reason why this FAA provision should not be given legal force.[53] [54]

In line with the arguments presented in the above paragraph, it has been held that:

"(…) the Argentine Constitution embraces the principle of constitutional supremacy (art. 31) and forbids: a) conferring upon the Federal Executive extraordinary powers or the total public authority, or providing for any type of subordination or supremacy whereby the life, honour or wealth of the Argentine people will be at the mercy of governments or any person (art. 29); b) carrying out any legislative delegation other than exceptional delegation to the Federal Executive in certain matters of administration or public emergency, for a fixed period and pursuant to the terms of the delegation established by the Congress (art. 76); c) signing treaties with foreign powers in violation of the principles of public law as provided for under the Constitution (art. 27), which refers to art. 116, regarding the exclusive jurisdiction of the Argentine Judiciary in matters of federal law; and d) delegating powers and jurisdiction other than to supranational organizations under conditions of reciprocity and equality within the

[52] Id.
[53] "This view is shared by renowned lawyers such as Germán J. Bidart Campos, José Osvaldo Casás, Eduardo S. Barcesat, Eduardo Conesa, Guillermo A. Muñoz, Alfredo Calcagno, Eric Calcagno, Liliana B. Constante and Arístides Horacio M. Corti, among others." (Araujo and Torres, 2013).
[54] Araujo, Facundo M. and Torres, María Carolina. "Apostillas a la problemática de la prórroga de jurisdicción en tribunales extranjeros o arbitrales en materia de deuda soberana". Revista Derecho Público (journal). Ministry of Justice and Human Rights of the Argentine Republic. Year 1, no. 3. Buenos Aires, Argentina. February, 2013.

framework of integration treaties with Latin-American States and, with regard to treaties with other States, through two successive votes of Congress (art. 75(24))".[55]

Moreover, the unconstitutionality referred to above is also evidenced by the reservation made by the Argentine Republic in ratifying its adherence to the American Convention on Human Rights (ACHR) in 1984, under Law No. 23,054: *" Article 21 [of the ACHR] is subject to the following reservation: The Argentine Government establishes that questions relating to the Government's economic policy shall not be subject to review by an international tribunal. Neither shall it consider reviewable anything the national courts may determine to be matters of 'public utility' and 'social interest', nor anything they may understand to be 'fair compensation'".* Let us recall that article 75(22) of the Argentine Constitution provides that the agreements entered into with other nations and international organizations rank higher than laws but lower than the Constitution and the treaties on Human Rights contained in the second paragraph —including the ACHR— which enjoy the same rank as the Argentine Constitution and supplement the rights and guarantees established by it.[56]

Based on these arguments, with regard to the legal actions brought by the vulture funds, Argentina's defence stated before the District Court for the Southern District of New York that the US courts have no jurisdiction over this case. However, this position was —mistakenly— rejected by the Judge who, as a result, accepted the claims.

Upon denial of the right of immunity from jurisdiction, the Court carried on with the proceedings to determine whether or not the Argentine Government had breached its obligation to afford equal treatment under the FAA.

This —*pari* passu— clause has been included in bond issuances for over 100 years without a clear definition of its actual meaning. As a matter of fact, no court has ever decided on its scope so far. This is why these proceedings are of particular legal relevance, since they are concerned with the first decision ever rendered by a judge regarding the provision on equal treatment contained in contracts for the issuance of

[55] Corti and Constante (2005) in Araujo, Facundo M. and Torres, María Carolina. "Apostillas a la problemática de la prórroga de jurisdicción en tribunales extranjeros o arbitrales en materia de deuda soberana". Revista Derecho Público (journal). Ministry of Justice and Human Rights of the Argentine Republic. Year 1, no. 3. Buenos Aires, Argentina. February, 2013.

[56] Araujo, Facundo M. and Torres, María Carolina. "Apostillas a la problemática de la prórroga de jurisdicción en tribunales extranjeros o arbitrales en materia de deuda soberana". Revista Derecho Público (journal). Ministry of Justice and Human Rights of the Argentine Republic. Year 1, no. 3. Buenos Aires, Argentina. February, 2013.

sovereign debt securities. In addition, there is a risk that an erroneous interpretation will create a precedent.[57]

The Latin phrase "*pari passu*" literally translates as "with equal step", which is sometimes interpreted as "under equal conditions", "at the same level" and, by extension, "fairly" or "without partiality or preferences". Within the context of situations of insolvency, this expression is used as an equivalent for "*par conditio creditorum*", which means that creditors must be treated "*pari passu*" or, in other words, that all of them are equal and that capital will be distributed among them without any preference. In a financial context, this term means that two or more loans, bonds or series of preferred shares have equal rights of payment or level of seniority. This is the obligation assumed by the issuer of debt securities, which is reflected in a series of duties, including the duty not to grant future creditors more favourable conditions or guarantees that are not given as well to the holders of these debt instruments. In this respect, the *pari passu* clause contained in agreements for the issuance of public debt securities is reckoned to provide equal rank or treatment as regards legal or payment rights. Equal legal rank means that there are no preferred creditors or subordinated debts. In other words, it means that a State cannot classify a debt as having lower rank than another debt or unilaterally alter that condition. Furthermore, equal rank with regard to payments means that the sovereign State is under a duty to pay public debts under equal conditions.[58]

The *pari passu* clause was included in paragraph 1(c) of the FAA, which provides that:

"(…) 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 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 (…)".

The plaintiffs accuse the Argentine Government of having violated the duty to afford equal treatment set forth in the abovementioned provision, both through the section on *"Risk Factors"* contained in the prospectuses for the 2005 and 2010 Exchange Bonds —which provides that securities of eligible holders that were not tendered may remain in default indefinitely— and each time it made payments under the Exchange Bonds, while it refused to pay its debt to the plaintiffs. They maintain that, by means of those

[57] de Sagastizabal, Raúl. "Argentina pelea en Nueva York el juicio del siglo". [online], rebelión.org, 28 December 2012. Available: http://www.rebelion.org/noticia.php?id=161426
[58] Id.

measures, the Government lowered the rank of the debt held by the plaintiffs as compared with other external indebtedness.

Furthermore, the plaintiffs state that, through Law No. 26,017 —the so-called "padlock law"— and Law No. 26,547 —which temporarily suspended the padlock law with a view to reopening the restructuring process of 2010— respectively promulgated in 2005, under Néstor Kirchner's administration (2003-2007), and in 2009, during the first term of the current head of State, Cristina Fernández, the legal rank of their holdings was reduced as a result of the prohibitions imposed upon the federal Government "*to reopen the swap process established in Decree No. 1735/04 (…) and to conduct any type of in-court, out-of-court or private settlement with respect to the (…) eligible (…) bonds that were not tendered in accordance with the applicable provisions"* —Law No. 26,017— and "[*to offer*] *holders of public debt securities who have brought judicial, administrative, arbitral or other actions (…) more favourable treatment than that afforded to those who have not filed those actions"* —Law No. 26,547—.

In December 2011, the US District Court for the Southern District of New York (Federal Judge Thomas Griesa) found that Argentina had violated the *pari passu* clause through the acts invoked by the vulture funds and ordered the State to pay the amount owed to the plaintiffs, at the same time or before making any interest payment on the debt issued pursuant to the 2005 and 2010 swaps. The Judge justified his decision by stating that "*The Equal Treatment Provision can't be interpreted to allow the Argentine government to simply declare that these judgments will not be paid (…) Argentina lowered the rank of plaintiffs' bonds in two ways: (1) when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under plaintiffs Bonds and (2) when it enacted the Padlock Law and the Padlock Suspension Law. [These laws] cause irreparable harm to the plaintiffs since the legal rank [of their holdings] was permanently lowered as compared with other debt. [Furthermore, the harm would be greater] in the event of a future default since they would never recover the same legal rank as other holders of securities who participated in the swaps".*[59]

The Argentine Government filed an appeal against this judgment before the United States Court of Appeals for the Second Circuit and the ruling was stayed pending a decision from the Second Circuit. The defence demonstrated through solid evidence that Argentina did not violate, in any aspect, the *pari passu* clause since —as stated in

[59] See NML Capital ACP LLC II LLC. v. Republic of Argentina, United States Court of Appeals, Second Circuit, 26 October 2012.

the record— "*it has not given the exchange bondholders a legally enforceable preference over the FAA Bonds. [Argentine laws clearly place on the same legal footing] any claims that may arise [both] from the Republic's restructured debt [and] unrestructured debt. [This is so] even if [the government] has favored the exchange bondholders by honoring their payment rights while violating plaintiffs' [since, despite such violation,] plaintiffs' bonds have always remained 'direct, unconditional, unsecured and unsubordinated obligations of the Republic' with the same legal 'rank' as any other debt—which is all the Equal Treatment Provision requires".*[60]

Emphasis should be placed on Article 5 of Law No. 26,547, which establishes that:

"Holders of government bonds (…) who wish to participate in the restructuring (…) will have to waive all of the rights held by them by virtue of the abovementioned securities, including those rights that may have been recognized by any judicial or administrative judgment, arbitral award or any decision issued by another authority, and waive and release the Argentine Republic of any judicial, administrative, arbitral or other actions, initiated or that may be initiated in the future, with regard to the abovementioned bonds or the obligations of the Argentine Republic arising therefrom, including any action aimed at receiving principal or interest payments on those securities.

Holders of public debt securities who have brought judicial, administrative, arbitral or other actions shall not be accorded more favourable treatment than that afforded to those who have not filed those actions".

It is evident from the foregoing that the provision guarantees the same legal treatment to holders of Exchange Bonds and FAA Bonds. Therefore, it does not violate the *pari passu* clause in any way whatsoever.

Quite on the contrary, the Argentine Government —accurately— understands that the equal treatment provision would be violated if the measure imposed by Judge Griesa was implemented, since it would be extremely unfair to those holders who have participated in the swap and accepted the haircuts. In other words, if Argentina were to pay vulture funds 100% of their debt securities, it would be giving them preferential treatment in respect of other creditors who accepted a significant haircut, with maturities until the year 2038. In addition, the application of the measure under consideration would lead to a reduction in the availability of State resources, thus making it more difficult to comply with the schedule of payments and maturities established under the 2005 and 2010 swaps, which would leave the country exposed

[60] Id.

to future claims for non-payment and violation of the *pari passu* clause. In this regard, the defence attorneys held that *"(…) the hardship to exchange bondholders and to the Republic stemming from the Injunctions far outweighs the purported prejudice to 'holdouts,' who bought their debt at or near default with full knowledge of the limitations on their ability to collect. The Injunctions 'will thrust the Republic into another economic crisis and undermine the consensual [sovereign debt] restructuring process the United States has been at pains to foster for the past several decades'".*[61]

Despite these arguments, the decision of the Second Circuit —which was issued on 26 October 2012— confirmed the ruling made by Judge Griesa and remanded the case to the District Court so that it would set the amount of the judgment and the terms of enforcement, which would subsequently return to the Court of Appeals in order for the final judgment to be issued.

Before making his decision, Thomas Griesa asked the parties to present their positions. The vulture funds were the first to set out their case. Their presentation was directed by NML Capital. In their submission, they ratified the request that the Argentine Government be ordered to pay the nominal value of their holdings simultaneously with the payment on the Exchange Bonds. Moreover, they stated that in the event that Argentina did not have sufficient resources to comply with that requirement, then the funds earmarked for the payment of the restructured debt should be used. They further requested that the government pay USD 1.33 billion into an escrow account until the conflict was resolved.

Argentina's answer came a few days later and centred on three main points. First, it placed emphasis on the fact that paying 100% of plaintiffs' holdings would be unfair to the bondholders who participated in the swap and that those creditors would be harmed in the event that plaintiffs were paid with the funds allocated to the payment of interest on their bonds, as that payment would be severely impaired in that case. For those reasons, Argentina's submission expressed an outright rejection of the use of those resources to that end. Second, the Argentine Republic rejected the alleged power of the New York courts to decide on the allocation of those funds. In accordance with the submission made by Argentina, once the country transferred the funds to the clearing houses, those funds immediately became the property of the Exchange Bondholders. In addition, this transaction was carried out in the Argentine territory; therefore, those assets fall outside the jurisdiction of the US courts. Finally, Argentina noted that a ruling in favour of the vulture funds would be detrimental to the Argentine

[61] Id.

economy and would set an unfortunate precedent for future debt restructurings, not only in Argentina but in general, since it would end up discouraging voluntary participation and encouraging instead speculation through litigation.

The decision issued by Judge Griesa became known on 20 November 2012. In line with expectations, the Judge ordered the Argentine Republic to pay 100% of plaintiffs' holdings and to deposit the money required by the plaintiffs in an escrow account by 15 December, the date when the Argentine Government had to pay interest on the restructured debt. The Bank of New York —Argentina's paying agent— was ordered not to transfer the funds to the accounts of the exchange bondholders, in the event that Argentina did not comply with these requirements.

The Argentine Government immediately filed a motion with the Second Circuit to request that the stay of Griesa's decision be maintained until completion of the appellate stage. The granting of such request guaranteed that Argentina was going to be perfectly able to make the following payment on its restructured debt. In accordance with a press release from the Argentine Ministry of Economy,[62] the filing *"[placed] emphasis on the deficiencies in Griesa's order and, in particular, on the fact that he lacked the necessary powers to suspend the stay that governed the proceedings; therefore, the ruling in this respect is void. [Furthermore, it insisted] that the formula proposed [by the Judge] to implement the pari passu clause [fairly] is unjust and [complained about] the attempt to jeopardize compliance by Argentina with its performing debt. [The filing also] highlighted that ignoring the laws passed by Congress with the consensus of a vast majority of the forces represented in Congress [which preclude the enforcement of the ruling] represents an attack on sovereignty"*. In addition, the motion stated that "*if Griesa had provided for a ratable payment formula that treated plaintiffs and those similarly situated on the same terms as those offered by Argentina in 2010, such remedy would have been consistent with the precedents protected under Argentine law and it could be a proposal that the Argentine Congress could actually discuss".* Thus, the Government opened the possibility for the conflict to be resolved through a third restructuring.

The Court of Appeals granted the motion filed by Argentina and announced a new schedule that ran until 27 February 2013. This decision brought relief to the Government, which was able to comply with the schedule of payments and maturities as established in the 2005 and 2010 swaps without any risk of attachment.

[62] Available at: http://www.mecon.gov.ar/wp-content/uploads/2012/11/26-11-2012.pdf

Naturally, the vulture funds attempted to have this decision reversed. They filed a motion demanding that the court move the deadline to 15 December and insisted on their request that the country be ordered to make a payment into an escrow account. Both Argentina and a group of holders of Exchange Bonds requested the court not to grant the motion. The government claimed that an order granting the motion would violate its sovereign immunity. The bondholders referred to the damage that they would potentially sustain if a measure affecting the payment capacity of the State were approved and requested the Court to order NML Capital to post a security in the amount of USD 2 billion to cover such damage, in the hypothetical case that it ruled in favour of the plaintiffs. Finally, the court denied the motion and affirmed the schedule and the order staying Griesa's decision.

The new schedule set by the Court of Appeals included several opportunities for the submission of the arguments of both parties and third-party motions, as well as the holding of a final hearing —on 27 February 2013— with all the parties involved. Among other non-parties, the government of the United States, the Bank of New York and the Gramercy investment fund, which took part in the 2010 swap, were allowed to participate as third parties. Their statements supported Argentina's position.

Argentina came first. The brief was filed on 28 December and, through it, the defence reaffirmed and strengthened the arguments it has been offering throughout this dispute. In this regard, the brief stated that the judgment passed by Judge Griesa —and its subsequent confirmation by the Second Circuit— raised questions as to the *"(…) primacy of New York law in sovereign debt instruments [because it] departs from accepted legal principles and the rules in force in the United States (…) [Not only does it] wreak havoc on innocent third parties [but it also forces] the Legislative and Executive branches of the Argentine government to appropriate funds [earmarked for other purposes] to pay plaintiffs. (…) There is no basis in U.S. jurisprudence for such extraordinary judicial commands to a foreign state."*[63]

The brief further asserts that: *"The decision ordering full payment is grossly disproportionate to the contractual violation it purports to address. By conditioning any single interest payment on the Republic's restructured debt upon payment in full to plaintiffs on their defaulted debt, the decision does not 'restore' rights [but] rewards [the behaviour of vulture funds and, on the pretext of reducing inequities, —on the contrary— it affords preferential treatment]. [Furthermore,] the court's decision tramples*

[63] "Si pone fin al litigio, se reabre el canje". Página 12 newspaper. 30 December 2012. Available at: http://www.pagina12.com.ar/diario/economia/2-210916-2012-12-30.html

on the rights of numerous third parties [and] clearly violates Article 4 A of the New York Uniform Commercial Code and contravenes New York law, as it interferes with property held by third parties not liable to plaintiffs."[64]

Finally, Argentina's brief reiterated the request for the Court of Appeals to consider as an alternative *"(…) to definitively end the litigation (…) A "Ratable Payment" formula that treats plaintiffs and those similarly situated on the same terms as participants in the Republic's 2010 Exchange Offer. [This] would be a 'remedy' consistent with 'equal treatment' and Argentine law and public policy, which the Argentine Executive could once again present to Congress."*[65]

Some days later, the third-party motions were filed. The government of the United States filed a brief as *amicus curiae* signed by the Departments of State, the Department of Justice and the Department of the Treasury in support of Argentina's position. Such document stated that the Barack Obama administration considered it *"a question of exceptional importance"* for the Court to review the decision and, in particular, it requested that the panel's interpretation of the *pari passu* clause be reviewed, as it was deemed *"(…) incorrect and adverse to the United States [since it] runs counter to longstanding U.S. efforts to promote orderly restructuring of sovereign debt."* Furthermore, the US government asserted that an order requiring Argentina to pay the plaintiffs with the funds allocated to the repayment of restructured debt *"(…) contravenes the United States Foreign Sovereign Immunities Act and may harm U.S. foreign relations".*[66]

For its part, The Bank of New York Mellon requested that the injunction entered by judge Griesa preventing such agent from transferring funds to Exchange Bondholders' accounts if the Argentine Government fails to make the payment ordered in the injunction be rendered ineffective. The Bank held that such measure is not only unlawful –it violates the FSIA- but also prevents the Bank from complying with its obligations to bondholders, which could result in legal action against it.

The position of holders of restructured debt securities was stated in a filing headed by the Gramercy investment fund as well as in other individual filings. These filings highlighted the damage to be suffered by them if the judgment entered by judge Griesa were to be enforced. Their main fear is that a technical default may take place and, consequently, their payments may be negatively affected. In this regard, they argued

---

[64] Id.
[65] Id.
[66] "EE.UU. formalizó su respaldo al planteo argentino". Página 12 newspaper. 29 December 2012. Available at: http://www.pagina12.com.ar/diario/ultimas/20-210886-2012-12-29.html

that the injunction *"unlawfully and unconstitutionally burdens the rights of innocent creditors (…) to collect payments the Republic owes to them."* In keeping with this, they challenged the way in which the *pari passu* clause is being construed and held that they feel discriminated by the court orders. In their own words: *"We are collecting with a haircut and in instalments whereas plaintiffs intend to collect in one single payment and in cash. This is no equal treatment."* They also claimed that as they agreed to participate in the swaps *"to contribute to Argentina's debt restructuring in keeping with the international fiscal policy of the Government of the United States (…), [they] should not (…) be punished."*[67]

For their part, in a filing headed by NML Capital and Aurelius Capital, vulture funds requested that the US Court of Appeals deny the Argentine Government's appeal and dismiss third-party statements asking to reverse judge Griesa's ruling. As was expected, they claimed that they would not accept the swap reopening offer and required that the judgment be fully upheld.

In the hearing held in the city of New York on 27 February each of the parties reaffirmed its position before the US Court of Appeals for the Second Circuit. It is worth highlighting that two days later the US Court of Appeals requested Argentina to prepare a payment proposal to be submitted before 29 March 2013. On such date, the Argentine Government submitted the swap reopening offer prospectus, which is within the terms established in previous restructurings, thus guaranteeing equal treatment to Exchange Bondholders. In this regard, two payment alternatives were considered. The first option consists in Par Bonds, without any principal haircut, due in 2038 at an interest rate of between 2.5% and 5.25% -in this way, 100% of the defaulted bonds par value would be acknowledged-. The second option includes Discount Bonds with a haircut at an interest rate of around 8.28% due in 2033. The proposal was accompanied by the country's commitment to submit a bill to Congress to annul the so-called padlock law *(Ley Cerrojo)* so as to assure the implementation of the proposal in due time and manner without any legal obstacles.

However, vulture funds, true to their style, rejected the restructuring offer contending that it is *"unacceptable and inconsistent".*

In this context, there were three possible alternatives to the US Court of Appeals' ruling. The first one was for the Court to enter a judgment ratifying that Argentina

[67] Barón, Ana. "Bonistas del canje piden suspender el fallo de Griesa contra la Argentina". Clarín newspaper. 27 November 2012. Available at: http://www.clarin.com/politica/Bonistas-canje-suspender-Griesa-Argentina_0_818318277.html

violated the *pari passu* clause and ordering the country to pay according to the terms established in the swap reopening proposal. Considering recent events, such a decision by the Court was seen as the most appropriate as it legitimized the 2005 and 2010 swaps, prevented a technical default, and established an important precedent in respect of sovereign debt lawsuits and future restructurings. The second alternative was for the appellate judges to order the country to pay vulture funds the par value of their holdings plus interest without affecting the Exchange Bonds payment scheme. In this case, the Argentine Government obtained an unfavourable judgment but could still continue fulfilling its restructured debt obligations without trouble. Finally, the worst possible scenario was for the US Court of Appeals to uphold, without modifications, judge Griesa's ruling, which orders that plaintiffs be paid the amount of their claim in one single payment and precludes the Bank of New York, in case of non-compliance, from transferring payments to Exchange Bondholders. Such a decision by the US Court of Appeals would seriously complicate the situation of the country as it would run the risk of entering into a technical default and having several lawsuits filed against it by creditors who had entered the swaps and now find that their rights could be jeopardized.

Anticipating the possibility of a decision by the US Court of Appeals in keeping with any of the last two alternatives mentioned in the paragraph above, the Argentine Government filed, on 24 June, a petition for a writ of certiorari with the United States Supreme Court of Justice against the judgment entered by the US Court of Appeals on 26 October 2012.

Basically, the petition held that, at Argentina's discretion, *"[the decision] affects federal questions that may [only] be reviewed by the Supreme Court. [In the first place because] it contravenes the Foreign Sovereign Immunities Act (FSIA) [and] it represents an unprecedented intrusion into the activities of a foreign State within its own territory that raises significant foreign relations concerns for the United States. [In the second place] the decision also imperils the voluntary sovereign debt restructuring process supported by both the United States and the rest of the international financial community, [and produces] a negative effect on New York as an international financial centre [as] It is hard to conceive of a greater irritant to foreign states and the international community than an order of one nation's courts to another nation on such matters that go to the core of the definition of sovereignty. [Finally, the US Court's decision is] unprecedented in any common law court [and] runs contrary to the rulings* *of several US courts of appeals – including the Second Circuit itself –in relation to the pari passu clause."*[68]

While the country awaited the Supreme Court's decision on the appeal petition against the ruling entered on 26 October 2012 –a petition that would be denied in October of the following year-, on 23 August 2013, the US Court of Appeals fully upheld judge Griesa's ruling, the enforcement of which was stayed until the Supreme Court enters its decision.

The arguments which led the US Court of Appeals to take such a decision were grounded, same as in previous resolutions, on its controversial interpretation of the *pari passu* clause. As regards the swap reopening offer submitted by Argentina, the US Court of Appeals merely stated in the case file that *"(…) no productive proposals have been forthcoming"*[69] , without stating the grounds for such an affirmation.

On the other hand, just as the US Court of Appeals showed no concern for providing reasonable grounds for its appraisal of the swap proposal, so the answers given by it fail to satisfy the motions filed by defendants and third parties throughout the appellate procedure and, in general, only emphasize the answers already given by that same Circuit Court in the ruling entered on 26 October 2012.

With regard to Argentina's petition, in which the country argues that judge Griesa's ruling violates the FSIA as it represents a serious intrusion into the activities of a foreign State because it decides upon the funds that the national government allots to the fulfilment of its restructured debt obligations, the US Court of Appeals stated in the case file that *"(…) as discussed in [our] October [2012 opinion], (…) the injunctions do not violate the FSIA because "they do not attach, arrest, or execute upon any property".*[70] [71] *[They direct Argentina to comply with its obligations to plaintiffs. (…) They affect Argentina's property only incidentally to the extent that the order prohibits Argentina from transferring money to Exchange Bondholders if it does not comply with the ruling (…) Argentina can pay (…) its Exchange Bondholders provided it does the same for its defaulted bondholders (…) The Injunctions do not transfer any dominion or*

[68] "Argentina elevó la primera apelación ante la Corte Suprema de EEUU". [online], Argentina, telam.com.ar, 24 June 2013. Available at: http://www.telam.com.ar/notas/201306/22486-argentina-elevo-la-primera-apelacion-ante-la-corte-suprema-de-eeuu.html

[69] See NML Capital ACP LLC II LLC. v. Republic of Argentina. United States, Court of Appeals for the Second Circuit, 23 August 2013.

[70] Section 1609 of the FSIA on immunity from attachment and execution of property sets forth that: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution (...)"

[71] See NML Capital ACP LLC II LLC. v. Republic of Argentina. United States, Court of Appeals for the Second Circuit, 23 August 2013.

control over sovereign property to the court.][72] Rather, the injunctions allow Argentina to pay its FAA debts with whatever resources it likes."[73] In respect of this opinion stated by the judges of the Court for the Second Circuit, it is worth highlighting that, although the court's injunctions do not technically imply an attachment because the funds are not seized, there is no doubt that said Court is effectively ruling on and exercising control over a foreign State's property, thus exercising powers it does not have. This conduct is a clear violation to sovereignty.

Likewise, as regards the inequality that both defendants and Exchange Bondholders understand the injunction represents and the harm that such injunction entails for these investors and for the Argentine economy, the US Court of Appeals answered that *"[In the first place], the amount currently owed to plaintiffs by Argentina as a result of its persistent defaults has priority. We believe that it is equitable for one creditor to receive what it bargained for, and is therefore entitled to, even if other creditors, when receiving what they bargained for, do not receive the same thing The reason is obvious: the first creditor is differently situated from other creditors in terms of what is currently due to it under its contract (…). The district court's decision does no more than hold Argentina to its pari passu contractual obligation (…). [In the second place] the injunctions present no conflict [to Exchange Bondholders] (…) because Argentina "has declared publicly that it has no intention of paying defendants" and, as a result, Exchange Bondholders will not be paid either. Under these circumstances, we conclude that the injunctions have no inequitable effect [against third parties. Rather, the harm would be caused by Argentina if it does not comply with them] (…) [In the third place] we considered the dire predictions from Argentina that enforcing the commitments it made in the FAA would have cataclysmic repercussions in the capital markets and the Argentine economy (…) We are mindful of the fact that courts of equity should pay particular regard to the public consequences of any injunction. However, (…) the district court found that Argentina now "has the financial wherewithal to meet its commitment of providing equal treatment to plaintiffs and Exchange Bondholders" [and] Argentina makes no real argument that, to avoid defaulting on its restructured debt, it cannot afford to service the defaulted debt."[74]*

There are several objections to be made to the statements by the US Court of Appeals quoted in the paragraph above. On the one hand, the grounds provided by the judges

[72] See NML Capital ACP LLC II LLC. v. Republic of Argentina. United States, Court of Appeals for the Second Circuit, 26 October 2012
[73] See NML Capital ACP LLC II LLC. v. Republic of Argentina. United States, Court of Appeals for the Second Circuit, 23 August 2013.
[74] Id.

lose authority when the Court gives priority to the plaintiffs' holdings in relation to other creditors. With such conduct, the Court for the Second Circuit is certainly taking an inequitable position by considering that one debt is superior in rank to another, thus violating the *pari passu* clause, which is precisely what the Court purports to remedy. On the other hand, just as the Court does not acknowledge the inequitable nature of the proposed injunction, so it fails to acknowledge its responsibility for the prejudice that such injunction entails to Exchange Bondholders, and blames the Argentine Government for such harm. However, the judges seem to forget that Argentina's non-compliance with the injunction is not a capricious decision and that, in any case, what is preventing transfers of restructured debt payments is not the country's decision but the ruling that the courts entered on Argentine property without having the power to do so. They are well aware of the fact that domestic legislation and the restructuring prospectuses prevent the country from complying with the injunction as there are rules which preclude the country from offering better conditions to one bondholder in relation to another. Were the country to do so, the State would be exposed to legal action for large claims by Exchange Bondholders, which could result in a new economic crisis. Therefore, although it is true that Argentina has the financial means to pay the vulture funds' claim, the lawsuits that would result from such payment would seriously compromise, among other things, its foreign-currency reserves and, along with this, the country's economy and the wellbeing of its people. Having said this, it seems that, at the time of ruling on the matter, the US Court of Appeals for the Second Circuit was not, as it stated in the case file, sufficiently "(…) *mindful of the fact that courts of equity should pay particular regard to the public consequences of any injunction."*

This was not the only issue in which the Court failed to consider the public consequences of the injunction. It also failed to do so when stating its opinion on the effects that such injunction may have on the debt restructuring global system. The Court holds that *"(…) cases like this one are unlikely to occur in the future [because] newer bonds almost universally include Collective Action Clauses (CACs) which permit a super-majority of bondholders to impose a restructuring on potential holdouts."*[75] However, there is no guarantee that the prescribed majorities will be reached and, in view of this, bondholders may choose to reject restructuring offers anticipating that a ruling like the one being considered may push the indebted State into a default, which would prevent them from collecting their rights. Likewise, vulture funds may purchase enough debt securities to crush any restructuring attempt, thus generating serious problems in the indebted countries' economies that would finally have consequences at

[75] Id.

the global level. As Anne Kruger –former IMF official- stated in a brief filed with the US Court of Appeals, whereby she requested to be considered *amicus curiae*, *"[it is by no means certain that Collective Action Clauses are sufficient to solve the problems faced by restructuring processes]. Any court ruling which gives preferential treatment to those who decide not participate in a restructuring process will, once the country's economy has recovered, make bondholders more reluctant to agree to this processes, thus creating more problems for the country's recovery. [A decision in keeping with this] would make it more attractive to remain as holdout [and, therefore, more difficult to solve complicated debt cases]."*[76]

The attitude adopted by the courts sitting in New York throughout these court proceedings is highly questionable, taking into account that, according to the their own words, "(…) *courts of equity should pay particular regard to the public consequences of any injunction."* Their attitude becomes even more questionable if we consider the importance of this case as this would be the first ruling on the *pari passu* clause in sovereign debt issuance contracts.[77] In this regard, the statement made by the Court for the Second Circuit in the most recent ruling particularly attracts out attention, as it affirms that *"(…) Our decision here does not control the interpretation of all pari passu clauses or the obligations of other sovereign debtors under pari passu clauses in other debt instruments. (…) our role is not to craft a resolution that will solve all the problems that might arise in hypothetical future litigation (…)"*[78]*.* While it is true that one single ruling cannot solve all disputes that may arise in the future –and it would be little realistic to expect that-, it should attempt to prevent such disputes, particularly when the issue is one that entails serious harm for the public wellbeing. On the other hand, the abovementioned statement further catches our attention when considering that it was made by a Court belonging to a legal system with a clear trend towards case-law application, as is the case of the American system. These statements lead us to think that the judges are aware of the fact that they are establishing a controversial interpretation of the *pari passu* clause which is far from being fair in the record of sovereign debt litigation.

[76] See Kanenguiser, Martín "Anne Krueger, a favor de la Argentina en el juicio de los holdouts". La Nación newspaper. 5 January 2013. Available at: http://www.lanacion.com.ar/1543136-anne-krueger-a-favor-de-la-argentina-en-el-juicio-de-los-holdouts. See also, "El país recibió una avalancha de apoyos en su pelea contra los fondos buitre". Tiempo Argentino newspaper. 5 January 2013. Available at: http://tiempo.infonews.com/2013/01/05/argentina-93930-el-pais-recibio-una-avalancha-de-apoyos-en-su-pelea-contra-los-fondos-buitre.php

[77] de Sagastizabal, Raúl. "Argentina pelea en Nueva York el juicio del siglo". [online], rebelión.org, 28 December 2012. Available at: http://www.rebelion.org/noticia.php?id=161426

[78] See NML Capital ACP LLC II LLC. v. Republic of Argentina. United States, Court of Appeals for the Second Circuit, 23 August 2013.

In this regard, it is worth quoting the words of Nobel Prize in Economic Sciences 2011 and former senior vice-president and chief economist of the World Bank, Joseph E. Stiglitz, which appear in an article published in the website Project Syndicate. When referring to the lawsuit against Argentina and in particular to the most recent ruling by the US Court of Appeals, he said:

"(…) A recent decision by a United States appeals court threatens to upend global sovereign-debt markets. (…) At the very least, it renders non-viable all debt restructurings under the standard debt contracts. In the process, a basic principle of modern capitalism –that when debtors cannot pay back creditors, a fresh start is needed– has been overturned.

(…) [In Argentina] devaluation and debt restructuring worked. In subsequent years, until the global financial crisis erupted in 2008, Argentina's annual GDP growth was 8%, one of the fastest rates in the world.

Even former creditors benefited from this rebound. In a highly innovative move, Argentina exchanged old debt for new debt –at about 30 cents on the dollar or a little more– plus a GDP-indexed bond. The more Argentina grew, the more it paid to its former creditors. Argentina's interests and those of its creditors were thus aligned: both wanted growth.[79]

(…) Economists applauded Argentina's attempt to avoid this outcome through a deep restructuring accompanied by the GDP-linked bonds. But a few "vulture" funds –most notoriously the hedge fund Elliott Management, headed by the billionaire Paul E. Singer– saw Argentina's travails as an opportunity to make huge profits at the expense of the Argentine people. They bought the old bonds at a fraction of their face value, and then used litigation to try to force Argentina to pay 100 cents on the dollar.

(…) Their litigation strategy took advantage of a standard contractual clause (called pari passu) intended to ensure that all claimants are treated equally. Incredibly, the US Court of Appeals for the Second Circuit in New York decided that this meant that if Argentina paid in full what it owed those who had accepted debt restructuring, it had to pay in full what it owed to the vultures.

If this principle prevails, no one would ever accept debt restructuring. There would never be a fresh start –with all of the unpleasant consequences that this implies-.

[79] The conditions in which the Argentine debt restructuring swaps in 2005 and 2010 were established will be explained in detail in Chapter 3 of this work.

In debt crises, blame tends to fall on the debtors. They borrowed too much. But the creditors are equally to blame –they lent too much and imprudently-. Indeed, lenders are supposed to be experts on risk management and assessment, and in that sense, the onus should be on them. The risk of default or debt restructuring induces creditors to be more careful in their lending decisions.

The repercussions of this miscarriage of justice may be felt for a long time. After all, what developing country with its citizens' long-term interests in mind will be prepared to issue bonds through the US financial system, when America's courts –as so many other parts of its political system– seem to allow financial interests to trump the public interest?

(…) For those in developing and emerging-market countries who harbor grievances against the advanced countries, there is now one more reason for discontent with a brand of globalization that has been managed to serve rich countries' interests (especially their financial sectors' interests)."[80]

In view of the US Court of Appeals' decision, Cristina Fernández's administration felt the need to implement a measure that would show both its willingness to settle the dispute in an equitable manner and to fulfil the commitments assumed. For these reasons, days after the Court had rendered its decision, Argentina sent a bill to Congress to suspend the so-called "padlock law" for an indefinite period and reopen the debt swap process for the third time.

The bill was passed into law on 11 September 2013 –Law N° 26,886-. Within the 9 articles that make up its text, it is established that *"the financial terms and conditions offered shall not be better than those offered to creditors [who agreed to the restructuring]"* (article 2), and those creditors who agree to enter the swap are obliged to forgo all existing legal action and any future action against the country in relation to this debt. Furthermore, it is established that *"bondholders (…) who have commenced legal, administrative, arbitral or any other proceedings shall not be offered treatment more favourable than that given to those who have not commenced any such proceedings"* (article 4). The law further provides that *"eligible bonds of the national government (…) whose holders have not entered the swap[s] (…) or have not expressly stated (…) their willingness not to agree to the swaps shall be replaced, by*

[80] Stiglitz, Joseph E. "The Vulture's Victory". Project Syndicate. [online], project-syndicate, 4 September 2013. Available at: http://www.project-syndicate.org/commentary/argentina-s-debt-and-american-courts-by-joseph-e--stiglitz/spanish

operation of law, with 2038 PAR VALUE STEP-UP BONDS OF THE ARGENTINE REPUBLIC" (article 6).

The third swap proposal –which on the date of publication of this paper has not yet been launched- contains the same alternatives contemplated in the proposal submitted by Argentina to the US Court of Appeals for the Second Circuit in New York on 29 March 2013. In this way, the Government clearly shows that it will not violate its commitment not to offer better conditions to one bondholder in relation to another, and that it does not discriminate against plaintiffs as it offers them the same treatment than that given to Exchange Bondholders. Furthermore, through the swap, the State attempts to show to the Supreme Court, with a good-faith gesture, that, in the words of the Ministry of Economy Hernán Lorenzino, *"(…) Argentina is not only willing to pay but also to maintain that willingness to pay".*[81]

In line with the above, it is worth recalling the statements made on a press release[82] signed by the Argentine Bankers Association, the Argentine Chamber of Commerce, the Argentine Industrial Union, and the Argentine Chamber of Construction –business entities with the largest influence on the country's economy-, which stated the following in relation to the swap reopening: *"It is an initiative that guarantees equal treatment to all creditors and re-confirms the country's commitment to fulfil its debt obligations in due time and manner."* Further in the text, they added: *"[With this measure, the government provides] a final solution to the debt problem [which] will enable the strengthening of the country's incorporation to the world and the capital markets. This will bring benefits in terms of investment flows, thus creating jobs, increasing productivity and technologic innovation, and promoting economic growth with social inclusion."*

While the Argentine Government worked on the third swap project, on 6 September it filed with the US Court of Appeals the last rehearing petition that it is entitled to file with such Court in respect of the decision entered on 23 August. The petition requests that the decision be reviewed by the three appellate judges who adopted it and the thirteen members who make up the Second Circuit, a process known as "en banc".

Simultaneously, Exchange Bondholders also requested an en banc rehearing. In their filing, they claim that the injunction *"infringes upon EBG's property rights"* and is *"unconstitutional"*. Furthermore, they claim that the injunction is excessive as it enjoins

[81] Lorenzino, Hernán. Plenary session of commissions at the Argentine Senate. Buenos Aires. 28 August 2013.

[82] Press release dated 28 August 2013. Available at: http://adeba.com.ar/comunicados-detalle.php?p=-sectores-productivos-apoyan-reapertura-d-canje-uda-30

the Bank of New York from transmitting any payments unless the country complies with the injunction *"even though it is undisputed that those funds are the property of [the Exchange Bondholders] as soon Bank of New York receives the money from the Republic."* Therefore, Exchange Bondholders understand, just as Argentina, that American courts have no powers to rule over such property.[83]

This last petition extends the terms of court proceedings. The term that the US Court of Appeals has to render its decision on the en banc petition has not yet been determined. Once the Court has ruled on the matter, the Argentine Government will have 90 days following the date of the decision to file a request for appeal against the ruling dated 23 August 2013 with the United States Supreme Court of Justice. Then, the Supreme Court will decide whether it will consider such request or not and, if it allows it, whether it will uphold judge Griesa's ruling or not.

It is worth mentioning that, since the commencement of these proceedings, Argentina has undergone several attachments of property belonging to the national Government.[84] The most recent case was the retention of Argentine Frigate Libertad in the city of Tema, African Republic of Ghana. The retention order was issued by the Supreme Court of said country at the request of the vulture fund NML Capital. The dispute was finally settled 77 days after the attachment of the Frigate with a ruling entered by the Tribunal for the Law of the Sea of Hamburg –within the United Nations- which established that the ship was property exempt from execution and ordered its immediate release. Subsequently, on 26 June 2013, a supplementary ruling entered by the Court of Ghana ordered NML to pay USD 8 million as costs to the administration of the port.

Simultaneously, the country has been undergoing harsh discrediting campaigns promoted by American Task Force Argentina (ATFA), an organization founded in 2001 by the vulture funds with the sole purpose of lobbying against Argentina. The activities that this organization conducts range from press releases which defame the Nation to financing protests and demonstrations against the Argentine Government in the United States.[85] Moreover, the organization influences the will of judges and politicians for its own benefit through means of questionable morality.

[83] Carrillo, Cristián. "Otra carta judicial en Nueva York". Página 12 newspaper. 7 September 2013. Available at: http://www.pagina12.com.ar/diario/economia/2-228487-2013-09-07.html

[84] On 25 October 2012 the Argentine Minister of Foreign Affairs, Héctor Timerman, disclosed in a press conference a list of 28 items of property belonging to the national Government which had been attached since 2003 by vulture funds and which the Government had been able to recover through legal action.

[85] For more information on discrediting campaigns that the Organization conducts against Argentina, visit the Organization's website: http://www.atfa.org/

It is worth mentioning that the Organization is headed by Robert Raben, Robert J. Shapiro, and Nancy Soderberg, who have held important positions in the judicial and political administration in the United States. Raben was appointed Assistant Attorney General of the Department of Justice in 1999 under former President Clinton's administration. Before that, he worked as a consultant in Congress until he was appointed to the Office of Legislative Affairs. During those years he advised democrat Congressman Barney Frank and the Judicial Committee of the House of Representatives. Shapiro is currently a consultant to the IMF. During the second Clinton administration, he was undersecretary of commerce for economic affairs. Furthermore, he worked in the campaigns of former President Clinton, Albert A. Gore –Clinton's vice-president-, and John Kerry –current Secretary of State-. Nancy Soderberg has worked in the Senate, the White House, and the United Nations throughout her professional career. Between 1993 and 1996 –Clinton's first administration-, she worked as an official at the National Security Council and as representative to the United Nations with rank of Ambassador. In 2012, current President Barack Obama appointed her as ambassador in her capacity as Chair of the Public Interest Declassification Board.

Going back to the case at issue, it is clear that its resolution is relevant at the global level as it involves matters related to sovereignty and to the whole global mechanism of organized sovereign debt restructurings. This last aspect is particularly a cause for concern to developed nations and international organizations as it represents an imminent conflict for European countries that are currently undergoing debt crises. Apart from this, the sovereignty dilemma is not a minor issue and it is important to discuss it.

Throughout this paper, we have raised the possible problems that may arise in future restructurings if the United States Supreme Court does not admit a potential appeal petition by Argentina or upholds Griesa's ruling and its controversial interpretation of the *pari passu* clause. Such ruling virtually enables a small group of creditors to gain possession of the assets that a sovereign allots to fulfil its obligations with other investors, thus denying the latter the exercise of their legitimate rights. Were such ruling to be upheld, it would establish a precedent that would generate a serious lack of confidence in the current restructuring system due to the fear of a large number of bondholders that the possibility of collecting their debts may be limited by one single holder. This would lead creditors who may have been willing to enter into a swap to reject it for fear that they will not collect their payments and to choose to take legal action. The same would be true with securities issued with Collective Action Clauses

(CACs). In the face of the possibility that the required majorities may not be reached, bondholders would probably feel tempted to reject a restructuring offer.

This is the same interpretation that the World Bank, the IMF, and banking associations make and which constitutes a cause of concern for them. For instance, in a document published on 23 May 2013, the IMF stated that *"(…) by allowing [the vulture funds] to interrupt the flow of payments to creditors who have participated in the restructuring, the decisions [of the American courts] would likely discourage creditors from participating in a voluntary restructuring. [Likewise], by offering holdouts a mechanism to extract recovery outside a voluntary debt exchange, the decisions would increase the risk that holdouts will multiply and creditors who are otherwise inclined to agree to a restructuring may be less likely to do so due to inter-creditor equity concerns that such a measure may raise."*[86]

As can be seen, if the Court were to follow the same trend as the court rulings entered until now, it would be legitimising these speculative practices -which, it is worth recalling, are unlawful under New York legislation-, punishing the people of indebted Nations –who eventually suffer the consequences of the adjustments that the economies of their countries must apply to pay their debts-, and depriving restructuring agreements of their legitimacy.

Likewise, the ruling paradoxically plunges the Argentine economy into a technical default and forces the Government to default on its restructured debt payment obligations. This would not only prejudice creditors, precipitate a new financial crisis in the country and generate an avalanche of court complaints but also contribute to the myth that Argentina refuses to pay its debts, which in turn would affect the country's access to loans.

Up to now, it is clear that the judges, with the intention of placing private interests ahead of public wellbeing, have decided to ignore the Brady principle of equal treatment, which has been established to maintain the proportion of credits among bondholders in order to guarantee that none of them obtains greater benefits than the others.

In keeping with the above, it would be advisable for the judges to review traditional American judicial criteria as they would find that in contractual matters they are urged to seek equitable solutions which take the public interest into account. For instance, in

[86] "El FMI advirtió que la ratificación del fallo de Griesa podría afectar futuros canjes de deuda.", [online], Argentina, telam.com.ar, 23 May 2013. Available at: http://www.telam.com.ar/notas/201305/18737-el-fmi-advierte-sobre-las-implicancias-que-podria-tener-el-fallo-a-favor-de-los-fondos-buitre.html

Mastrobuono v. Shearson Lehman Hutton, Inc. (1995), the United States Supreme Court acknowledged that: *"(…) where the terms of a contract may be interpreted in at least two reasonable ways, the meaning which favours public policy shall be preferred."*[87]

There exists the hypothesis that one of the reasons why the courts have entered such an inequitable judgment based on an unusual interpretation of the *pari passu* clause is that the real purpose is to plunge the country into a default. This hypothesis is grounded on the premise that vulture funds have acquired Credit Default Swaps (CDS) –insurance against risk of default-. Therefore, were a default to take place, they could collect on such insurance, which is estimated to be worth millions. In this way, the judgment entered becomes an extremely profitable instrument for these financial speculators. This situation is deeply worrying and calls for special attention because if this were the strategy –and if it actually worked-, it could establish a new *modus operandi* for vulture funds. And if this happened, the harm to be suffered by the economies of the States would be far more serious because, in this scenario, they would very likely have to face the cost of bailing out the banks which issued such insurance without delay.[88]

Now, as was stated above, another matter which calls for attention is the unduly American intrusion in affairs inherent to the Argentine Government. In the first place, the mere fact that American courts are placing a foreign government in the defendant's seat for establishing a public policy aimed at safeguarding its economy is by itself an absolute violation to sovereignty and the clearest proof that currently the interests of financial players are placed ahead of the wellbeing of Nations at the global level. A matter that also deserves our attention is the court injunctions which have ruled on public assets when in fact such property is generally exempt from execution. Besides, these measures condemn *acta iure imperii* –another violation of sovereignty-. The fact that American courts are exercising such powers is a consequence of the delegation of judicial powers to foreign judicial bodies, whether under Bilateral Treaties on investment or agreements for the issuance of debt securities. This requirement, which prevails in international trade agreements, is not innocuous but rather constitutes a powerful for the subordination of the countries. Although it is hard for governments in need of financing to avoid this requirement because it determines their access to loans,

[87] de Sagastizabal, Raúl. "Argentina pelea en Nueva York el juicio del siglo". 28 December 2012. Available at: http://www.rebelion.org/noticia.php?id=161426

[88] In the hearing held on 27 February 2013, one of the court judges, Rosemary Pooler, warned the attorney for NML Capital about these suppositions. The attorney denied them; however, no substantial evidence has been submitted to support such denial.

it is necessary to reconsider these provisions, as they entail a high economic and political cost, and begin to design a legal and operative national structure to fully recover judicial sovereignty.[89]

At the international level, it is important to underscore the imperious need to regulate these practices. Although some countries have taken some initiatives, these are scarce and insufficient.[90] What is needed to ban this criminal conduct is global willingness. In 1587, an English judge stated the following in relation to the practice of Champerty: *"(…) So great was the evil of rich and powerful barons buying up claims, and, by means of their exalted and influential positions, overawing the courts, and thus securing unjust and unmerited judgments, and oppressing those against whom their anger was directed, that it became necessary, in an early day in England, to enact statutes to prevent such practices."*[91] The speculation to which this Court made reference is exercised today by vulture funds, who direct their anger against the people of indebted Nations. It is surprising, or rather very reproachable, that conduct which five centuries ago was already identified as strongly harmful and unlawful has not yet been condemned. Far more reproachable is the fact that judicial bodies and legal texts legitimise these practices.

The dispute that Argentina has been facing undoubtedly reveals the urgency to discuss these issues and to establish an efficient and fair mechanism for sovereign debt restructuring. But, at the same time, it reveals great resistance by the system. Proof of this is American President Barack Obama's refusal to include a punishment to the vulture funds' conduct in the document of the 8th G20 Summit held in the city of Saint Petersburg, Russia.

As Stiglitz states it, *"debt restructurings often entail conflicts among different claimants. That is why, for domestic debt disputes, countries have bankruptcy laws and courts. But there is no such mechanism to adjudicate international debt disputes (…) [nor] the pretense of attempting fair and efficient restructurings. [However,] The US court's*

[89] Zaiat, Alfredo. "Soberanía". Página 12 newspaper. 3 March 2013. Available at: http://www.pagina12.com.ar/diario/economia/2-214976-2013-03-03.html

[90] In April 2010, the British Parliament passed a law prohibiting the filing of complaints with London courts in relation to debts of HIPCs. Bills entitled "Stop vulture funds bill" (2009) and "lutter contre l'action des fonds financiers dits "fonds vautours" (2007) were submitted to the American and French Congresses respectively. However, they have not been passed to date.

[91] Compilación Jurisprudencia del Área del Pacifico, vol. 28, pp. 11,12 (Compilación de Fallos de Oregon, 1891) See Elliott Associates, L.P. v. The Republic of Peru. LEXIS 12253, United States Disctrict Court, 6 August 1998.

tendentious, economically dangerous ruling [in the current dispute in which Argentina is involved] shows why we need such a system now."[92]

In keeping with this, it is worth mentioning that the Argentine President, Cristina Fernández, made a proposal at the Saint Petersbutg Summit for *"a bankruptcy Act at the international level"* similar to the Acts that are applied at the local level. She gave the example of the Argentine Act, under which *"a debt restructuring is considered to be approved if 66% of creditors accept the offer."* Then, she stated: *"we need a system equal to all"*, and added *"it is not possible that the country has conducted a debt restructuring agreed by almost 93 percent of bondholders, and a few "vultures" representing merely 0.45 percent of all creditors want to prevent Argentina from continuing making payments on its debt in due time and manner, as it has been doing since 2005 with its own resources. (…) The problem is that, although the vultures are few in number, they have an extremely powerful lobby."*[93]

In this regard, it is necessary to design regulations at the global level aimed not only at limiting the activity of these speculators but also at attempting to prevent courts from making such unusual interpretations as that of the Champerty practice –in the case involving Peru- or the *pari passu* clause –in the case involving Argentina-. In 1824, another English court established: *"(…) a resort to the public tribunals for justice, should produce injustice only where the administration of justice is weak or corrupt, or where the laws are very imperfect. Where the administration of justice is firm, pure, and equal to all, and where the laws give adequate redress for groundless suits, it is not easy to conceive, that unlawful conduct may arise."*[94]

In the cases referenced in this paper, there are more than enough examples of the serious consequences suffered by the people when –as stated in the quotation above- cases are administered by *"justice [that] is weak or corrupt"* with "*laws [that] are very imperfect"*. Rulings such as those entered in the referenced cases prove that the current system for the administration of justice favours the interests of a few powerful parties, thus preventing justice from being a right to all, especially excluding the poorest sectors. As stated by the Court of the early 19th century, the legislative branch must fight against groundless suits so that there can be justice and unlawful activities

[92] Stiglitz, Joseph E. "The Vulture's Victory". Project Syndicate. 4 September 2013. Available at: http://www.project-syndicate.org/commentary/argentina-s-debt-and-american-courts-by-joseph-e--stiglitz/spanish

[93] Cufré, David. "Siria y los fondos buitre en el menú de la Cumbre". Página 12 newspaper. 6 September 2013. Available at: http://www.pagina12.com.ar/diario/economia/2-228450-2013-09-06.html

[94] See Elliott Associates, L.P. v. The Republic of Peru. LEXIS 12253, United States Disctrict Court, 6 August 1998.

may be prevented. Regulations must be designed in keeping with this aim. Only then will the people be truly protected not only from this type of speculators but also from serious harm which they have to suffer on account of the decisions adopted by judges, leaders, and political officials which favour private interests to the detriment of the State. Law must be a tool aimed at promoting social justice, the wellbeing of societies, and the sovereignty of the peoples.

3. The economic consequences of a ruling favourable to the vulture funds.

The history of Argentine indebtedness problems is marked by the suffering of a large part of the population who underwent the changes in the economy, openness, deregulation, and adjustments implemented under the message of bailout policies in the face of the difficulties generated by public debt.

Getting to the trial stage was the result and consequence of that history and, in order to understand the economic effects that the ruling entered by judge Griesa entails for the Argentine society in particular and also for Exchange Bondholders and the international financial system, it is necessary to make a brief review of how such debt originated and what events led to its inevitable restructuring.

3.1 Why did Argentina enter into default in late 2001?

As part of the economy recovery process following the default declared in 2001, Argentina agreed with more than 91% of its creditors, after the two swap offers in 2005 and 2010, to default on its external public debt[95], without any financial support from the international community.

The Argentine default was almost inevitable considering its collapsed economy. In order to become acquainted with the origin of debt-related problems and their importance, it is necessary to go back to the 70s, a decade in which the impressive increase in liquidity in the international financial system due to the dollars resulting from the 1973 oil shock and the recession in central countries caused those dollars to be channelled at very low interest rates to peripheral countries, which were in a better economic situation. A characteristic of this process was that international lending organizations ceased to be the main foreign creditors and were replaced in terms of importance by large transnational banks of central countries, which had received the petrodollar funds.

This is how the rate of indebtedness began to grow in the region accompanied by a new accumulation regime and a new international organization of production which put an end to the one that had been established after the post-war period. "This new stage

[95] A widely spread idea is to distinguish between domestic and external public debt according to the creditors' place of residence. However, this paper considers that the important factor is the currency in which the debt was incurred given that among the unusual conditions with which the national Government was faced was the fact that 60% of the creditors were Argentine residents but still the debt was in dollars.

of internationalization resulting from the mid-1970s world crisis entailed, on the one hand, an increase in production integration at the global level due to the expansion of direct foreign investment –channelled through transnational companies- and, on the other, the deepening of financial internationalization[96] to unprecedented levels."[97]

The difficulties started when, in 1979, the United States Federal Reserve abruptly increased the financing cost in an attempt to reduce the inflation rate. The external debt then becomes a true problem because, although the debt had been incurred at low rates, these rates were of the floating type and, besides, indebtedness was not accompanied by an increase in the repayment capacity. Furthermore, to these new conditions we must add a decrease in the terms of trade. However, this did not deter José Alfredo Martínez de Hoz, Minister of Economy during the last dictatorship in Argentina, who continued promoting indebtedness as the backbone of external openness and exchange rate appreciation, something that would be later repeated by Carlos Saúl Menem and his Minister of Economy, Domingo Cavallo.

The Argentine situation worsened as from 1981 when Lorenzo Sigaut, who had replaced Martínez de Hoz, implemented an exchange rate hedge. This was a direct subsidy to a part of external debt private debtors[98] that was granted to those who renewed their loans abroad for a period of at least one year and a half. Through this regime, the Central Bank of the Argentine Republic (BCRA) guaranteed the exchange rate to companies that had incurred debt in the international markets to protect them from devaluation[99], which would actually happen. In this way, the price difference was paid by the Central Bank and, therefore, by society. The Central Bank releases came one after the other, completing and broadening the parties that were eligible for the subsidy, as was the case of the subsidies granted as a retroactive remedy for

---

[96] "The expansion of financial internationalization definitively boosted after the deregulation of capital markets in the US and England from 1979 onwards. Deregulation was implemented under the R. Reagan and M. Thatcher administrations, respectively. That was the beginning of the consolidation of a process which revolutionized the macro and micro behaviour of international economy and in which financial assets (debt instruments, shares, bonds, etc.) expanded far beyond the growth of fixed assets, thus precipitating several financial crises capable of destroying fictitious capital due to the fall in the price of financial assets." Basualdo, Eduardo; Nahón, Cecilia; Nochteff, Hugo. "Deuda externa privada en la Argentina (1991-2005). Trayectoria, naturaleza y protagonistas". Desarrollo Económico. Vol 47, No. 186, 193-224. Buenos Aires, Argentina. 2007.

[97] Basualdo, Eduardo; Nahón, Cecilia; Nochteff, Hugo. "Deuda externa privada en la Argentina (1991-2005). Trayectoria, naturaleza y protagonistas". Desarrollo Económico. Vol. 47, No. 186, 193-224. Buenos Aires, Argentina. 2007.

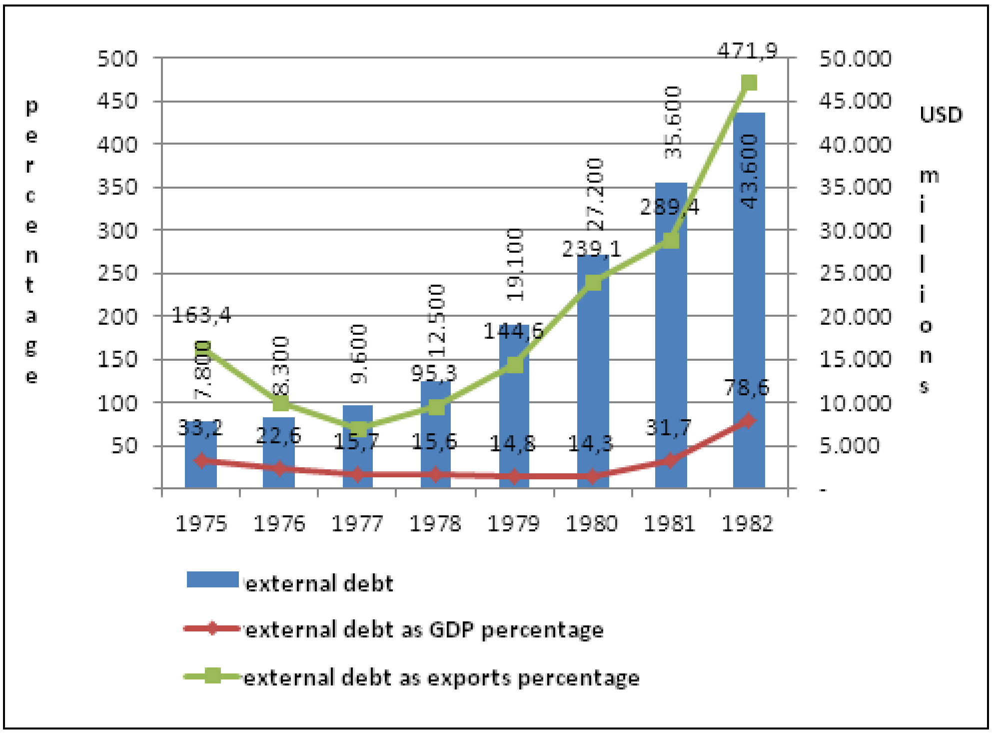
[98] The purchase of external debt by companies was not aimed at the expansion of productive activities but rather at speculative activities in an attempt to obtain a financial return. This process consisted in placing in the local market the money they obtained abroad as debt given that the domestic interest rate was systematically higher than the cost of indebtedness in the international market. This was also the start of the dynamics where capital flight is closely linked to external indebtedness, a connection which lasted until the end of convertibility.

[99] External debt debtors gave Argentine pesos to the State according to the agreed-upon quotation in the exchange rate hedge and the State assumed the responsibility of paying foreign creditors in dollars.

devaluations that have taken place before the application of this scheme. In 1982, when Cavallo, who would later be former President Menem's Minister of Economy, was appointed as President of the Central Bank, a new exchange rate hedge regime was implemented. The new regime did not annul the existing one but created a new alternative to increase the insured debt amount, thus extending its expiration. As it had happened under Sigaut's administration, subsequent policies for the provision of additional benefits to debtors followed. In late 1982, in view of the fact that exchange rate hedge expirations exceeded foreign currency reserves available in the BCRA, steps begin to be taken towards the nationalization of the private debt. Through Notice "A" 251 of November 1982, the BCRA started to convert a part of the private debt into public debt, thus modifying the expiration schedule of the obligations, which were now owed by the State. At the same time, it established payment to creditors with bonds. In this way, the reduction of external private debt was completed with the nationalization of the debt.[100]

[100] Basualdo, Eduardo "Deuda externa y poder económica en Argentina" Ed. Nueva América. Buenos Aires, Argentina. 1987.

Chart No. 1: Evolution of Argentine external debt in absolute terms and its relation to exports and GDP (1976-1982)



Notes: stated in USD million and percentages
Source: Arceo, Nicolás and Wainer, Andrés. "La crisis de la deuda y el default. Los distintos intereses en torno a la negociación de la deuda pública". Flacso. Buenos Aires, Argentina. 2008

Beyond each country's particular situation, the new financial conditions after the increase in interest rates in the United States and Europe generated acute solvency conditions of external debts all over Latin America. Debt service –payment of interest and principal- grew hugely, making the repayment of the incurred debts very difficult. Besides, global trade contraction resulted in a decrease in the price of commodities, which are the main export products in the region. The first country to announce its incapacity to pay its external debt was Mexico in 1982, with its government declaring a stay of payments for 90 days. As a result of this default, banks reduced or halted the grant of new loans and rejected the refinancing of those which were close to expiring (a large part were short-term loans). The crisis broke out and Latin American countries found themselves in the need of conducting debt restructurings. The intermediary work was conducted mainly by the IMF.

At first, the general belief was that this situation was temporary and that debt rescheduling would be enough to overcome the crisis. However, this rescheduling only extended the agony and the countries were condemned for decades to observe the structural reform regulations imposed by international organizations such as the IMF and the World Bank. Urged as they were by the need to renegotiate their debt and obtain financial aid, governments committed to make adjustments and adapt their economies to the neoliberal paradigm.

When Raúl Alfonsín took office in 1983, the dictatorship had left behind an economy marked by stagnation, inflation, and a growing external debt (which amounted to 45 billion dollars). At first, the constitutional Government attempted to negotiate a political solution to over-indebtedness and open the debate on the lawfulness of the external debt.

In a context of considerable interest rate growth, Bernardo Grispun, the Minister of Economy, decided to apply a 6-month unilateral moratorium for the purpose of getting to know the nature of the debt, review the conditions of the debt incurred by the civic-military dictatorship, and evaluate the figures, among other things. Meanwhile, the Government sought to reach an agreement with the countries of the region in order to face creditors. President Alfonsín raised the issue of external indebtedness with Brazil and other Latin American countries and requested that such debt be reconsidered.

In June 1984, a meeting was held in Cartagena which brought together representatives of 11 countries that made up 80 per cent of the regional debt. On that occasion, Argentina raised the need to conduct joint negotiations. That proposal failed as it was backed only by Bolivia; the other countries thought that they would obtain preferential conditions if they negotiated individually and did not want to take the risk of entering into uncertain joint agreements. Besides, creditors and the Treasury of the United States tried to create divergences to continue with the case-by-case method established by the IMF as a necessary requirement. In this way, while Latin American governments faced the financial power individually, creditors acted jointly in keeping with IMF strategy.

Alfonsín ended up accepting the creditors' rules to renegotiate external debt as his proposal to form a "pool of debtors" received no support. The IMF enforced conditions in exchange for refinancing. Such conditions included the adoption of policies aimed at increasing the immediate payment capacity of debt service, which basically meant establishing adjustment measures to public expenditure, greater tax collection, and obtaining further external loans. In this way, Argentine entered the "Baker Plan".

In the face of the "debt crisis", which would last years, two plans were implemented. They had been designed by American officials and ordered by the IMF for the purpose of guaranteeing that financial creditors would collect their credits: these were the

"Baker Plan" and the "Brady Plan". The first one (1985-1986) consisted in granting loans for a term of 3 years to some countries that were selected for having the highest indebtedness level. The funds came from multilateral credit agencies and commercial banks. In return, governments were obliged to adapt their economies to the conditions that would generate "adjustments with growth". According to the proposal, debtor countries should achieve a higher savings and investment rate in order to promote sustainable growth, which is why they had to continue applying the short-term adjustments established by the IMF along with openness and free market policies so that private investors would find suitable investment conditions. For their part, international financial agencies and commercial banks provided the financial support that those policies needed. The permanent monitoring by the IMF of short-term matters and by the World Bank of issues pertaining to structural changes guaranteed the fulfilment of the commitments assumed by debtors. As was expected, the implementation of these conditions did not generate satisfactory results but rather complicated the situation of debtor countries even more. The new financing turned out to be extremely onerous and, therefore, hard to comply with. This prevented debtor countries from resuming debt service payments or regaining access to international credit markets in "normal" conditions. "Almost five years after the launch of the "Baker Plan", not only have creditor banks failed to make progress towards the privatization of State-owned companies so as to regain the principal owed to them but they have also stopped collecting interest and principal amortizations (…) which is a result of the struggle among international credit agencies for directing the negotiation process by giving priority to adjustment policies, in the case of the IMF, or to structural reform policies –privatization of State-owned companies-, in the case of the World Bank."[101]

The Argentine Government had to pay each year 8% of its GDP as interest. On account of the increase in interest rates at the international level, the debt grew permanently while the deterioration of the terms of exchange accelerated. In view of the constant loss of reserves and the impossibility of continuing paying its debt obligations, in May 1988 the Government declared a moratorium of external debt interest payments. "However, the moratorium of external debt payments declared by the Radical Party Government brought about the burst of hyperinflation as foreign banks, which belonged to the group of foreign creditors and had been negatively affected by the default declared by the Argentine Government, were the ones to start

[101] Basualdo, Eduardo. "Evolución e impactos de la deuda externa en la Argentina." Matériaux pour l´historie de notre temps, quarterly journal, in cooperation with Sociohistórica journal of the UNLP. Edited by: Association de la BDIC (Bibliotheque de Documentation Internationale Contemporaine) et du Musee. No. 81, 42-50. 2006

the “run” in the exchange market in February 1989, thus unleashing the first hyperinflation crisis which would cause the early termination of Alfonsin’s administration.”[102]

In these years, an event that would later have serious consequences –reference to which has been made in the first part of this paper– took place. When the loans in dollars that the BCRA had assumed under the exchange-rate hedges expired, the Bank did not have enough foreign currency reserves to repay those loans. In return, the Argentine Treasury offered creditors to refinance the debt through the issuance of government securities (Bonods). In 1986, the situation became complicated again when the Central Bank found once more that it did not have enough dollars available to repay the “Bonods”. The Raul Alfonsín’s administration unilaterally decided to replace those securities with long-term securities. This swap was not accepted by three creditor companies, which insisted on being reimbursed through legal action alleging contractual non-performance. Argentina attempted to dismiss the complaint by invoking sovereign immunity. The dispute was finally settled in 1992 when the United States Supreme Court of Justice entered a ruling favourable to plaintiffs alleging that, according to the Foreign Sovereign Immunities Act, the issuance of public debt is an action *“in connection with a commercial activity"*[103] that has a *"direct effect in the United States".*[104] This a legally and insidiously incorrect precedent, as sovereign debt transactions are certainly iure imperii acts and a chapter of income that is part of the government income/expenditure process governed by public law and not, as established since then, commercial acts or acts governed by private law.

When the Radical Party Government came to an end, the external debt had grown 40%, increasing from USD 45.069 billion to USD 62.843 billion (Chart No. 1). However, this was only the beginning.

[102] de Monserrat Llairó, María. “La argentina neoliberal. De Alfonsín a Menem”. Centro de Investigación en Estudios Latinoamericanos para el Desarrollo y la Integración (CEINLADI) FCE- UBA. Buenos Aires, Argentina. 2008.
[103]. The Republic of Argentina V. Weltover Inc. United Nations Supreme Court of Justice. Decision, 12 June 1992.
[104] Ídem.

Chart No. 1: Growth of Argentine external debt between 1976 and 1989

Year	**Debt** (million USD)
1976	9.739
1980	27.162
1983	**45.069**
1989	**62.843**

Source: Toussaint (2001) in Oddone, Carlos Nahuel. "Mercados emergentes y crisis financiera Internacional". Published by eumed·net. 2004. Available at: http://www.eumed.net/cursecon/libreria/2004/cno/cno.pdf

The new administration led by Menem unified exchange rates, implemented a 100% devaluation –which caused a new inflation spiral-, opted for a tax adjustment and launched a policy to reduce State intervention. The Executive Branch designed, and the Argentine Congress passed, the so-called Laws on State Reform and Economic Emergency, which allowed the Government to privatize state-owned companies, sell state-owned real property, eliminate the "Buy National" Regime (Law No. 18,875), and let foreign companies into the Argentine market. In 1991, in an attempt to curb rampant inflation, the newly appointed Minister of Economy, Domingo Cavallo, promoted a bill for the establishment of a Convertibility system, which was passed by Congress in March of that same year. This further aggravated the solvency problem, which would become evident in subsequent years.

During the first months of government, the Menem administration stuck to the moratorium on the payment of interest decreed by former president Alfonsín, and suffered no serious tax problems. In 1990, monthly payments of interest were resumed, and in April 1992, a decisive event took place. The terms for the refinancing of the medium and long-term debt were agreed upon with the Committee of Creditor Banks. A final agreement was entered into in December, and swap operations began in the early months of 1993.

In 1993, a few years after the "Baker Plan" was signed, Argentina entered into a new agreement –the "Brady Plan"–, which was also doomed to fail. This new agreement, together with structural reforms of a neo-liberal nature (such as privatizations, a stabilization shock, de-regulation, the opening of the economy, and the liberalization of financial flows), was promoted by the Menem administration as a definite solution to the problem of the debt. But “far from that, the Brady Plan was actually the beginning of a new period of indebtedness.”[105]

In 1989, the US Secretary of the Treasury announced the Brady Plan, which was an attempt to supplement the Baker Plan in order to allow commercial banks to recover their principal and receive the interest payable by Latin American countries.

The agreement entered into by Argentina included the issue of three types of bonds:

- Par bonds –with no discount–, issued with a 30-year term to maturity at a tiered fixed interest rate that increases gradually from an annual 4 to 6% over the entire period.
- Discount bonds (with a 35% haircut over the original debt), issued with a 30-year term to maturity at a floating LIBO rate plus 13/16% (0.8125).
- A third type of bonds was used to pay late interest: Floating rate bonds, issued with a 12-year term to maturity and a 3-year grace period, at the LIBO rate plus 13/16 (0.8125).

In brief, the Plan consisted of offering haircuts over principal and interest rate reductions in exchange for the old bonds held by the banks. This negotiation was a new type of restructuring, which marked the appearance of a new type of negotiable instruments in the international markets. The growing importance of a new type of financial intermediaries –mutual funds– offered transnational banks the possibility to dramatically reduce their high level of exposure. The agreement included not only innovations aimed at attracting commercial banks into accepting it, but also other clauses that made it tempting for indebted countries to enter it as well. In order to satisfy both sides, the Brady Plan included a new payment instrument: US Treasury zero coupon bonds with a 30-year term to maturity.[106] These bonds paid no interest, but rather capitalized it throughout the term to maturity, which allowed debtors to substantially reduce their initial cost, while ensuring creditors that they would collect

[105] Kulfas, Matías and Schorr, Martín “La deuda argentina. Diagnóstico y lineamientos propositivos para su reestructuración”. Fundación OSDE / CIEPP. Buenos Aires, Argentina. 2003.
[106] “By including the issue of collateralized bonds, the Brady Plan gave a certain relevance to the concept of net debt (that is, gross debt minus external assets of the public sector such as - and mainly - guarantees) in the analysis. Indeed, considering that the payment of a substantial part of the external debt was secured by the US Treasury zero coupon bonds, it could be concluded that the net debt had been considerably reduced in. Subsequent issues, however, did not include this collateralization […].” Kulfas, Matías and Schorr, Martín. 2003.

their credit at maturity.[107] It is worth noting that the use of this type of bonds is a financing method for the US Treasury itself.[108]

The 1993 balance of the Argentine public debt reflects the swap implemented with the Brady Agreement –while the debt with commercial banks was substantially reduced from USD 30.265 to USD 1.18 billion, debt represented by Government bonds grew from USD 11.292 to USD 41.926 billion-. In addition, debt with international organizations –which provided the funds required to acquire US Federal Reserve zero coupon bonds– also increased. In other words, the increase in debt between 1992 and 1993 was basically originated in the financial cost of the Brady Plan. Evidence shows that, since 1993 -during which time new debts were incurred by the Menem and De la Rúa administrations- "the burden of the debt within domestic economy as a whole was not reduced; on the contrary, a new period of explosive indebtedness began, comparable only to that which developed during the last military dictatorship that ruled the country. Indeed, while the debt grew by 10.7% between 1990 and 1993 (at an accumulated annual average rate of 3.4%), from 1993 to 2001, it grew by 126.6%, at an average annual rate of 10.8%.[109]

The Brady Plan, far from being the so-called definite solution to debt, not only gave new strength to the indebtedness process, but also included a “new” method of indebtedness that brought about serious consequences. Indeed, this swap implied replacing a specific and easily identifiable creditor with a myriad of creditors shielded by anonymity. Debts were no longer due to large commercial banks (as had been the case during the 1980’s), but rather to bondholders who could trade their bonds in different markets, both local and international, making it much more difficult to reach a renegotiation agreement over the debt in the event the Plan failed –which was actually the case-. Finally, it was agreed that any potential legal disputes over the new instruments would be submitted to the jurisdiction of foreign courts (in this case, the courts of the city of New York), which required Argentina to waive its status as a sovereign state by agreeing to meticulous waivers of any rights it might have in connection with the issue of the Brady bonds and the agreements entered into with foreign banks, thereby losing its immunity as a State against public policies. In this way, the Brady Plan provided fertile ground for the multiplication of terms and conditions that allowed vulture funds to access and operate with sovereign debt, as has been explained before.

---

107 US Treasury bonds were a guarantee which gave the Argentine Government the possibility to sell them in order to meet future payments in the event it had no other resources to do so.
108 Basualdo, Eduardo. 2006
109 Kulfas, Matías and Schorr, Martín. 2003

In this context, the Menem administration -as has been described in the previous chapter- issued bonds under the Fiscal Agency Agreement it entered into with Banker Trust Company in 1994, which contained the *pari passu* clause and other waivers of sovereign immunity. It was due to these terms that, after the country defaulted on its payments in 2001, vulture funds were able to file legal actions against Argentina with the courts of the city of New York.

President Menem implemented all the reforms required by international financial powers, commonly known as the Washington Consensus: fiscal discipline, State reforms, tax reforms, financial liberalization, free and competitive exchange rates (the only policy that was not implemented, with the support of the IMF), international trade liberalization, removal of barriers to FDI, privatization of state enterprises, deregulation of markets, and protection of private property. International financial organizations and academic centres of the Establishment considered that these measures comprised the policy that peripheral countries should implement in order to resume the "path of growth". Nevertheless, these measures only lead to an increasingly vulnerable economy and fuelled public debt to astronomical proportions. This was possible due to recovery of international financial markets, which provided liquidity support.

During the first years of the decade, the income received by the Government by way of FDI and portfolio investments (in both cases through privatizations) was, in addition to external debt, an important source of foreign currency, which made it possible to face the problems with public accounts, whose deficit was growing at an alarming rate –in spite of continual public spending cuts, particularly in the fields of economic and social rights, which resulted in the deterioration of the social situation-. This increase in the debt was not caused by excessive primary spending, but rather by excessive debt services coupled with the successive transfer of State revenue from, among other things, the privatization of the national pension scheme[110] and significant reductions in employers' contributions, implemented with a view to compensating the negative effect of the convertibility system on the foreign exchange rate.

These capital flows, however, were only temporary,[111] and the constant use of public funds to finance debt service payments and generate international reserves as part of a

[110] It is interesting to observe the vicious circle generated by the transfer of public revenue to the private sector: The revenue made by pension fund managers [AFJPs] was the result of the increase in debt holdings, since it was partially due to the loss of this revenue that the State had to incur more debt by resorting to, among other things, AFJPs themselves, which received at excessively high interest rates.

[111] During the first years of the convertibility system, International capital markets were characterized by low interest rates and a high level of liquidity, which made it easy to obtain foreign financing for fiscal deficit. However, the international financial structure dramatically changed after the Tequila crisis (Mexico, 1995) and the subsequent crisis in Asia (1997), Rusia (Ruble crisis, 1998), and Brazil (Real crisis, 1999).

model that desperately needed to obtain foreign currency in order to later expel it,[112] coupled with a permanent current account deficit, which was also the result of the model implemented, led to a new process of explosive indebtedness.

3.2 The outcome

Before defaulting, Argentina, led by then President Fernando de la Rúa, decided that tax responsibility was a main priority in 1999. In December 2000, and faced with a growing tax deficit and the maturity of a large part of the debt of the following year, the Government requested a loan in order to dispel fears that the country would default on its debt and be able to access international market at lower financial costs.

Within this context, a “financial shield” was implemented. This plan was an agreement entered into with the International Monetary Fund, with the participation of other international financial organizations (the World Bank and the IADB), a group of banks, pension fund managers [AFJP] and the Government of Spain (Spanish companies had the largest foreign investments in the country). This agreement –which had been entered into for a term of three years and a total amount of USD 39.7 billion– established that, in the short term, the IMF had to contribute USD 14 billion, the World Bank, USD 5 billion, and Spain, USD 1 billion. These first contributions, however, were insignificant when compared to the total amount of the debt that was due on 2001 (USD 26.6 billion), coupled with the need to finance the country’s fiscal deficit, which was around USD 7 billion. The rest of the money required to meet the country’s obligations was expected to come from the market. As opposed to the contributions made by the abovementioned parties, the latter had no agreed upon rate, but rather depended on the mood of the markets, which, in those times, were not precisely favourable for Argentina.

Moreover, the pre-arranged contributions were not fully secured either. The contribution committed by the IMF would be released as the Government fulfilled its promise to implement the following “structural reforms”: deregulation of *obras sociales*

Given that privatizations had reduced public revenue, support from international organizations and debt trading in foreign markets were not enough.

[112] The appreciation of the Argentine peso reduced domestic industry and contributed to replace workforce with imported equipment. The trade balance reported negative balances on an almost structural basis. These two phenomena were the result of the implementation of a fixed exchange rate (ARS 1 = USD 1) with the convertibility system, coupled with the opening of the Argentine economy to foreign and financial markets. In addition, there was a significant flight of capital out of the country, which was almost perfectly correlated to the increase in foreign debt.

[health insurance providers], strengthening labour flexibilization measures, eliminating Basic Universal Benefits, and completing the privatization of the social security system under the supervision of pension fund managers [AFJPs]. In any case, Argentina was basically undertaking to ratify the convertibility regime and the neo-liberal policies that came along with it, since none of the above measures was aimed at improving the solvency of the country or at solving the crisis it was getting into.

At first sight, it could be determined that external debt would grow -as was actually the case-. Fiscal deficit kept increasing, and new interest was generated. No reduction of the domestic interest rate was guaranteed either. In addition, the financial aid received did not improve the structural restrictions imposed on the economy of Argentina. It only pointed at the defects of the model implemented. The rescue that financial organizations and other entities were undertaking to attempt was only aimed at preserving their businesses and ensuring that debt services were paid. It was a mere reassurance of payment being implemented by the system itself.

After the implementation of the “financial shield”, recession continued, public revenue remained below the levels required, and capital flows continued to be unfavourable. The credit market closed due to excessively high interest rates.

Mr. José Luis Machinea, the creator of the “financial shield”, was replaced at the Ministry of Economy by his colleague Ricardo López Murphy. The latter lasted only two weeks in the position due to the unpopular measures he attempted to implement, which included, among others, the following: Budget cuts in public universities and the elimination of provincial programmes financed by the Federal Government, such as Education Incentives, subsidies for tertiary education institutions, and others. In terms of taxes, VAT exemptions were to be eliminated. Finally, the series of measures included a State reform which implied the reduction of federal public employment by 30%, further labour reform measures, and new privatizations, such as the sale of AFJP Nación (public pension fund manager) and Casa de la Moneda (Argentine Mint), and the sale of the National Lottery to the private sector.

These policies were impossible to implement because they were unanimously rejected after being announced, resulting in protests organized by all the sectors affected by them, which went out on the streets to express their disapproval, particularly students. President De la Rúa was forced to replace his new Minister. During the so-called month of the three Ministers, on 16 March the Ministry of Economy was left in the hands of a familiar face –Mr. Domingo Cavallo-. Continuing in the path of Machinea and López Murphy, Cavallo’s fate was also sealed. His policies were aimed at strengthening the implementation of the measures proposed by his predecessors –he was, after all, the father of the economic model-.

In June 2001, faced with the requirement of a 15% interest rate, Cavallo decided to launch a bond swap transaction known as the "Mega-swap", in the hope of obtaining lower rates. While the "financial shield" plan had been fostered by the IFM, this new measure was a decision exclusively adopted by the Argentine Government. As a result, the debt maturity profile did improve, but at the cost of a substantial increase in the applicable interest rate: 46 bonds that were about to reach maturity with an average annual rate of 10.3% were swapped for 5 new bonds at an actual interest rate of 15.3%. Consequently, debt holdings increased,[113] and so did the future flow of interest. In addition, the considerable amount of USD 150 million was paid by way of commissions.

In July 2001, the Zero Deficit Law was passed, establishing that expenditures had to equal revenues. In a context of high and growing deficit, this law implied considerable cuts. Therefore, jointly with fiscal balance, the budget cuts ordered by Machinea were approved, and public salaries, pensions and allowances were reduced in an attempt to increase public revenue, applying VAT to other activities and a tax on cheques for all bank transactions. The priority was to pay debt instalments plus interest, and public spending was determined afterwards. This measure, which had been imposed by the IMF as a condition to disburse more money, did nothing but aggravate the recession, further shrinking public revenue and resulting in a higher fiscal deficit. The "solution" to alleviate the country's current account resulted in the deterioration of fiscal accounts.

After 10 years, the model became unsustainable: 4 years of uninterrupted economic recession, an explosive debt, a huge flight of capitals out of the country, a growing bank run, 38.3% of the population living under the poverty line, 13.6% of the population living in extreme poverty, an unemployment rate of 18% and an underemployment rate over 16%. The only solution to all this was to discard the economic model that was causing so much damage. The first step in this direction was to abandon the convertibility system and default on the payment of a debt that was suffocating the country. The only way to restore the Argentine economy was to change the conditions that were leading it to its ruin.

---

[113] "The total amount of the debt varied by USD 3,071,790,000, reaching an amount of USD 127,291,140,000 after the swap." General Audit Office of the Argentine Republic. "Informe de Auditoría de Gestión de Administración de Pasivos Canje de deuda Pública" [online document], agn.gov.ar, 19 June 2001.

It is in contexts like this that vulture funds swing in. As their name indicates, they wait until this moment to dig their claws into what they consider to be an easy prey or an agonizing body which, however, has a chance to survive. It must be borne in mind that the economic hardships of a country do not last forever. The need to survive and avoid absolute poverty leads to the adoption of measures that help the country stand back on its feet. Vultures wait until this moment to seize their prey. They wait until the ability to pay is recovered. As opposed to actual vultures, vulture funds do not wait for death, but for revival.

Abandoning the economic model described above –which can be interpreted as a survival skill– was clearly frowned upon by the international financial community. Indeed, the markets quickly launched a campaign against the measures adopted by Argentina. Nevertheless, it is interesting to take a look at the recent –and not so recent– history of the debt incurred by countries after emerging as such, particularly of those that are currently core countries, since they have also been through default or debt restructuring experiences.[114] It is useful to analyze the case of countries such as Germany, France, and Spain, which defaulted on their debt more times than Argentina: 8 times the former two countries, and 13 times the latter. If we take a look at Latin America, there are many countries that come before Argentina. Brazil and Chile declared their default 9 times, and Uruguay did it 8 times. Argentina, in turn, only defaulted on its debt 7 times.

Public debt and the neo-liberal policies implemented during more than 25 years had become the main causes of the growing deterioration and external dependence of the Argentine economy. The default declared in 2001 was a breath of fresh air for the Argentine economy, which allowed it to get back on its feet and grow at an annual rate of 9% between 2002 and 2004. Thanks to this, by 2005 it was possible to renegotiate the inherited public debt, taking into account the goals and objectives of a medium-term programme for growth with equity. To this end, the debt restructuring required a haircut, a restriction on interest rate levels, and the inter-temporal rescheduling of principal and interest, in order to sustainably adjust debt services to an economy that had the resources it needs to grow. In this way, the Argentine economy could attain a solid level of solvency, which was the best guarantee for creditors themselves.[115]

[114] In this respect, see Reignhart, Carmen and Rogoff Kenneth. “This time is different: a panoramic view of eight centuries of financial crises”. NBER Working Paper No. 13882. April 2008.
[115] Hopenhayn, Benjamín and Vanoli, Alejandro “La deuda del estado nacional Situación y propuestas de reestructuración”, Mimeo. 2008

The strong growth of domestic and external public debt, induced by the implementation of a neo-liberal model, had been inversely proportional to the ability to make external payments. The indiscriminate implementation of liberal economic policies in a context of a significant exchange rate lag, within the framework of a convertibility system and an alleged fiscal balance that was never achieved in spite of the increasingly recessive cuts applied to public spending, which resulted in further reductions in the economic activity and caused a significant deficit in the country's current account, as well as constant external deficit, further generated "(…) the destruction of a large portion of the domestic industry, dramatic levels of unemployment and poverty, a progressive reduction in the financial ability of the State, successive crises and speculative surges, a serious depression, the collapse of domestic and external finances, and the collapse of the basic institutions of the Argentine society."[116]

Although abandoning the convertibility system was the first step required for Argentina to save its economy, the devaluation of the Argentine peso caused the country's total public debt to reach unsustainable record amounts.[117] While it represented 63% of GDP by the end of 2001, it reached 166% of GDP in early 2002. Debt restructuring was inevitable. Due to the flight of capitals and the devaluation of the Argentine peso, the seriousness and proportions of the problem made it impossible for the country to continue paying.

Chart No. 2 covers the Convertibility period and shows the status of the public debt until 2001. During the first three years –1990 to 1993–, public debt was around USD 60 billion. Between 1990 and 1992, this was mainly due to the swap of debt for the privatization of companies. In 1993, the swap resulting from the "Brady Plan" reduced the country's debt with commercial banks, while increasing its debt in government bonds and with international organizations. As has already been explained, these organizations contributed the funds required to purchase the US Treasury zero coupon bonds. Therefore, between 1992 and 1993, the debt grew by 6.8%, mainly due to the cost of the financing obtained under the Brady Agreement. After 1993, things did not get better, but much the opposite: A new era of indebtedness began. Indeed, while the debt grew by 10.7% between 1990 and 1993 (at an average accumulated annual rate

---

[116] Id.

[117] Indicators such as the public debt holdings to exports ratio, or the public debt holdings in USD to exports ratio were 543% and 525% in 2001, and 535% and 410% in 2002, respectively. "La deuda pública en Argentina: un análisis del canje del año 2005." Taken from the journal published by Centro Cultural de la Cooperación, issue No. 18 [online version]. centrocultural.coop, May/August 2013. Available at: http://www.centrocultural.coop/revista/articulo/403/la_deuda_publica_en_argentina_un_analisis_del_canje_del_anio_2005.html

of 3.4%), between 1993 and 2001, the debt grew by 126.6%, at an average annual rate of 10.8%.

"Although the Brady Plan also included a reduction in the future interest burden -which is why bondholders largely chose the par bond–, the growing placement of the bonds, jointly with the resulting increase in the indebtedness level, led to an uninterrupted increase in the interest burden, which grew at an accumulated average annual rate of 17% between 1993 and 2001, [which, in turn, led] interest, which represented 1.2% of GDP and 5.7% of public expenditure in 1993, to represent 3.8% of GDP and 19.8% of public expenditure in 2001 (…) The evolution of public debt holdings in terms of gross domestic product shows that they grew significantly: from 27% in 1993, to 53.8% in 2001. In addition, its ratio to exports of goods and services grew from 390% in 1993 to 471% in 2001. This means that, in order to pay the total amount of the debt by late 2001, it would have been necessary to spend more than half of the GDP generated in a year, or an amount equivalent to almost five years of exports."[118]

Chart No. 2: Assessment of Argentina's Gross Public Debt. 1990-2001

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Government bonds												
	8.406	7.378	11.292	41.926	47.421	58.341	68.841	74.054	78.212	85.804	93.079	97.315
International organizations												
	8.222	7.962	7.104	10.501	11.894	15.384	16.367	16.790	19.122	20.311	21.764	32.362
Bilateral debt												
	8.159	8.816	9.001	9.559	10.731	11.614	10.162	8.104	7.455	5.918	4.561	4.477
Commercial banks												
	30.944	32.874	30.265	1.180	1.567	1.816	1.452	1.423	3.646	5.029	2.461	2.015
Short-term debt												
	0	0	0	0	0	0	0	0	3.295	4.174	5.108	6.746
Other creditors												
	1.851	1.811	1.083	580	587	617	283	731	628	641	1.045	1.537
TOTAL	**57.582**	**58.841**	**58.745**	**63.746**	**72.200**	**87.772**	**97.105**	**101.102**	**112.358**	**121.877**	**128.018**	**144.452**

Notes: Government bond holdings by late 2001 include the swap of some bonds for secured loans carried out in November 2001. Stated in USD million at the end of each period.
Source: Kulfas, Matías and Schorr, Martín "La deuda argentina. Diagnóstico y lineamientos propositivos para su reestructuración". Fundación OSDE / CIEPP. Buenos Aires, Argentina. 2003.

These macro-economic indicators, coupled with the abovementioned social indicators, made it clear that it was impossible to fulfil these obligations, and that the economy needed a recovery period in order to be able to meet them. "A country that has seen its currency depreciate by approximately 300% in an extremely short period of time cannot keep up with the same schedule of payments. Creditors are aware of this [and they were even before the maxi-devaluation of the Argentine peso, which can be

[118] Kulfas, Matías and Schorr, Martín. 2003

demonstrated by the recent international default experiences,[119] as well as by the change in their attitude towards the treatment that should be afforded to insolvency in connection with the payment of sovereign debt]."[120]

Although each stage of indebtedness has its own specific characteristics, they all share an essential attribute: a shift in value generation, from a model based on production to one based on financial appreciation[121] and linked with deindustrialization and the concentration of capital, production and income, which resulted from the complete liberalization process implemented on the capital account of the balance of payments. The excessive financial liberalization that resulted from this -at both the domestic and international levels- rendered economies vulnerable to the arrival of speculative capitals that left most countries in a situation of serious external vulnerability. Indeed, before the Argentine crisis of 2001, several other crises had erupted in Mexico (Tequila crisis, 1995), Asia (1997), Russia (Ruble crisis, 1998), and Brazil (Real crisis, 1999). This clearly demonstrates that economies were susceptible to the swinging moods of financial markets. In the specific case of Argentina, however, the crisis resulted not only from the model of capital accumulation and reproduction in force, which was inspired by the neo-liberal paradigm, but also from the "debt-dependent" nature of its convertibility system. Still, it should be borne in mind that the original causes of these crises can be traced back to the levels of indebtedness fostered by the international financial market during the 1970's, as well as to the subsequent costly restructuring processes implemented during the 1980's and 1990's, which were designed by international credit institutions and included requirements for structural reforms that led to the systematic destruction of peripheral economies and, as a result, to the deterioration of the living conditions of their population.[122]

---

[119] More specifically, Russia (1998), Ecuador (1999), Pakistan (1999), and Ukraine (2000).

[120] Kulfas, Matías and Schorr, Martín. 2003

[121] "Arceo and Basualdo (2002) define "financial appreciation" as "the allocation of surpluses by large companies to several financial assets (securities, bonds, term deposits, etc.) in the domestic and international markets. This process enters and prevails in the Argentine economy during the late 1960's, expanding due to the fact that interest rates – or the connection among them – yield better results than any other economic activity, and also due to the fact that the accelerated growth of external debt makes it possible to send local capital abroad in order to make it operate as a surplus that can be appreciated, or to release profits to that end." Financial appreciation has made it possible for concentrated capital sectors to transfer capital from the financial sphere into production and back to finance, making extraordinary profits depending on the specificities of the economic process and political cycles. In this respect, its growing ability to co-opt public authorities has been its main tool to profit from these opportunities." Kufas, Matías and Schorr, Martín. "Deuda externa y valorización financiera en la Argentina actual Factores explicativos del crecimiento del endeudamiento externo y perspectivas ante el proceso de renegociación," in Realidad Económica No. 198 (Journal). Instituto Argentino para el Desarrollo. Buenos Aires, Argentina. May 2003.

[122] Several court proceedings were initiated in Argentina in connection with the different processes of indebtedness. "The first and most important case, given its historical relevance, was case No. 14467, filed in 1982. This case was known as Case Olmos, because it was Alejandro Olmos who initiated the proceedings. In this case, the various unlawful and fraudulent mechanisms implemented by the military dictatorship that ruled Argentina between 1976 and 1982 in order to increase the debt of the country were

3.3 Post-default

On 23 December 2001, after some 20 people were killed during the repression against the protests that took place on 19 and 20 December and that led to the resignation of then-president Mr. De la Rúa, the interim President, Mr. Rodríguez Saa, announced that Argentina was in default. Although the country had previously gone through debt crises, this was the first time that it had formally declared the suspension of payments of principal and interest on sovereign debt securities. The total amount of the public debt at the time was USD 144.453 billion, of which USD 69.833 billion were affected by default. That is to say, suspension of payment was declared in respect of 48.3% of the debt, whilst the loans granted by multilateral lending institutions and the secured loans agreed in November 2001 remained unaffected.[123] "(….) After Eduardo Duhalde took office, on 2 January 2002, a portion of the public debt was regularized. Only the securities issued up to such date and the debt categorized as Bilateral (Paris Club), Commercial Banking and others were in default."[124]

After several frustrated renegotiation experiences, such as the 2003 Dubai process[125], in 2005, president Néstor Kirchner eventually opened the restructuring process. This was a voluntary, rather than a forced, swap. This is evidenced by the fact that the swap was not accepted by 100% of the creditors.

The offer made by the government covered eligible debt in the amount of USD 81.836 billion (Principal + overdue interest as of 31 December 2001). Ultimately, interest accrued and unpaid until the date of default were recognized, but not the post-default interest.[126]

---

proved. The relevant court issued its ruling in the year 2000 […]. Nevertheless, and despite the evidence submitted during the case, the applicable statute of limitations prevented any punishment from being imposed on those responsible for the largest case of fraud against the Argentine State. The relevant file was forwarded to the Argentine Congress, but bill was passed to establish a committee to investigate the issue. The case has been held up for more than a decade, and it remains pending. Moreover, there are other court cases [on the Argentine debt generated during the 1990's and the lawfulness of the so-called "mega-swap"], which are currently under investigation and awaiting a decision." Gogliormella, Christian; Malic, Estanislao. 2013

[123] Arceo, Nicolás and Wainer, Andrés. "La crisis de la deuda y el default. Los distintos intereses en torno a la negociación de la deuda pública". Flacso. Buenos Aires, Argentina. 2008.

[124] Gogliormella, Christian; Malic, Estanislao. 2013

[125] In September 2003, in Dubai, United Arab Emirates, President Néstor Kirchner made the first negotiation attempt, presenting a restructuring schedule for defaulted bonds.

[126] The total amount of the defaulted government securities was USD 102.5 billion. The difference of USD 20.7 billion between such amount and USD 81.8 billion provided for corresponds to the interest accrued between 31 December 2001 and 31 December 2003, which was not recognized in the swap offer.

In exchange for the defaulted securities, three bonds with different specificities were offered, to be issued on 31 December 2003 and with interest to be calculated as from that date:

- Par Bonds: it was specified that USD 10 billion would be issued in the form of Par Bonds if the level of acceptance of the swap did not exceed 70%. If such percentage was exceeded, then the issuance of such Bonds would amount to USD 15 billion. They did not entail any haircuts of the original unpaid principal amount, accrued interest initially at 1.33% in US dollars that would progressively rise to 5.25% 25 years after issuance, and had a 35-year term (maturity in 2038).

- Quasi-Par Bonds: these would be issued in Argentine Pesos in an amount equivalent to USD 8.333 billion (regardless of the amount accepted) and would pay interest at a fixed rate in Argentine Pesos of 3.31% plus a coefficient linked to the Consumer Price Index (known as "CER") and had a 42-year maturity. They would be capitalized during the first 10 years.

- The Discount Bond, which entailed a 66.3% reduction from the face value of the original defaulted bond. This issuance would amount to USD 20.17 billion if 70% was exceeded and to USD 19.87 billion if that percentage was lower. These bonds would pay the highest interest, *i.e.,* 8.28% per annum. Of such rate, 4.31% would be capitalized during the first five years, and, thereafter, 2.51%, until their disappearance following 10 years. They had a 30-year maturity (maturity year 2033).

In turn, units linked to GDP growth were introduced, which meant additional payments to the holders of securities if GDP grew at constant prices above the basis established for the period –actual effective GDP would have to surpass actual GDP of the base case (*i.e.*, the one estimated at the time of the swap)-. Creditors would receive 5% of the excess between effective and reference GDP. As long as it did not exceed the established cap, the total amount that would be paid during the effective term of the GDP-linked Securities, per unit of GDP-linked Security, would not be higher than 0.48 measured in currency unit.

When the restructuring finished, the swapped debt amounted to USD 62.318 billion, equivalent to slightly more than 76% of the eligible debt. The amount of the new debt was USD 35.261 billion in nominal value, distributed as follows: around USD 15 billion in Par Bonds, USD 11,932 billion in Discount Bonds and USD 8.329 billion in Quasi-Par Bonds. That is, discount was 43.4% of the amount of the eligible debt.[127]

It should be emphasized that, as mentioned above, interest accrued between the time when default was declared to 31 December 2003, *i.e.,* USD 20,73 billion, was not recognized. If this item is taken into account, the haircut would be greater, around 70%. But interest on those new bonds amounting to USD 644.83 million was recognized and paid in cash, which accrued from the date of issuance of such bonds (31 December 2003) to the date of settlement; GDP-linked Units were delivered and interest of USD 759.42 million was capitalized.

Chart No. 3: Outcome of the 2005 Argentine debt swap

"Eligible" Debt			81,836
Swapped Debt			62,318
Acceptance %			76.15%
Bond Type	Old Debt Swapped (Offers)	New Debt (Issuances)	Discount
Par Bonds	15,000	15,000	0.00%
Discount Bonds	35,405	11,932	-66.3%
Quasi-par Bonds	11,913	8,329	-30.1%
Total	**62,318**	**35,261**	**-43.4%**

Notes: stated in equivalent USD million
Source: General Audit Office of the Argentine Republic. "Estudio especial sobre administración de pasivos del Estado – Canje default 2005". AGN. Gerencia de Control de la Deuda Pública. March, 2006. Available at: http://www.agn.gov.ar/doc-tecnicos/26doctec.pdf

The difference between USD 81.839 billion and USD 62.318 billion, *i.e.*, USD 19.521 billion, corresponds to the eligible debt that did not enter into the swap, the well-known holdouts, which include the vulture funds.

One of the most significant events that resulted from the restructuring was that a large portion of debt was pesoized, as the 3% peso-denominated debt (vis-à-vis 97% denominated in US dollars) rose to 37%. This change was important indeed, since the

[127] In addition, USD 644.83 million was paid in cash as interest accrued on those new bonds, from the date of issuance of such bonds (31 December 2003) to the settlement date; GDP-linked units were delivered and interest in the amount of USD 759.42 million was capitalized.

main creditors under the defaulted securities were Argentine, who had almost 38.5% of the total.[128]

In tandem with the opening of the swap, Argentine Congress passed Law No. 26.017 – the so-called “padlock” law–, which provides that holders of eligible bonds that do not accept the swap will not be able to collect later on because the reopening of a further negotiation process is prohibited once the restructuring is completed. This penalty made it possible to reach a high level of acceptance of the swap, although it should not be forgotten that the “game” played by the vulture funds is another one, since they seek to make extraordinary profits out of the debt crisis through the courts and not through the market, which means that nothing modified their intent to obtain full payment plus interest through foreign courts.

In 2006, with a view to showing its intention to resolve its debt issues and eliminate the conditions imposed by the IMF, Argentina fully repaid its debt to the IMF contracted in 2001 amid the despair of the De La Rúa administration to delay his impending fall from power.

Moreover, in an international context marked by crisis, the Government, in an attempt to give out positive signs and put an end to all litigation against the country, announced its intention to regularize the situation of bondholders who did not enter into the 2005 swap, the holdouts, by re-opening the swap in exchange for the termination of any administrative, legal or arbitral claims brought against Argentina. Still, it was established that the conditions of the new swap could not be the same as or better than those of the previous one. Prior to this reopening, it was necessary to suspend for a short period the padlock law that did not allow this.

The restructuring process took place during the April-August 2010 period. The acceptance percentage was 67%, and involved the redemption of USD 12.21 billion of the eligible amount (USD 18.3 billion). Taking into account the amounts covered by this swap, along with those covered by the previous one, more than 91% of the eligible debt in 2005 was regularized. The total amount of the new debt issued on the basis of this transaction, in residual values as of 30 September 2010 (accounted for at the exchange rates as of such date), was USD 7.831 billion: USD 2.144 billion in par bonds, USD 4.737 billion in discount bonds, and USD 949 million in 2017 global bonds. In addition, for each eligible unit of value that entered into the swap, a GDP-linked unit

[128] Arceo, Nicolás and Wainer, Andrés, 2008.

was delivered.[129] With a high level of acceptance among institutional investors, except for those who are in litigation, approximately USD 4.5 billion of institutional investors plus USD 1.73 billion of retail investors were not restructured.

Chart No. 4: Results of the 2010 Argentine debt swap

"Eligible" Debt			18,300
Swapped Debt			12,210
Acceptance %			66.72%
Bond Type	Old Debt Swapped (Offers)	New Debt (Issuances)	Discount
Par Bonds	2,144	2144	0.00%
Discount Bonds	10,066	4737	-52.94%
Global 17 Bonds		949	
Total	**12,210**	**7,831**	**-35.86%**

Notes: stated in equivalent USD million
Source: Authors' own calculations based on data from the Secretariat for Public Finance

The offer was distributed as follow:

- For institutional investors (Banks and investment funds): Discount Bonds with a future GDP-tied coupon and for interest accrued since 31 December 2003 a 2017 Global Bond was delivered at an 8.75% rate that was issued with international jurisdiction.
- For retail investors: Par Bonds, with a future GDP coupon.

[129]Ministry of Economy and Public Finance of the Argentine Republic. "Informe de Deuda Pública". Secretariat for Public Finance. Ministry of Economy and Public Finance (MECON). [online], mecon.gov.ar, 30 September 2010.

Chart No. 5: Outcomes of the 2005-2010 Argentine debt swaps

"Eligible" Debt			81,836
Swapped Debt			74,528
Acceptance %			91.07%
Bond Type	Old Debt Swapped (Offers)	New Debt (Issuance)	Discount
Par Bonds	17,144	17,144	0.0%
Discount Bonds	45,471	16,669	-63.3%
Quasi-par Bonds	11,913	8,329	-30.1%
Global 17 Bonds		949	
Total	**74,528**	**43,091**	**-42.2%**

Notes: stated in equivalent USD million
Source: Authors' own calculations based on data from the General Audit Office of the Argentine Republic and the Secretariat for Public Finance.

Salient aspects of both swaps:

- The percentage of acceptance of debt that arises from the analysis equals 91.07% –the official figure is 92.4%–; consequently, according to the estimations made, 8.93% did not enter the swap.
- Servicing of the new debt has been extended to the years 2033 and 2038, and since principal amortizations will occur at the end of the term of the bond, for a relatively long period only interest is accrued.
- The nominal haircut following both swaps was approximately 42%.
- The issuance of GDP-linked units.
- In several cases, the same bonds were issued under Argentine or foreign jurisdiction.
- The issuance of the 2017 Global Bond, which was only applied to the 2010 swap on account of interest accrued since the first swap.

- The 2010 swap did not recognize the prior payment on account of the GDP Coupon.
- The main currency in which the securities were issued is the Argentine Peso, with 37% of the total. The second main currency is the Euro, with 33%, followed by the US dollar, with 29%. This pre-eminence of the Euro is attributable to the second swap, where the Euro definitely took precedence over the US Dollar.

It is therefore important to make some considerations regarding the financing that the State had received at a rate that reflected default expectations at critical times prior to the outcome. Such conditions worsened the situation of the economy increasing its financial fragility. At international level, it is considered that the debt bonds issued by the States of core countries pose a virtually nil insolvency risk. Consequently, the interest rate reflects exclusively the deferred cost, with the sovereign risk thus being negligible. Since peripheral countries, like Argentina, are not in that situation, the interest rate of the sovereign debt incorporates a premium known as "country risk", which measures, mainly, the risk of insolvency and possibility of default. Thus, when investors purchase a security, according to the interest rate level, they can perceive the risks that they are exposed to. If the rate is high, so is the yield, but the investor is subject to a high insolvency risk –*i.e.,* risk of non-payment of the obligations– on the part of the debtors. Thus, the purchase of a security on these conditions reflects a high risk perception on the part of lenders. The higher the rate at which the creditor lends money, the higher the expectation that non-payment will occur. That is why "(…) financing at a high cost is the path for the expectation of non-payment to materialize, it foreseeably leads to bankruptcy or restructuring (…) Refinancing at high rates thus has no other rationale than that of pumping up the liabilities to be executed on that occasion. Consequently, the lender can anticipate that the liabilities will not be honoured in full, but rather that there might be a haircut [inevitable and justified]. If the borrower is a State, the possibility of bankruptcy does not exist."[130]

When a situation of impossibility of payment occurs and the need for debt restructuring arises, the haircut amount cannot be defined in advance, as it will be the result of a negotiation in which a diversity of elements come into play to define the haircut level.

[130] Müller, Alberto "Default y reestructuración: ¿Cuál fue la real quita de la deuda pública argentina?" Working Paper No. 32, CESPA (Centre of Studies of Argentina's Situation and Perspectives), School of Economic Sciences, University of Buenos Aires. March, 2003.

Alberto Müller (2013) makes an alternative analysis of the calculation of the haircut amount. But this measures what the revised value of the debt would be if Argentina had been charged the interest that would have applied to it if it had been a zero-risk country and the interest that was effectively charged to it. The difference between the two values would be the haircut. This method considers the effective charge for servicing in view of the fact that it is a peripheral country. Given that it is a high nominal cutback, it could be offset with a commitment to pay high interest. The approach, Müller says, "consists in comparing the technical value of the defaulted bonds with the future discounted flows corresponding to the total bonds issued in the swap".

According to Müller's analysis, the haircut resulting from both swaps was moderate. The introduction of GDP-linked Units, as the author says, "has proven to be a determining factor in the valuation of the swap. A virtuous effect should be noted in this regard, insofar as the creditor is linked to the country's economic performance". Without the issuance of the GDP coupons, the haircut would have been substantially higher, especially if the good performance of the Argentine economy since 2003 is taken into account. It also recognizes that the swap conditions clearly improved when rising interest rates were established, as well as deferral of the payment of principal and automatic capitalization of a portion of interest.

Ultimately, those investors who would have gone for a zero-risk bond (US Treasury) and an Argentine bond, even under the swaps –*i.e.*, subject to haircuts– would have obtained much higher yields.

Christian Gogliormella and Estanislao Malic (2013) also made an alternative analysis on the outcome of the 2005 swap. These authors stated that "it is important to assess the impact on future debt maturities. That is, comparing the flows of maturities that the "old" debt had relative to the restructured debt (…) If the discount rate used is the January 2005 6-month Libor rate, which is a worldwide reference rate, the current value of the restructured debt (USD 83.16 billion) was lower than that of the "old" debt (USD 113 billion) by USD 29,000". Now, when Gogliormella and Malic rely on the rate for the last long-term bond issued prior to the default –that of the "Mega-swap"– which was 15.5%, they estimate that "(…) the current value of the restructured debt (USD 16.69 billion) is lower than that of the "old" debt (USD 69.833 billion) by USD 47.143". Therefore, according to the analysis they made, the haircut would have amounted to 26% and 73%, respectively. A consequence, also, of both the haircut and the deferral in the average life of the debt and the payment horizon.

After the swaps were carried out, it did not take long for the vulture funds to spring into action. The legal struggle between them and the Argentine Government had broken out when default was declared, but it worsened with the restructuring, when they were left almost isolated. In view of the legal proceeding that Argentina is facing at the federal New York court –as mentioned in the previous section–, the Argentine Government stated that it cannot accord to the vulture funds a more favourable treatment than that afforded to the creditors who restructured the debt and proposed that a restructuring offer be reopened that provides for the same conditions as those of the second swap conducted in 2010, which was rejected by the plaintiffs.

Still, the debt negotiation process was successful and entailed not only a very significant reduction in the debt burden –after decades that saw the economy's normal performance being dependent on debt, which led to the population being highly impoverished– but it also set an important world precedent. Less than 9% of the eligible debt did not enter the restructuring –the holdouts–, a very low percentage. This percentage includes, above all, bondholders that would not enter into the restructuring anyway, even on the favourable negotiation conditions that led more than 91% of the creditors to accept exchanges of the old defaulted securities for the newer ones, waiving any potential claims. In fact, in the first stage, slightly more than 76% of the creditors agreed, and this was attractive enough for a further 15% to join in accepting the offer. These actors, the vulture funds, craft their business around the expectation of collecting 100% of what they claim. Their expectations are based on the lawsuits won around the world against peripheral countries –of Africa and Latin America, mainly–, who were forced, at the time of issuing debt, to become subjected to US and UK jurisdiction especially, where the courts tend to favour these financial speculators. Their tools are the huge sums of money that they have, which allow them to run smear campaigns and bring legal actions against crisis-ridden economies, and to lobby in order to prevent their activities from being prohibited by law and obtain court judgments that legitimize their actions and set aside what little regulation exists to prevent their practices. In the case of Argentina, out of the sum of USD 3.6 billion (plus interest) that did not enter the swap, 8.3% –some USD 300 million– was held by US residents, whereas 85% of such sum is held by the vulture funds and private persons that reside outside the US. It should also be recalled that the vulture funds acquired governmental securities in the secondary market and started to purchase them when the fall was inevitable and after the default, when Argentine bonds were available for purchase at between 10% and 30% of their face value. Thus, a double game exists, the almost foreseeable slip into default that could be anticipated on the basis of the high interest rates –in addition to the other macroeconomic indicators– that Argentina was facing to issue debt, this being understood as the corollary of high risk and high probability of the country defaulting on its debts, and the mechanism of the vulture funds who precisely play on this possibility in order to obtain sums running into the millions when this actually happens, by purchasing bonds at derisory prices in the secondary market, when the economy falls into default or when it is willing to carry out a restructuring. To the extent that global regulation and the judicial system fail to address these fraudulent practices, the vultures will continue to hover over any weak economy. Argentina's successful restructuring is a landmark, and the possibility that these funds might lose their bet would cause them to lose future litigation against the different countries in which they are currently making their bets. If Argentina manages to close this chapter in a world that is characterized today by core economies in crisis that are on the verge of default, this would make some glad and disappoint others who speculate with the financial crises of nations.

It thus becomes absolutely necessary to redefine the conditions that enable the proliferation of this type of practices. But it should also be recalled that the scenario in which States started to suffer this kind of attacks was the need of the interests of the world financial system, which, in the face of the high liquidity of the banks owned by capitalists of the most powerful countries of the world, sought to place their funds generating huge debts among the peripheral nations that transformed into a heavy burden when the core countries were hit by crisis and decided to modify their reference interest rates, causing regional economies to collapse. The transition from negotiations with creditor banks to "bailout" and "stabilization" plans –such as the Brady Plan–, which resulted in an atomization of the lenders, was the initial condition that gave room for the proliferation of speculation around devalued bonds. The redefinition of the international financial system is as necessary as recovering sovereign immunity in these issues. Especially after the plights suffered by peoples in decades during which the sovereign debt was inherited mostly from dictatorships and served the interests of the new –or not so new– international order.

4. Summary and conclusions

Lately, in the international community, the phenomenon of the vulture funds gained notoriety as a result of the lawsuit against Argentina brought by these financial actors.

The lawsuit was the consequence of a long, and partly fraudulent, history of indebtedness of the Argentine Government that dates back to the last dictatorship and that worsened during the Menem and De La Rúa administrations. These years carried grave economic and social consequences. While, in terms of the economy, the year 2001 saw the end of four years of interrupted recession, explosive debt, tremendous capital flight and an increasing bank run, in the social sphere, indicators showed that 38.3% of the total population was below the poverty line, 13.6% below the extreme poverty line, and that unemployment was running at 18%, while underemployment amounted to 16%.

Against this backdrop, default –as declared by the interim head of state Mr. Rodríguez Saa in December 2001– was inevitable. Cessation of payments made it possible for the economy to begin to recover. Thus, between the years 2002 and 2004, nominal GDP grew at an average pace of 9%. At that pace and in view of the favourable recovery conditions that were perceived, then-president Néstor Kirchner launched in 2005 a restructuring of the defaulted debt.

The level of acceptance of the 2005 swap was significant. Out of the eligible debt sum of USD 81.836 billion, more than 76% was restructured. Later on, with the intention of resolving the debt issue and responding to its obligations, in 2010, the government led by Cristina Fernández reopened the restructuring process, which resulted in regularizing more than 91% the total defaulted debt.

The renegotiation of Argentina’s defaulted debt was successful. It entailed a large haircut of principal as well as rescheduled payments, and set a significant world precedent. Furthermore, the innovative introduction of GDP-linked Units had a virtuous effect as creditors were linked to the country’s economic performance.[131] Despite the high level of acceptance, USD 3.6 billion (plus interest), held by individual investors, holdouts and vulture funds, was not restructured.

[131] Müller, Alberto “Default y reestructuración: ¿Cuál fue la real quita de la deuda pública argentina?” Working Paper No. 32, CESPA, School of Economic Science, University of Buenos Aires. March, 2003.

Vulture funds are high-risk hedge funds that –in the case of sovereign debts– deliberately purchase governmental securities at default prices for the purpose of seeking payment in court of the total value of those bonds plus any interest accrued.

Once the sovereign bonds are acquired, their strategy is based on refusing to participate in the restructuring plans offered by the governments and bringing legal actions against the debtor State in foreign courts –generally US and UK courts–, claiming payment of sums running into the millions on account of their holdings, as they anticipate that they stand a good chance of obtaining judgments in their favour. That is how they operate, without creating wealth, employment, or any value in the real economy, they only speculate with the crisis of countries to become rich at their expense. Their behaviour only hinders and impairs the economic recovery of nations, causing enormous damage to the population's development and well-being.

Under this logic, they do not subject themselves to the game of the market within which investors win or lose according to the fluctuations in the value of their holdings. Quite on the contrary, they acquire bonds at high interest rates even knowing the high risk of uncollectibility that those rates indicate, because they bet on the issuing country declaring default, which, in view of a scarcely regulated system and courts that legitimate their practices, enables them to file a court action against the State and obtain tremendous profits through judgments in their favour. Thus, the risks of the stock exchange game disappear for them and court judgments become highly profitable instruments. In this way, a judgment against would be the only risk that the vulture funds face.

The owners of these investment funds generally have their domicile in tax havens, where the lack of regulation facilitates their business. Although a lengthy list of this type of enterprises can be found in the market, they usually belong to the same shareholders and their composition changes only slightly. The most well-known ones are Kenneth Dart and Paul Singer. The latter is the financial vulture that has brought the most legal actions against Argentina. The list of countries sued by them include: Brazil, Cote d'Ivoire, Ecuador, Panama, Peru, Poland, Democratic Republic of Congo, Turkey and Vietnam.

These actors wield enormous political and economic power that allows them to ensure success in their business. Through donations to the most influential political sectors and lobbying, they manage to sway judged and politicians in their favour. In addition, they devote astronomical sums of money to press campaigns aimed at disparaging indebted countries, a tool that they use to legitimate their practices with the public opinion and delegitimize the actions that the States sued undertake in order to shield their economies from the risks that they are exposed to due to the practices of these speculators. For those purposes, in the case of Argentina, in 2001, the vulture funds that purchased a part of its debt at default price founded, along with former US officials, the American Task Force Argentina (AFTA), from which they issue defamatory notices, lobby and even finance pot-banging marches and protests against the Argentine government[132].

The development and propagation of the vulture funds phenomenon is a consequence of the changes that have occurred throughout the history of the international financial system. The "bailout" and "stabilization" plans devised by the IMF, the World Bank and the core countries as a result of the Latin American debt crisis –which broke out in 1982 with the Mexican default–, and adopted by peripheral countries, allowed these practices –which up to the 90's were confined to the private sphere– to enter the sovereign debt business.

Particularly the implementation of the Brady Plan that was designed in 1989 by then-US Treasury Secretary so that creditor commercial banks could collect on debts owed by States beset with crisis gave rise to the foray and operation of the vulture funds with sovereign debts. The Plan, basically, involved in swapping bank loans for government securities that could be freely traded in the stock exchange, which resulted in atomization of lenders and the proliferation of speculation around the debts of the countries that became yet another asset available to anyone. This hampered sovereign debt renegotiations, insofar as such debts were no longer owed to a single identifiable creditor, but rather to anonymous bondholders.

The Latin American debt crisis that led to "bailout" plans the likes of the Baker and Brady plans, which far from stemming the crisis actually worsened it, was the result of excessive indebtedness that began in the 70's when, as a result of the increased liquidity in the international system arising from the dollars coming from the 1973 oil shock and the recession that the core countries were experiencing, those dollars were channelled to peripheral countries at very low, though floating, interest rates, which subsequently became impossible to pay when interest rates rose in view of the new financial scene imposed by the US and Europe. With the onset of the crisis, external indebtedness in the entire region worsened, because the solutions adopted by Latin American countries following the recommendations of the IMF and the World Bank not only failed to resolve the problem, but also led to further waves of indebtedness that

[132] See: http://www.atfa.org/

triggered different financial crises a decade later: Mexico (tequila effect, 1995), Asia (rice effect, 1997), Russia (vodka effect, 1998) Brazil (caipirinha effect, 1999) and Argentina (2001).

These changes to the international financial system that began in the 70's were accompanied by a shift away from the absolute legal doctrine that conferred full immunity on States and into the restrictive doctrine that divides a State's activities into iure imperii or public acts, which are regarded as sovereign and thus subject to immunity, and iure gestionis or commercial acts, which are regarded as private in nature and thus do not enjoy immunity. With the adoption of this doctrine, increasingly restrictive legal standards were designed, which deprived States of their legitimate right to sovereign immunity. Legal instruments like the European Convention on State Immunity (1972), the US Foreign Sovereign Immunities Act (FSIA) (1976) and the UK State Immunity Act (1978) which involved deliberately vague definitions leading to legally and insidiously incorrect judicial criteria that became established over time with a view to benefiting private creditors.

Moreover, with regard to sovereign debts specifically, under the pretext of providing legal certainty to creditors and making credit more attractive for investors, States were incited to include in their debt issuance contracts waiver-of-immunity clauses and establish the jurisdiction of foreign courts. This requirement, which, rather than for the sake of legal certainty it was established as a powerful instrument for the subordination of countries, became mandatory in practice and difficult to evade, because it places conditions on access to financing. The jurisdictions adopted were mainly the cities of New York and London, the world's two most important financial hubs.

However, this contract provision clashes with the principle of the law that a party cannot waive a right if public or moral considerations are affected. Therefore, each provision to this effect included in contracts for the issuance of sovereign securities should be declared void. Yet, although waiver of immunity clearly violates that precept, the courts have not seen it this way.

In Argentina, the first antecedent of waiver of legal sovereignty is to be found in the military dictatorship in 1976, when Law No. 21305 was passed. This waiver of sovereignty was later ratified in the 54 bilateral investment treaties signed between 1992 and 2002 and in the successive issuances of bonds, even those under the 2005 and 2010 debt swaps, where waiver of sovereign immunity clauses were applied in foreign and international courts[133], despite the prohibition contained in the Argentine Constitution.

These changes to the international financial system, the extremely restrictive legal texts adopted by core countries and the waiver of sovereign immunity imposed in debt issuance contracts left the indebted States bereft of legal protection and exposed to numerous claims. That is how the legal actions brought by the vulture funds proliferated and, especially, because of the judgments entered in their favour in those lawsuits, which have legitimated their practices.

At present, vulture funds hold a large share in the global financial markets. If we look at the total of lawsuits brought against States over sovereign debts, we will see that they have grown exponentially and coincide with financial deregulation. While in the 70's and the 80's, the number of lawsuits was 2 and 6, respectively, in the 90's, they grew to 41 and then to 54 in the 2000's, even though the number of defaults declined over those years. Out of those 54, 41 were brought against Argentina.[134] The latest large world default was indeed in 2001 in Argentina, which partly explains the high number of claims that the country has been facing. Nonetheless, Greece should not be forgotten, which experienced a large-scale default, albeit with the blessing of the Troika. It should also be noted that the jurisdictions where those cases were brought were, as is to be expected, the US firstly, followed by England. So, out of those 103 lawsuits, almost 88% were pursued in North American territory, 9% in England and the other 3% was referred to arbitration. Furthermore, almost 90% of those lawsuits were started by vulture funds.

In the history of lawsuits over sovereign debts, there are two landmarks cases in view of the precedent they set, to which the lawsuit currently facing Argentina should be added. They are nonetheless relevant, because they constitute the most symbolic example of the deleterious effect of the practices conducted by these funds, the legal actions they pursued against the so-called Highly Indebted Poor Countries (HIPCs) during the 90's. In those cases, they purchased debt with the expectation that relief plans be announced so as to legally claim the value of their holdings at that time. Thus, with judgments in their favour, on numerous occasions, the money intended for poverty alleviation programmes ended up in the hands of the vulture funds.

---

[133] Asiain, Andrés. "El fallo Griesa y la operación buitre". [online], Argentina, infobae.com.ar, 9 September 2013. Available at http://opinion.infobae.com/andres-asiain/

[134] Schumacher, Julian, Trebesch, Christoph and Enderlein, Henrik, "Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010". [online], papers.ssrn.com, 15 April 2013. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997

The first lawsuit that set an important precedent was the 1992 case *Republic of Argentina v. Weltover*. In 1986, the government led by former president Raúl Alfonsín unilaterally decided to replace bonds issued during the last military dictatorship –"bonods"– because the country did not have enough foreign exchange to make those payments. Three creditor companies did not accept the swap and sued the State in US courts. Although the defence invoked its sovereign immunity right, the courts denied it, because, based on their extremely limited understanding, ruled that the issuance of government securities is a transaction in which the government acts as a private party and, therefore, it is a "commercial activity" that, according to the FSIA, has no sovereign privileges. This controversial interpretation on the part of the US judges impaired in the succeeding lawsuits over public debt the right to immunity enjoyed by States, thus depriving them of a genuine defensive tool, and facilitated the business of the vulture funds.

Afterwards, in 1996, another legal action was brought whose judgment is relevant because it legitimated speculation practices concerning defaulted debt. This was the *Elliott Associates v. Republic of Peru* case. On this occasion, the investment fund Elliott Associates –owned by Paul Singer– bought, 6 months after the Alberto Fujimori started negotiations that led to the Brady Agreement, USD 11.4 million in Peruvian external debt, with an estimated nominal value of USD 20.7 million. Once the restructuring was announced, Elliott refused to participate and sued the Peruvian State in New York for the total value of its holdings. The defence moved to dismiss the case insofar as Elliott's conduct amounted to a violation of Section 489 of the New York Judiciary Law –known as the Champerty Doctrine– which prohibits buying matured securities *"(…)with the intent and for the purpose of bringing an action or proceeding thereon."* Although the lower court sided with Peru, stating that Elliott had indeed engaged in Champerty and described in detail in the proceedings how their practices were framed within the scope of the law, the Second Circuit court reversed the lower court by making a particular interpretation of that rule. The judge stated that, for that conduct to be illicit, the legal action must be the primary goal, and in this case, the goal was no other than being paid in full. Thus, with an interpretation that does not make any legal sense, because anyone that files a claim expects to collect on it, the court legitimized these practices, which are fraudulent under the Champerty Doctrine, and left the States bereft of this defensive tool.

Thus, as several legal disputes on the issuance of sovereign securities took place, the courts have proceeded in such a way that nations have increasingly been left defenceless in the event of a speculative attack. Along these lines, the current lawsuit that is subjecting Argentina to a singular definition of the pari passu clause breaches the equal treatment principle under the Brady plan that was provided for the purpose of ensuring proportionality among the bondholders to ensure that none of them obtains more benefits than others.

In 1994, the Menem administration signed a Fiscal Agency Agreement with the Banker Trust Company under which a new offer of government securities was issued. A portion of that debt was purchased by vulture funds once the country defaulted. The issuance contract included in paragraph 1(c) a pari passu clause, by which creditors should afforded equal legal rank and payment rights. This means that the State cannot assign to a debt a lower rank than another one and that the holdings must be paid on equal terms. Furthermore, the jurisdiction of the federal court of New York was established. These conditions gave rise to the legal actions that were later started by the vulture funds for USD 1.33 billion.

The plaintiffs claim that the Argentine Government breaks this clause whenever it pays its obligations towards bondholders who entered the 2005 and 2010 swaps and does not make any transfers of funds on the securities held by the litigants. They maintain that, through this conduct, the State lowers the rank of their holdings, just like it does through Laws No. 26,017 –the “padlock” law– and 26,547 (which temporarily suspended the padlock low in order to reopen the 2010 restructuring process) and the provisions of the swap prospectuses that set forth that any such debt that has not entered the restructuring may remain in default indefinitely.

In view of these allegations, the Argentine defence, after challenging the jurisdiction of the New York courts over this case, because of the unconstitutional nature of the assignment agreed under the FAAs, and also because the case revolves around a sovereign action –an allegation rejected by the court–, argued in its favour that the pari passu clause has never been violated because no legally binding preference has been accorded to the holders of the restructured debt over the plaintiffs, insofar as Argentine legislation clearly places them upon an equal legal footing as their holdings are maintained as direct, unconditional, unsecured and unsubordinated obligations, thus complying with the equal treatment provision required by the standard.

Still, US District Court Judge Thomas Griesa for the Southern District of New York ruled in favour of the vulture funds. This ruling was appealed by the Argentine Republic to the Second Circuit Court of Appeals in New York. In the appeal, the Argentine Government proposed a remedy for the alleged breach of the pari passu clause that involved applying a prorata payment formula that incorporated the same terms of the

2010 swap, thus ensuring equal treatment with respect to the exchange bondholders and respecting the Argentine law that does not allow offering privileged conditions to a bondholder over others. Nonetheless, on 23 August 2013, the Circuit Court affirmed Griesa's judgment –although it was stayed until the US Supreme Court's resolution– ordering the State to pay to the plaintiffs the face value of the securities held by them and, if such payment was not made, it prohibited the Bank of New York –payment agent for Argentina– from transferring the funds to the accounts of the swap holders.

Without any doubt, the judgment issued transgresses the equality provision that the judge claims to be upholding, insofar as the judgment gives rise to a situation of inequality by ordering payment to the litigants that does not provide for equal treatment vis-à-vis the holders of swapped debt. In addition, the court prioritizes the holdings of the plaintiffs and conditions any payment coming from the restructured debt to the defaulted debt, thus subordinating a debt to another, which is precisely what the pari passu clause forbids. Furthermore, it is tantamount to an attack against sovereignty as it fails to take account of the laws enacted by Argentine Congress –which prevent the execution of what the judgment provides– and as it decides on the assets owned by a foreign State, it infringes on the FSIA. Moreover, they fail to take into account the responsibility of the courts in equity for paying special attention to the public consequences of any court order. In this regard, the judges did not consider the losses that the order represents for the Argentine economy nor for the global architecture of debt restructuring, because, on the one hand, it pushes the country into technical default and leaves it exposed to future claims; and, on the other, it sets a bad precedent for future restructurings –and also undermines the one carried out by Argentina– by enabling a very small group of creditors to jeopardize the collection rights of most lenders. It is likely that, in the face of the fear that this precedent causes, from now on, those who may have been willing to accept a renegotiation will no longer accept one and choose to go to the courts for fear that a court's decision might prevent them from enjoying their rights.

Against this backdrop, with a view to expressing the Argentine State's willingness to pay and ensuring equal treatment to holders of swapped bonds and defaulted debt, Congress passed Law Nº 26,886, which indefinitely suspends the so-called "padlock law" and authorizes the Executive to reopen the restructuring process. The draft new offer –which as of the date of completion of this paper has yet to be launched– incorporates the same terms as those established in the previous swaps and provides for an option to buy bonds with maturities in 2038 without principal haircuts at rates ranging between 2.5% and 5.25%, and another one with principal haircuts and at a rate of around 8.28%, with maturity in 2033.

How the lawsuit will unfold depends on the outcome of any future judicial steps. Taking into account the implications of the judgments rendered so far, both for the country and for the global architecture of sovereign debt restructurings, it would be convenient if the US Supreme Court agreed to review the case on appeal by the Argentine Republic and decided to reverse these judgments.

As this judicial proceeding progressed, three myths about Argentina have been put forward, which were dispelled throughout this paper. The first myth is that the country refuses to pay off its debts. However, since the launch of the two swaps, the government has been regularly meeting its obligations. In addition, Argentina demonstrates a clear willingness to pay through the imminent reopening of the swap of the still defaulted debt. The second myth is that the offer made in the 2005 and 2010 swaps was unfair to the creditors, which is easily disproved by the high degree of acceptance among the creditors of such swaps. Certainly, the negotiation process was a success without precedents in the world. This paper has presented in detail the favourable conditions that the swaps established since the issuance of GDP growth-linked units both for the creditors and for the country, which means that the Argentine economy is not tied to indebtedness, a situation that had remained for decades and led to continuous adjustment policies. The last myth is that Argentina fails to observe the orders rendered by foreign courts. Regarding ICSID awards, it has been clarified that there are four such awards which are pending execution, the reason being that the award creditors refuse to observe the procedure provided by law for that purpose. As for the judgments that US courts have been rendering in the context of the current lawsuit, the Argentine government is not enabled by its domestic legislation nor by the prospectuses of the 2005 and 2010 swaps to offer better conditions to a bondholder over others, which prevents Argentina from making the payment ordered by the latest judgment.

At the same time, this paper has discussed the serious worldwide consequences carried by the orders rendered. In the lawsuit against Argentina, the first decision of a judge on the equal treatment provision in contracts for the issuance of sovereign debt was rendered. Along with this, there is a risk that an inappropriate interpretation might be set as precedent. If the interpretation that the courts have adopted so far prevails, it is likely that the degree of acceptance that debt restructuring usually garners will be drastically reduced, and that the number of lawsuits will increase, which would affect the economic recovery of indebted countries.

Along these lines, the lawsuit has placed on the agenda the challenge posed by the vulture funds to the debt restructuring architecture. On the other hand, it has also brought to light other matters related to the waiver of sovereignty that debtor States are forced to accept as a condition for having access to credit. This paper seeks to provide some food for thought with regard to these issues that should be reworked in the financial system without losing sight of the fact that they involve a moral debate that society should engage in.

The judgments entered so far constitute the clearest example that what prevails in the world is a system that prioritizes financial interests over the public interest, thus preventing justice from being a right for all and excluding, mainly, the most vulnerable sectors.

It is necessary for the international community to seek to prevent this criminal conduct through regulations that punish it and designed for the purpose of preventing the courts from adopting particular interpretations that undermine the well-being of peoples for the sake of the wealth of a few. To that end, it is necessary to have the political willingness to overcome the resistance that the system shows. If this does not happen, these changes are very unlikely to occur.

It is also crucial for political and social leaders of peripheral countries to seek to promote a legal and operative order aimed at upholding and exercising the sovereignty of their States so as to carry out the transition from a structure of dependence to one of liberation and self-determination of their peoples. For that purpose, as stated by Eduardo Barcesat, "(…) what is required is a social block committed to the recovery of the right to liberation and self-determination, both as individuals and as a people. If that is not incorporated and translated into political and institutional practices, challenging the validity [of waiver-of-sovereignty clauses] does not make any sense and serves no social purpose and thus amounts to mere argument." He adds, "It should be recalled that Karel Vasak, the first director of UNESCO's Human Rights division and who gathered both the international dimensions and philosophical foundations of human rights, defined the right to self-determination of peoples as being equivalent to the right to life of individuals (…) If we are to exist as a people, if we are to have a life as such, it is necessary to exercise the rights of liberation and self-determination. And, we must be firmly convinced that no right is superior to the right of existence, as individuals and as a people."[135]

[135] Barcesat, Eduardo. "Ruptura de la dependencia de los TBI y el CIADI". Revista Derecho Público (journal). Ministry of Justice and Human Rights of the Argentine Republic. Year 1, issue 3. Buenos Aires, Argentina. February 2013.

Bibliography

Araujo, Facundo M. and Torres, María Carolina. "Apostillas a la problemática de la prórroga de jurisdicción en tribunales extranjeros o arbitrales en materia de deuda soberana". Revista Derecho Público (journal). Ministry of Justice and Human Rights of the Argentine Republic. Year 1, issue 3. Buenos Aires, Argentina. February, 2013.

Arceo, Nicolás and Wainer, Andrés. "La crisis de la deuda y el default. Los distintos intereses en torno a la negociación de la deuda pública". Flacso. Buenos Aires, Argentina. 2008.

Barcesat, Eduardo. "Ruptura de la dependencia de los TBI y el CIADI". Revista Derecho Público (journal). Ministry of Justice and Human Rights of the Argentine Republic. Year 1, issue 3. Buenos Aires, Argentina. February, 2013.

Basualdo, Eduardo. "Deuda externa y poder económico en Argentina" Ed. Nueva América (publisher). Buenos Aires, Argentina. 1987.

Basualdo, Eduardo. "Evolución e impactos de la deuda externa en la Argentina." Matériaux pour l´historie de notre temps, Revista trimestral, in collaboration with Sociohistórica, from UNLP. Published by: Association de la BDIC (Bibliotheque de Documentation Internationale Contemporaine) et du Musee. No. 81, 42-50. 2006.

Basualdo, Eduardo; Nahón, Cecilia; Nochteff, Hugo. "Deuda externa privada en la Argentina (1991-2005). Trayectoria, naturaleza y protagonistas". Desarrollo Económico. Vol 47, No. 186, 193-224. Buenos Aires, Argentina. 2007.

Cámpora, Mario (h). "Notas sobre la jurisdicción de los tribunales de Nueva York en operaciones de crédito público de la República Argentina". Revista de Derecho Público (journal). Infojus. Year I, Issue I, 2012, pp.81-100.

Corti, Arístides H. and Constante, Liliana B. "La soberanía y los tribunales arbitrales del CIADI" La Ley (journal), LL 2005-C, 1032.Buenos Aires, Argentina.

de Monserrat Llairó, María. "La argentina neoliberal. De Alfonsín a Menem". Center for Research on Latin American Studies for Development and Integration (CEINLADI) School of Economic Sciences – University of Buenos Aires. Buenos Aires, Argentina. 2008.

Hopenhayn, Benjamín and Vanoli, Alejandro "La deuda del estado nacional Situación y propuestas de reestructuración", mimeo. 2008.

Kulfas, Matías and Schorr, Martín "Deuda externa y valorización financiera en la Argentina actual Factores explicativos del crecimiento del endeudamiento externo y perspectivas ante el proceso de renegociación" Realidad Económica No. 198. Argentine Development Institute. Buenos Aires, Argentina. May, 2003.

Kulfas, Matías and Schorr, Martín "La deuda argentina. Diagnóstico y lineamientos propositivos para su reestructuración". Fundación OSDE / CIEPP. Buenos Aires, Argentina. 2003.

Laudonia, Mara. "Los buitres de la deuda". Editorial Biblos (publisher). Buenos Aires, Argentina. 2013

López Velarde Estrada, Rogelio. "Algunas consideraciones en materia de inmunidad soberana a la luz del Derecho Positivo norteamericano" Revista Jurídica (journal). Yearbook of the Law Department of Universidad Iberoamericana, nbr. 21. México. 1992.

Müller, Alberto "Default y reestructuración: ¿Cuál fue la real quita de la deuda pública argentina?" Working Document No. 32 CESPA (Centre of Studies of Argentina's Situation and Perspectives), School of Economic Sciences, University of Buenos Aires. March, 2003.

Palast, Greg. "Vulture´s picnic. In pursuit of petroleum pigs. Power pirates and high-finance carnivores". BBC. 2012

PIDHDD Capitulo Peruano. "Deudas corruptas: Crímenes de Cuello Blanco. Cuando la corrupción afecta los derechos de las personas". PIIDHDD. Peru, 2005. Available at: http://www.jubileoperu.org.pe/home/public_html/jubileoperu.org.pe/wp-content/uploads/2010/04/librodeudascorruptas.pdf

Reignhart, Carmen and Rogoff Kenneth. "This time is different: a panoramic view of eight centuries of financial crises". NBER Working Paper No. 13882. April, 2008.

Sassen, Saskia. "Territorio, autoridad y derechos: de los ensamblajes medievales a los ensamblajes globales". Katz. Serie conocimiento. Buenos Aires, Argentina. Madrid, Spain. 2010

News articles

Barón, Ana. "Bonistas del canje piden suspender el fallo de Griesa contra la Argentina". Clarín newspaper. 27 November 2012. Available at: http://www.clarin.com/politica/Bonistas-canje-suspender-Griesa-Argentina_0_818318277.html

Carrillo, Cristián. "Otra carta judicial en Nueva York". Página 12 newspaper. 7 September 2013. Available at: http://www.pagina12.com.ar/diario/economia/2-228487-2013-09-07.html

Carrillo, Cristián. "Rapaces…". Suplemento Cash, Página 12 newspaper. 2 September 2012. Available at: http://www.pagina12.com.ar/diario/suplementos/cash/17-6240-2012-09-02.html

Cufré, David. "Siria y los fondos buitre en el menú de la Cumbre". Página 12 newspaper. 6 September 2013. Available at: http://www.pagina12.com.ar/diario/economia/2-228450-2013-09-06.html

"EE.UU. formalizó su respaldo al planteo argentino". Página 12 newspaper. 29 December 2012. Available at: http://www.pagina12.com.ar/diario/ultimas/20-210886-2012-12-29.html

"El FMI advirtió que la ratificación del fallo de Griesa podría afectar futuros canjes de deuda.", [online], Argentina, telam.com.ar, 23 May 2013. Available at: http://www.telam.com.ar/notas/201305/18737-el-fmi-advierte-sobre-las-implicancias-que-podria-tener-el-fallo-a-favor-de-los-fondos-buitre.html

"El país recibió una avalancha de apoyos en su pelea contra los fondos buitre". Tiempo Argentino newspaper. 5 January 2013. Available at: http://tiempo.infonews.com/2013/01/05/argentina-93930-el-pais-recibio-una-avalancha-de-apoyos-en-su-pelea-contra-los-fondos-buitre.php

Kanenguiser, Martín "Anne Krueger, a favor de la Argentina en el juicio de los holdouts" La Nación newspaper. 5 January 2013. Available at: http://www.lanacion.com.ar/1543136-anne-krueger-a-favor-de-la-argentina-en-el-juicio-de-los-holdouts.

"Si pone fin al litigio, se reabre el canje". Página 12 newspaper. 30 December 2012. Available at: http://www.pagina12.com.ar/diario/economia/2-210916-2012-12-30.html

Lukin, Tomás. “El CIADI empieza a ser historia antigua”. Diario Página 12. 19 de octubre de 2013. Disponible en: http://www.pagina12.com.ar/diario/economia/2-231598-2013-10-19.html

Zaiat, Alfredo. “Carroñeros”. Página 12 newspaper. 27 August 2013. Available at: http://www.pagina12.com.ar/diario/elpais/1-227688-2013-08-27.html

Zaiat, Alfredo. “Soberanía”. Página 12 newspaper. 3 March 2013. Available at: http://www.pagina12.com.ar/diario/economia/2-214976-2013-03-03.html

Zaiat, Alfredo. “Soberanía jurídica”. Página 12 newspaper. 3 November 2012. Available at: http://www.pagina12.com.ar/diario/economia/2-207062-2012-11-03.html

Articles and web reports

“Argentina elevó la primera apelación ante la Corte Suprema de EEUU”. [online], Argentina, telam.com.ar, 24 June 2013. Available at: http://www.telam.com.ar/notas/201306/22486-argentina-elevo-la-primera-apelacion-ante-la-corte-suprema-de-eeuu.html

Argüello, Jorge. “Radiografía de un fondo buitre ensañado con Argentina”. [online], embajadaabierta.com, 3 March 2012. Available at: http://www.embajadaabierta.com/?p=1883

Asiain, Andrés. “El fallo Griesa y la operación buitre”. [online], Argentina, infobae.com.ar, 9 September 2013. Available at: http://opinion.infobae.com/andres-asiain/

“Audiencia Pública Nacional Tribunal Ético de la Deuda Externa Peruana y su impacto en la realización de los DESC. Caso Elliott”, [online] Available at: https://www.google.com.ar/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.selvas.eu%2Fdownload%2FFSA%2FSentenciaTribEticoLima.doc&ei=44snUpewGIP89QSslIGgDw&usg=AFQjCNHBYYLAOUFoPFexzFpVLxfeo2EI3Q

General Audit Office of the Argentine Republic (Auditoria General de la Nación - AGN). “Estudio especial sobre administración de pasivos del Estado – Canje default 2005”. AGN. Gerencia de Control de la Deuda Pública. Buenos Aires, Argentina. March 2006. [online] agn.gov.ar Available at: http://www.agn.gov.ar/doc-tecnicos/26doctec.pdf

General Audit Office of the Argentine Republic. “Informe de Auditoría de Gestión de Administración de Pasivos Canje de deuda Pública”. AGN. [online], agn.gov.ar, 19 June 2001.

“Caso: Elliott Associates, LP”. Fact-finding committee in charge of complying with with the conclusions and recommendations agreed by the five fact-finding committees during the 2001-2002 legislative period. Economic and Financial Offences Area. Field: external debt. Congress of the Republic. Lima, Peru. [online], congreso.gob.pe, July 2003. Available at: http://www.congreso.gob.pe/historico/ciccor/infomin/min_deuda.pdf

Clinton, Bill. “Kenneth Dart, citizenship and Tax havens”. [online], billclintondailydiary.blogspot.com.ar, 12 February 2005. Available at: http://billclintondailydiary.blogspot.com.ar/2005/02/kenneth-dart-citizenship-and-tax.html

Press release: “Argentina presenta ante la Cámara de Apelaciones petición para suspender la orden por Griesa”. Ministry of Economy and Finance. Buenos Aires. [online], mecon.gov.ar, 26 November 2012. Available at: http://www.mecon.gov.ar/wp-content/uploads/2012/11/26-11-2012.pdf

Press release: “Los sectores productivos apoyan la reapertura del canje de deuda”. [online], adeba.com.ar, 28 August 2013. Available at: http://adeba.com.ar/comunicados-detalle.php?p=-sectores-productivos-apoyan-reapertura-d-canje-uda-30

de Sagastizabal, Raúl. “Argentina: Los fondos rapaces”. [online], rebelión.org, 29 November 2011. Available at: http://www.rebelion.org/noticia.php?id=140281

de Sagastizabal, Raúl. “Argentina pelea en Nueva York el juicio del siglo”. [online], rebelión.org, 28 December 2012. Available at: http://www.rebelion.org/noticia.php?id=161426

de Sagastizabal, Raúl. “Los fondos buitre. Quiénes son y cómo se juntan”. [online], rebelión.org, 6 December 2012. Available at: http://www.rebelion.org/noticia.php?id=160313

de Sagastizabal, Raúl. “¿Qué son los fondos buitre?”. [online], rebelión.org, 25 December 2011. Available at: http://www.rebelion.org/noticia.php?id=141733

Economía del Bicentenario. “Operación rapiña. Radiografía de los fondos buitre”. [online], economiadelbicentenario.com, 23 November 2012. Available at: http://www.economiadelbicentenario.com/node/121

Argentine Embassy in the US. "La Argentina y default de 2001: Mitos y realidades. La reestructuración de la deuda soberana y la recuperación socio-económica del país". [online], embajadaabierta.com, 2012.

Espiñeira, Marcelo. “Fondos buitre. Sobrevuelan el cielo español”. [online], embajadaabierta.com, 2 August 2012. Available at: http://www.embajadaabierta.com/?p=3533

Gogliormella, Christian; Malic, Estanislao. “La deuda pública en Argentina: un análisis del canje del año 2005” La revista del CCC (journal). No. 18. [online], centrocultural.coop, May/August 2013. Available at: http://www.centrocultural.coop/revista/articulo/403/la_deuda_publica_en_argentina_un_analisis_del_canje_del_anio_2005.html

Hernández Vigueras, Juan. “Un riesgo global. Así funcionan los fondos buitre”. [online], attacmadrid.org, 31 January 2013. Available at: http://www.attacmadrid.org/?p=8545

Laryea, Thomas. “Donegal V. Zambia and the persistent debt problems of low income countries.” [online], scholarship.law.duke.edu, 2010. Available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1593&context=lcp

Lau-Tám Oyafuso, Alfredo. “El laberinto jurídico establecido por la Ley de Inmunidades Soberanas Extranjeras norteamericana de 1976”. Boletín Informativo Virtual ITAES. Universidad de San Martín de Porres. La Molina, Lima, Perú, [online], derecho.usmp.edu.pe, April 2012. Available at: http://www.derecho.usmp.edu.pe/Itaest_Articulos_Estudiantiles/04-2012_El_Laberinto_Juridico_Establecido_Por_La_Ley_De_Inmunidades_Soberanas_Extranjeras_Norteamericana_De_1976.pdf

Lau-Tám Oyafuso, Alfredo. “La interpretación restrictiva de las leyes de inmunidades soberanas en el Derecho Internacional Económico”. Boletín Informativo Virtual ITAES. Universidad de San Martín de Porres. La Molina, Lima, Perú. [online], derecho.usmp.edu.pe, April 2012. Available at: http://www.derecho.usmp.edu.pe/Itaest_Articulos_Estudiantiles/04-2012_La_Interpretacion_Restrictiva_En%20Las_Leyes_De_Inmunidades_En_El_Derecho_Internacional_Economico.pdf

Lipworth, Gabrielle and Nystedt, Jens. “Resolución de crisis y adaptación del sector privado”. IMF. [online], imf.org, June 2001. Available at: http://www.imf.org/external/pubs/ft/fandd/spa/2001/06/pdf/lipworth.pdf

Ministry of Economy and Public Finance of the Argentine Republic. “Informe de Deuda Pública”. Secretariat for Public Finance. MECON. [online], mecon.gov.ar, 30 September 2010.

Oddone, Carlos Nahuel. “Mercados emergentes y crisis financiera Internacional”. Published by: eumed·net. [online], eumed.net, 2004. Available at: http://www.eumed.net/cursecon/libreria/2004/cno/cno.pdf

Roubini, Nouriel. “From Argentina to Greece: crisis in the global architecture of orderly sovereign debt restructurings”. [online], roubini.com, 28 November 2012. Available at: http://www.roubini.com/media/13-08-13-13-26/pdf/analysis-c3015acd70d3a58f259057daeba21eb5.pdf

Schumacher, Julian, Trebesch, Christoph and Enderlein, Henrik, “Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010”. [online], papers.ssrn.com, 15 April 2013. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997

Stiglitz, Joseph E. “La victoria de los buitres”. Project Syndicate. [online], Project-syndicate.org, 4 September 2013. Available at: http://www.project-syndicate.org/commentary/argentina-s-debt-and-american-courts-by-joseph-e--stiglitz/spanish

Zenere, Yanina Ruth. “La inmunidad de jurisdicción de los Estados y sus órganos”. Revista Electrónica Cordobesa de Derecho Internacional Público (journal). School of Law and Social Sciences of Universidad Nacional de Córdoba. Córdoba, Argentina. Year I, Issue I. April, 2008. [online], revista.unc.edu.ar, Available at: http://revistas.unc.edu.ar/index.php/recordip/article/view/44/34

Speeches

Lorenzino, Hernán. Plenary Session of Committees of the Argentine Congress. Buenos Aires, Argentina. 28 August 2013.

Timerman, Héctor. News conference at the Government House. Buenos Aires, Argentina. 25 October 2012.

Court decisions

Elliott Associates, L.P. v. Banco de la Nación and the Republic of Peru. EE.UU. United States Court of Appeals for the Second Circuit, 5 May 1999.

Elliott Associates, L.P. v. the Republic of Peru. LEXIS 12253, United States District Court, 6 August 1998.

NML Capital ACP LLC II LLC. v. the Republic of Argentina. United States Court of Appeals, Second Circuit, 23 August 2013.

NML Capital ACP LLC II LLC. v. the Argentine Republic. United States Court of Appeals, Second Circuit, 26 October 2012

Republic of Argentina v. Weltover. US Supreme Court. Decision, 12 June 1992.

Legislation

Argentina. Decree No. 1735/04, 9 December 2004, Deuda Pública. Official Gazette, 10 December 2004.

Argentina. Decree No. 563/10, 26 April 2010, Deuda Pública. Official Gazette, 29 April 2010.

Argentina. Law No. 17454, 20 September 1976, Code of Civil and Commercial Procedure of the Argentine Republic. Official Gazette, 7 November 1967.

Argentina. Law No. 21305, 20 April 1976. Official Gazette, 6 May 1976.

Argentina. Law No. 22434, 16 March 1981. Official Gazette, 26 March 1981.

Argentina. Law No. 23054, 1 March 1984, Pact of San José. Official Gazette, 27 March 1984.

Argentina. Law No. 24430, 14 December 1994, Argentine Constitution. Official Gazette, 10 January 1995.

Argentina. Law No. 26017, 9 February 2005, Public Debt. Official Gazette, 11 February 2005.

Argentina. Law No. 26547, 18 November 2009, Public Debt. Official Gazette, 10 December 2009.

Argentina. Law No. 26886, 11 September 2013, Public Debt. Official Gazette, 23 September 2013.

United States .28 USC Part IV Chapter 97 – Jurisdictional Immunities of Foreign States, of the United States Code, 21, October 1976.

New York, United States. N.Y. JUD. LAW § 489: NY Code – Section 489: Purchase of claims by corporations or collection agencies, of New York Judiciary Law.

Peru. Supreme Decree 072-96-EF, 23 June 1966. Official Gazette, 27 June 1966.

Peru. Supreme Decree 131-98-EF, 31 December 1998. Official Gazette, 3 January 1999.

Peru. Supreme Decree 106-2000-EF. Official Gazette, 30 September 2000.

International Treaties

American Convention on Human Rights, San José de Costa Rica, 7 November 1969.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID, 14 October 1966.

PAPERS PUBLISHED BY CEFID-AR:

No. 1 – "METAS DE INFLACIÓN: IMPLICANCIAS PARA EL DESARROLLO". Martín Abeles and Mariano Borzel. June 2004

No. 2 – "ALGUNAS REFLEXIONES SOBRE EL ROL DE LA BANCA PÚBLICA". Daniel Kampel and Adrian Rojze. November 2004

No. 3 – "REGULACIÓN BANCARIA EN ARGENTINA DURANTE LA DÉCADA DEL 90". Guillermo Wierzba and Jorge Golla. March 2005

No. 4 – "BANCA COOPERATIVA EN FRANCIA. UN ESTUDIO DE CASO". Mariano Borzel. June 2005

No. 5 – "LA CUESTIÓN TRIBUTARIA EN ARGENTINA. LA HISTORIA, LOS DESAFÍOS DEL PRESENTE Y UNA PROPUESTA DE REFORMA". Jorge Gaggero and Federico Grasso. July 2005

No. 6 – "SOCIEDAD DE GARANTÍA RECÍPROCA. UNA HERRAMIENTA PARA EL DESARROLLO DEL CRÉDITO PYME". Alejandro Banzas. October 2005

No. 7 – "EL MANEJO DE LA CUENTA CAPITAL: ENSEÑANZAS RECIENTES Y DESAFÍOS PARA ARGENTINA" Author: Mariano Borzel, Contributor: Emiliano Libman. December 2005

No. 8 – "FINANCIAMIENTO A PYMES EN LA BANCA PÚBLICA. ESTUDIO DE CASO: DESARROLLO DE MODELOS DE SCORING DE RIESGO CREDITICIO EN EL BANCO DE LA PROVINCIA DE BUENOS AIRES". César Marcelo Ciappa. January 2006

No. 9 – "LA CRISIS ARGENTINA DE 2001. ALGUNOS TÓPICOS SOBRE SU IMPACTO EN EL PORTAFOLIO Y LAS FUENTES DE FINANCIAMIENTO DEL SECTOR PRIVADO NO FINANCIERO". Máximo Sangiácomo. February 2006

No. 10 – "DIMENSIÓN DE LOS CONGLOMERADOS FINANCIEROS. EL CASO ARGENTINO" Author: Jorge Golla Contributor: Lorena E. Fernández. May 2006

No. 11 – "EL SPREAD BANCARIO EN LA ARGENTINA. UN ANÁLISIS DE SU COMPOSICIÓN Y EVOLUCIÓN (1995-2005)". Federico Grasso and Alejandro Banzas. August 2006

No. 12 – “LA INVERSIÓN EXTRANJERA DIRECTA EN LA POST-CONVERTIBILIDAD. PRINCIPALES TENDENCIAS EN UN NUEVO PATRÓN DE CRECIMIENTO” Ariana Sacroisky October 2006

No. 13 – “ESTRUCTURA PRODUCTIVA Y DETERMINACIÓN DE PRECIOS. UN ABORDAJE SECTORIAL (2002-2005)” Mariano Borzel and Esteban Kiper. November 2006

No. 14 – “LA FUGA DE CAPITALES. HISTORIA, PRESENTE Y PERSPECTIVAS”. Jorge Gaggero, Claudio Casparrino and Emiliano Libman. May 2007

No. 15 – “LA INVERSIÓN Y SU PROMOCIÓN FISCAL ARGENTINA, 1974 – 2006” Jorge Gaggero and Emiliano Libman, June 2007

No. 16 – “DESAFÍOS DE LA RECONFIGURACIÓN PRODUCTIVA EN ARGENTINA. APORTES PARA EL DEBATE ACTUAL”. María Agustina Briner, Ariana Sacroisky and Magdalena Bustos Zavala. July 2007

No. 17 – “LA SOSTENIBILIDAD DE LA POLÍTICA DE ESTERILIZACIÓN”. Roberto Frenkel. August 2007

No. 18 – “EL FINANCIAMIENTO A LA VIVIENDA EN ARGENTINA. HISTORIA RECIENTE, SITUACIÓN ACTUAL Y DESAFÍOS”. Alejandro Banzas and Lorena Fernández. September 2007

No. 19 – “NUEVAS ARQUITECTURAS FINANCIERAS REGIONALES. SU INSTITUCIONALIDAD Y CARACTERÍSTICAS”. Guillermo Wierzba. December 2007

No. 20 – “UN ESTUDIO DE CASOS SOBRE BANCA DE DESARROLLO Y AGENCIAS DE FOMENTO” Claudio Golonbek and Emiliano Sevilla. May 2008

No. 21 – “BANCA DE DESARROLLO EN ARGENTINA. BREVE HISTORIA Y AGENDA PARA EL DEBATE” Claudio Golonbek, September 2008

No. 22 - “LA REGULACIÓN FINANCIERA BASILEA II. LA CRISIS Y LOS DESAFÍOS PARA UN CAMBIO DE PARADIGMA” Guillermo Wierzba, Estela del Pino Suarez, Romina Kupelian and Rodrigo López. November 2008

No. 23 – “LA PROGRESIVIDAD TRIBUTARIA. SU ORIGEN, APOGEO Y EXTRAVÍO (Y LOS DESAFÍOS DEL PRESENTE)” Jorge Gaggero. December 2008

No. 24 – “LAS ESTRATEGIAS DE FOCALIZACIÓN DE LA INVERSIÓN EXTRANJERA DIRECTA. LECCIONES PARA LA ARGENTINA DE LAS EXPERIENCIAS DE SINGAPUR, MALASIA Y LA REPÚBLICA CHECA” Ariana Sacroisky. April 2009

No. 25 – “DESIGUALDAD Y CRECIMIENTO. LA LITERATURA, LOS DEBATES Y SU MEDICIÓN” Author: Federico Grasso Contributor: María José Castells. May 2009.

No. 26 – “CRISIS MUNDIAL. ELEMENTOS PARA SU ANÁLISIS”. Enrique Arceo, Claudio Golonbek and Romina Kupelian. July 2009

No. 27 – “TITULIZACIÓN HIPOTECARIA EL INSTRUMENTO. RESEÑA DE EXPERIENCIAS. ENSEÑANZAS Y DESAFIOS POST-CRISIS PARA SU USO EN LA ARGENTINA”. Alejandro Banzas and Lorena Fernández. August 2009

No.28 – “BANCA DE DESARROLLO UN ESTUDIO DE CASO: BNDES, DISEÑO INSTITUCIONAL Y ROL CONTRACICLICO”. Claudio Golonbek and Andrea Urturi. March 2010.

No.29- “LA *FUGA* DE CAPITALES II. ARGENTINA EN EL ESCENARIO GLOBAL (2002-2009). Jorge Gaggero, Romina Kupelian and María Agustina Zelada. July 2010.

No.30- “CENTRO, PERIFERIA Y TRANSFORMACIONES EN LA ECONOMIA MUNDIAL”. Enrique Arceo and María Andrea Urturi. August 2010.

No.31- “EL REGIMEN BAJO PRESION: LOS ESQUEMAS DE METAS DE INFLACION EN BRASIL, CHILE, COLOMBIA Y PERU DURANTE EL BOOM EN LOS PRECIOS INTERNACIONALES DE MATERIA PRIMA”. Martin Abeles and Mariano Borzel. September 2010.

No.32- “LOS DESAFÍOS PARA SOSTENER EL CRECIMIENTO. EL BALANCE DE PAGOS A TRAVÉS DE LOS ENFOQUES DE RESTRICCIÓN EXTERNA”. Rodrigo López and Emiliano Sevilla. October 2010.

No.33- “EL SISTEMA FINANCIERO ARGENTINO. LA EVOLUCIÓN DE SU REGIMEN REGULATORIA DESDE LA LIBERALIZACIÓN FINANCIERA. IMPACTOS RELEVANTES SOBRE EL CRÉDITO Y LA ECONOMÍA REAL”. Guillermo Wierzba, Estela del Pino Suarez and Romina Kupelian. November 2010

No.34 - “AMERICA LATINA: EXPANSIÓN, CRISIS Y DESPUÉS. UN ESTUDIO DE CASO SOBRE LA POLÍTICA CONTRACÍCLICA EN ARGENTINA”. Guillermo Wierzba and Pablo Mareso. December 2010.

No.35 - “PRODUCTO POTENCIAL Y DEMANDA EN EL LARGO PLAZO: HECHOS ESTILIZADOS Y REFLEXIONES SOBRE EL CASO ARGENTINO RECIENTE”. Fabián Amico, Alejandro Fiorito and Guillermo Hang. January 2011.

No.36 - “SECTOR FINANCIERO ARGENTINO 2007/2010. NORMALIZACIÓN, EVOLUCIÓN RECIENTE Y PRINCIPALES TENDENCIAS”. Claudio Golonbek and Pablo Mareso. March 2011.

No.37 - “LA REGULACIÓN DE LA BANCA EN ARGENTINA (1810-2010). DEBTAES, LECCIONES Y PROPUESTAS”. Guillermo Wierzba and Rodrigo López. June 2011.

No.38 - “PLANIFICAR EL DESARROLLO. APUNTES PARA RETOMAR EL DEBATE”. Claudio Casparrino, Agustina Briner and Cecilia Rossi. July 2011.

No.39 - “MÁRGENES UNITARIOS FLEXIBLES, CICLO ECONÓMICO, E INFLACIÓN”. Gustavo A. Murga and María Agustina Zelada. August 2011.

No.40 - “IMPACTO DEL PRESUPUESTO SOBRE LA EQUIDAD. CUADRO DE SITUACIÓN (ARGENTINA 2010)”. Jorge Gaggero and Darío Rossignolo. September 2011.

No.41 - “DIMENSIÓN Y REGULACIÓN DE LOS CONGLOMERADOS FINANCIEROS. EL CASO ARGENTINO”. Romina Kupelian and María Sol Rivas. December 2011.

No. 42 – “GLOBALIZACIÓN FINANCIERA Y CRISIS. LOS LÍMITES QUE IMPONE LA OMC PARA LA REGULACIÓN ESTATAL”. Ariana Sacroisky and María Sol Rivas.

No. 43 – “ESTRATEGIAS DE DESARROLLO Y REGÍMENES LEGALES PARA LA INVERSIÓN EXTRANJERA”. Enrique Arceo and Juan Matias De Lucchi.

No. 44 – “EL ENFOQUE DE DINERO ENDÓGENO Y TASA DE INTERÉS EXÓGENA”. Juan Matías De Lucchi.

No. 45 – “EXPANSIÓN ECONÓMICA Y SECTOR EXTERNO EN LA ARGENTINA DE LOS AÑOS 2000”. Balance y desafíos hacia el futuro. Fabián Amico, Alejandro Fiorito and María Agustina Zelada.

No. 46 – “IMPACTO SOBRE LA EQUIDAD II. SIMULACIÓN DE LOS EFECTOS DISTRIBUTIVOS DE CAMBIOS EN EL GASTO PÚBLICO Y LOS IMPUESTOS. (ARGENTINA, 2010)”. Jorge Gaggero and Darío Rossignolo.

Nº 47 – “IMPACTO SOBRE LA EQUIDAD III. FISCALIDAD Y EQUIDAD EN LA ARGENTINA: UN ENFOQUE DE EQUILIBRIO GENERAL”. María Priscila Ramos and Leandro Antonio Serino. With the assistance of Jorge Gaggero and Darío Rossignolo.

Nº 48 “SECTOR EXTERNO Y POLÍTICA FISCAL EN LOS PAÍSES EN DESARROLLO. LA EXPERIENCIA DE AMÉRICA LATINA ANTE LA CRISIS INTERNACIONAL DE 2008-2009”. Martin Abeles, Juan Cuattromo, Pablo Mareso and Fernando Toledo.