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The Origins of Argentina's Litigation and Arbitration Saga, 2002-2016

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Arturo C. Porzecanski

Abstract

The voluminous and protracted litigation and arbitration saga featuring the Republic of Argentina (mostly as defendant or respondent, respectively) established important legal and arbitral precedents, as illustrated by three cases involving Argentina which were appealed all the way up to the US Supreme Court and were settled in 2014. At first glance, the scale of Argentina-related litigation activity might be explained by the sheer size of the government's 2001 default, the world's largest-ever up to that point. However, its true origins are to be found in the unusually coercive and aggressive way that the authorities in that country went about defaulting on, and restructuring, their sovereign debt obligations. The mass filing of arbitration claims, in turn, was prompted by Argentina's radical and seemingly irreversible changes to the "rules of the game" affecting foreign strategic investors, which broke with binding commitments prior governments had made in multiple bilateral investment treaties. In sum, a major deviation from best practices as understood and settled in the early 2000s, which codified how economic policy adjustments are to be made in a way that minimizes damage to the investment climate, preserves access to the international capital markets, and promotes rapid and sustainable economic growth, lies at the root of Argentina's litigation and arbitration saga which came to an end during 2016.

KEYWORDS: Argentina, Arbitration, Bilateral Investment Treaties

ARTICLE

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The voluminous and protracted litigation and arbitration saga featuring the Republic of Argentina (mostly as defendant or respondent, respectively) established important legal and arbitral precedents, as illustrated by three cases involving Argentina which were appealed all the way up to the US Supreme Court and were settled in 2014. At first glance, the scale of Argentina-related litigation activity might be explained by the sheer size of the government’s 2001 default, the world’s largest-ever up to that point. However, its true origins are to be found in the unusually coercive and aggressive way that the authorities in that country went about defaulting on, and restructuring, their sovereign debt obligations. The mass filing of arbitration claims, in turn, was prompted by Argentina’s radical and seemingly irreversible changes to the “rules of the game” affecting foreign strategic investors, which broke with binding commitments prior governments had made in multiple bilateral investment treaties. In sum, a major deviation from best practices as understood and settled in the early 2000s, which codified how economic policy adjustments are to be made in a way that minimizes damage to the investment climate, preserves access to the international capital markets, and promotes rapid and sustainable economic growth, lies at the root of Argentina’s litigation and arbitration saga which came to an end during 2016.

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INTRODUCTION

During the 2002-2016 period, hundreds of thousands of foreign investors in Argentina—they had purchased equity stakes in local companies, founded affiliates or subsidiaries there, or else had bought government bonds during the 1990s—became plaintiffs in judicial or arbitration proceedings brought against the Republic of Argentina.¹ For the most part, these cases were heard in the federal courts of the United States, or else in arbitral proceedings hosted by the International Centre for Settlement of Investment Disputes (“ICSID”).² Given the sheer number of cases filed and appealed, the substantial sums at stake, and the complexities involved because the defendant was a sovereign state (combined with unwillingness on Argentina’s part to settle out of court, or to honor judgments and awards rendered against it), the litigations and arbitrations became veritable sagas.³ These sagas finally came to an end during 2016, in the wake of a new government elected in Argentina on a platform that included achieving a reconciliation with foreign investors in order to regain access to international debt and equity markets.⁴ The new

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

2. As detailed below, there were also proceedings against Argentina under the International Chamber of Commerce (“ICC”) International Court of Arbitration and under ad hoc tribunals established in accordance with the rules of the United Nations Commission on International Trade Law (“UNCITRAL”).

3. Until early 2016, the principal monetary winners of this litigation marathon had surely been the armies of lawyers and experts marshaled—and duly paid—by all sides in order to pursue or defend against lawsuits and arbitration claims filed in multiple jurisdictions. This author served as a remunerated expert witness in one judicial case and in one arbitration claim. See *Seijas v. Republic of Argentina*, No. 10 Civ. 4300 (TPG), 2011 WL 1137942, at *8-9 (S.D.N.Y. Mar. 28, 2011); *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5.

4. In a second round of presidential elections in Argentina held on November 22, 2015, Mauricio Macri, of the centrist coalition *Cambiamos*, narrowly defeated Daniel Scioli, of the

authorities settled with virtually all claimants in principle and then, in April, placed US\$16.5 billion of new bonds in the United States and elsewhere—the largest emerging-market debt sale then on record—to raise the funds needed to pay for the settlements.⁵

I. IMPORTANCE OF THE ARGENTINA SAGA

The legacy of the voluminous and protracted Argentina-related litigation and arbitration saga is that precedents were established and legal history was made. In terms of the litigation, the outcome of three cases involving Argentina, which were appealed all the way to the US Supreme Court and decided in 2014—all three against Argentina, disregarding in each instance amicus support for Argentina's position from the US government—serve to illustrate the point.

On March 5, 2014, the Court ruled on a case (*BG Grp. PLC v. Republic of Argentina*) in which, for the first time in its history, the dispute involved a bilateral investment treaty (“BIT”): in this instance, the BIT binding the United Kingdom and Argentina as it applied to a claim that had been won by the BG Group, a British multinational oil and gas company.⁶ Overturning an appellate ruling that the investor's failure to fulfill a particular treaty requirement (Article 8) had deprived arbitrators of jurisdiction, as alleged by Argentina, and in spite of an amicus proffered by the United States favorable to Argentina,⁷ the Court's seven-member majority ruled for the claimant and effectively reinstated a US\$185 million arbitral award payable by Argentina to the BG Group.⁸⁹

incumbent *Frente para la Victoria*, a Peronist populist party that had ruled Argentina for twelve years, as led by President Néstor Kirchner (in office from May 25, 2003 until December 10, 2007), then by his wife Cristina Fernández Kirchner (in office through December 9, 2015).

5. Benedict Mander & Elaine Moore, *Argentina Puts an End To Long Holdouts Saga*, FIN. TIMES (Apr. 22, 2016), <https://next.ft.com/content/516ab98a-08a1-11e6-876d-b823056b209b>; see also Alexandra Stevenson, *How Argentina Settled a Billion-Dollar Debt Dispute With Hedge Funds*, N.Y. TIMES (Apr. 25, 2016), http://www.nytimes.com/2016/04/25/business/dealbook/how-argentina-settled-a-billion-dollar-debt-dispute-with-hedge-funds.html?_r=0.

6. See *BG Grp. PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014).

7. Brief for the United States as Amicus Curiae in Support of Vacatur and Remand, *BG Grp. PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014).

8. Article 8 specified that investors wishing to arbitrate a dispute with the host country first had to submit the dispute to the country's local court system and then wait for eighteen months. However, the arbitration panel concluded that it had jurisdiction because, among other things, Argentina's conduct (which included enacting new laws that hindered recourse to its judiciary by firms in BG Group's situation) had excused the claimant from its failure to

Two other important cases were decided in mid-June 2014. In the first, *Republic of Argentina v. NML Capital Ltd.*, the Supreme Court had been asked to consider how widely and far—including around the globe—investors may go in search of a sovereign’s assets when it refuses to pay on its outstanding judgments.¹⁰ Here the petitioner was Argentina and the respondent was NML Capital, Ltd., one of its defaulted bondholders, who had prevailed in eleven debt-collection actions that it brought against the sovereign, and yet had not managed to collect anything.¹¹ In aid of executing the judgments, NML sought discovery of Argentina’s property, serving subpoenas on two non-party banks for records relating to the sovereign’s global financial transactions. The Southern District of New York granted NML’s motions to compel compliance, and the Second Circuit affirmed.¹²

Argentina appealed, claiming that the Foreign Sovereign Immunities Act of 1976 (“FSIA”) does not empower courts to order the discovery demanded by the subpoenas, and that such discovery of foreign-state property would infringe on sovereign immunity and the principles behind it.¹³ Asked for its opinion, the Justice Department filed a brief siding with Argentina, expressing concern that permitting such sweeping examination of a foreign state’s assets by US courts would risk reciprocal adverse treatment of the United States in foreign courts.¹⁴ In any event, the Supreme Court ruled by another seven-member majority that no provision in the FSIA immunizes a foreign-

comply with Article 8’s requirement. See Diane Marie Amann, *Opinion Analysis: Clear Statement Ruling in Investor-State Arbitration Case Leaves Open Question on U.S. Bilateral Treaties*, SCOTUSBLOG (Mar. 6, 2014, 4:06 PM), <http://www.scotusblog.com/2014/03/opinion-analysis-clear-statement-ruling-in-investor-state-arbitration-case-leaves-open-question-on-u-s-bilateral-treaties/>.

9. For a critique of the court’s reasoning, though not of the outcome, see Jarrod Wong, *BG Group v. Republic of Argentina: A Supreme Misunderstanding of Investment Treaty Arbitration*, 43 PEPP. L. REV. 541 (2016).

10. See *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014).

11. NML Capital is a Cayman Islands-based offshore unit of Paul Singer’s Elliott Management Corporation. See Georgina Hurst, *New Argentina Debt Crisis Spells Trouble for Custodian Banks*, INST. INV. (Sept. 23, 2014), <http://www.institutionalinvestor.com/article/3383263/banking-and-capital-markets-emerging-markets/new-argentina-debt-crisis-spells-trouble-for-custodian-banks.html#.VJb4A97A>.

12. See Lyle Denniston, *Argument Preview: A Global Search for Money*, SCOTUSBLOG (Apr. 16, 2014, 7:48 AM), <http://www.scotusblog.com/2014/04/argument-preview-a-global-search-for-money/>.

13. Petition for Writ of Certiorari, *NML Capital, Ltd.*, 134 S. Ct. 2250 (No. 12-842).

14. Brief for United States as Amicus Curiae in Support of Petitioner, *NML Capital, Ltd.*, 134 S. Ct. 2250 (No. 12-842).

sovereign judgment debtor from post-judgment discovery of information concerning its extraterritorial assets. It thereby gave a precedent-setting green light for judgment debtors to scour the world in search of potentially attachable sovereign assets.¹⁵

In the second case decided in mid-June 2014, *NML Capital, Ltd. v. Republic of Argentina*, Argentina asked the Supreme Court to take up a case in which the same NML Capital was the lead plaintiff. NML and other unpaid investors had proven, at least to the satisfaction of the District Court and the Second Circuit, that their bond covenants (from the 1990s) included Argentina's unconditional waiver of sovereign immunity and a particularly creditor-friendly version of the boilerplate *pari passu* clause, according to which Argentina had promised the same treatment and payment priority as it would afford its other bondholders. Because Argentina had been paying creditors who had agreed to its punishing restructuring terms, but had not paid anything to its holdout creditors, NML had requested, and the lower courts had agreed, to remedy the breach of contract with an order of specific performance. The District Court had entered and, despite contrary advice from the US government,¹⁶ the Court of Appeals concurred with an injunction providing that whenever the Republic pays any amount due under the terms of its bonds, it must also pay plaintiffs the same fraction of the amount due to them.¹⁷ In so doing, the courts cleared the way for investors to demand payment on the bonds they held whenever Argentina made any payments to holders of later bond issues which were being honored—a novel form of injunctive relief.¹⁸

Argentina then filed a writ of certiorari requesting review on the grounds that the *pari passu* clause should be interpreted by the New York Court of Appeals, since it involved contract language under New York state law, and that the remedy fashioned by the lower courts coerced a sovereign to pay with assets that the FSIA allegedly

15. On the importance of this case, see Adriana T. Ingenito & Christina G. Hioureas, *Carving Out New Exceptions to Sovereign Immunity: Why the NML Capital Cases May Harm U.S. Interests Abroad*, 30 MD. J. INT'L L. 118 (2015); Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293 (2015).

16. Brief for the United States as Amicus Curiae in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing En Banc, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105(L) (2d Cir. Dec. 28, 2012).

17. *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013).

18. See Lyle Denniston, *No Relief for Argentina on Debt*, SCOTUSBLOG (June 16, 2014, 12:57 PM), <http://www.scotusblog.com/2014/06/no-relief-for-argentina-on-debt/>.

held immune.¹⁹ However, the Supreme Court denied review without comment,²⁰ a decision of legal importance and immediate financial-market impact: it prompted Argentina to default anew on its universe of post-restructuring, foreign-law bonds rather than pay the successful plaintiffs what the courts had deemed they were owed.²¹ While this novel enforcement mechanism (for a private creditor attempting to collect from a rogue sovereign debtor) did not yield the desired result, the *pari passu* case also set an important precedent.²²

The Argentina-related arbitration saga, involving more than fifty cases lodged just with ICSID, likewise established important precedents.²³ In virtually every case that Argentina had to justify measures taken to the detriment of foreign investors, the nation pointed to BIT provisions allowing for exceptions to agreed conduct in times of major economic, political or social crisis. Specific clauses, such as Article XI of the United States-Argentina BIT, allowing the exclusion from the coverage of the treaty of measures “necessary for the maintenance of public order, the . . . maintenance or restoration of

19. Petition for Writ of Certiorari, *Republic of Argentina v. NML Capital, Ltd.* (Feb. 18, 2014), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/03/2014-02-18-Argentina-Petition-for-Certiorari-Final-as-filed1.pdf>.

20. Order List, 573 U.S. 5 (June 16, 2014), available at http://www.supremecourt.gov/orders/courtorders/061614zor_2b8e.pdf.

21. *Fitch Downgrades Argentina's FC IDR to 'RD'*, FITCH RATINGS (July 31, 2014, 3:48 PM), https://www.fitchratings.com/creditedesk/press_releases/detail.cfm?pr_id=843318; Gabriel Torres & Bart Oosterveld, *Moody's Changes Argentina's Outlook to Negative as Default Will Hasten Economic Decline*, MOODY'S (July 31, 2014), https://www.moodys.com/research/Moodys-changes-Argentinas-outlook-to-negative-as-default-will-hasten—PR_305436; Argentina Foreign Currency Ratings Lowered To 'SD' After Holders of Discount Bonds Did Not Receive Interest Payment, STANDARD & POOR'S (July 30, 2014), http://www.buenosairesherald.com/files/vinculos/201407/165882_30_183236.pdf.

22. For some early analysis, see Emma Kingdon, *Leveraging Litigation: Enforcing Sovereign Debt Obligations in NML Capital, Ltd. v. Republic of Argentina*, 37 B.C. INT'L & COMP. L. REV. 30 (2014); Brett Neve, *NML Capital, Ltd. v. Republic of Argentina: An Alternative to the Inadequate Remedies under the Foreign Sovereign Immunities Act*, 39 N.C. J. INT'L L. & COM. REG. 631 (2014). For the view from the winning attorneys in both NML cases, see Matthew D. McGill & Alexander N. Harris, *NML Capital v. Argentina: Enforcing Contracts in the Shadow of the Foreign Sovereign Immunities Act*, 30 MD. J. INT'L L. 3 (2015).

23. According to ICSID, there were thirty-five cases concluded as of October 2016 (up from twenty-nine as of the end of 2014), in which Argentina was the respondent (defendant). See *Cases*, INT'L CTR. SETTLEMENT INV. DISP., <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD28&mntly=ST4> (last visited Oct. 31, 2016). In addition, there were eighteen cases still pending resolution as of October 2016 (down from twenty-two cases as of end of 2014). See *Cases*, INT'L CTR. SETTLEMENT INV. DISP., <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD27&mntly=ST4> (last visited Oct. 31, 2016).

international peace or security, or the protection of its own essential security interests” had been routinely invoked by Argentina as valid grounds for policy decisions which had deleterious consequences for international investors.²⁴

The different conclusions reached in numerous arbitral decisions involving Argentina suggest that while the case law was not settled, it was definitely enriched.²⁵ For example, in several instances the tribunals found that Argentina’s policies had contributed significantly to the economic crisis and the emergency invoked, and also that the measures adopted by the government at the time were not the only way for it to have safeguarded its interests. Therefore, Argentina could not be exempted from its responsibilities to investors. In other arbitrations, it was deemed that Argentina could rely on the defense of necessity only for a limited period—when there really was a threat to public order and to the government’s essential security interests—but not after 2003, when the economic crisis subsided.²⁶ One of the more recent decisions in the stream of investment arbitrations involving Argentina, *El Paso Energy v. Argentina* (concluded in 2011, affirmed after an annulment application was dismissed in September 2014), held that Argentina had contributed to the state of necessity, and thus it could not avail itself of the necessity defense.²⁷

Argentina’s mistreatment of foreign investors also elicited the first ICSID arbitral proceedings involving groups of bondholders, marking a major expansion in the role of these arbitrations in determining to what extent States have failed to protect purely financial investors who made loans or purchased bonds (or even financial derivatives), in contravention of whatever commitments had been made in bilateral investment treaties. The ICSID Convention and Rules do not specifically address the use of mass claims processes, and jurisdiction is limited to legal disputes arising directly out of an

24. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993).

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

26. See Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 LEIDEN J. INT’L L. 637 (2007) (discussing an early example of two diametrically opposed rulings).

27. Sacerdoti, *supra* note 25, at 381; see also *El Paso Energy Int’l Co. v. the Argentine Republic*, ICSID Case No. ARB/03/15 (Sep. 22, 2014).

“investment,” but the notion of investment was never defined.²⁸ As a result, in all proceedings Argentina always questioned the proper standing of bondholder groups and the relevance of their “investments.”

In February 2007, a group of more than 190,000 Italian bondholders registered a request for ICSID arbitration against the Argentine Republic, relying not on a violation of Argentina’s obligations under its bond contracts—a claim that had been pursued without success in the Italian courts²⁹—but on its obligations under the Italy-Argentina BIT (*Abaclat & Others v. The Argentine Republic*).³⁰ In its pioneering decision on jurisdiction and admissibility issued in August 2011,³¹ the ICSID tribunal reached the important, if controversial, conclusion that it had the authority to conduct a collective-claims proceeding, and that the bondholders had made a duly protected “investment.”³² The outcome of the claim was

28. Christoph Schreuer, *Investment Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 296 (Cesare P. R. Romano, Karen J. Alter & Yuval Shany eds., 2014).

29. See Jürgen Bröhmer, *Immunity and Sovereign Bonds*, in *IMMUNITIES IN THE AGE OF GLOBAL CONSTITUTIONALISM* 190 (Anne Peters, Evelyne Lagrange, Stefan Oeter & Christian Tomuschat eds., 2014) (discussing that a precedent highly damaging to Italian creditors had been set by the 2005 *Borri v. Argentina* judgment by the Italian Court of Cassation, which accorded Argentina immunity because the issuance of bonds was an act performed *jure imperii*, and the rights of the Argentine people had to be balanced against the losses of Italian creditors).

30. See Press Release, L’Associazione Per La Tutela Degli Investitori In Titoli Argentini, ICSID Registers Request for Arbitration Brought By 195,000 Italian Investors Against Argentina (Feb. 9, 2007), <http://www.tfargentina.it/download/TFA%20Press%20Release%209%20Feb%202007.pdf> (discussing claimants’ representation in these proceedings by *Associazione per la Tutela degli Investitori in Titoli Argentini*, otherwise known as Task Force Argentina (“TFA”), a group underwritten by eight Italian banks that had been most active in selling Argentine bonds to their retail clients); see also *L’Associazione, ASSOCIAZIONE PER LA TUTELA DEGLI INVESTITORI IN TITOLI ARGENTINI*, www.tfargentina.it/chisiamo.php (last visited on Oct. 31, 2016). TFA had previously filed lawsuits in US federal courts on behalf of Italian investors holding bonds governed by New York law, as well as in various European jurisdictions, alleging Argentina’s breach of its contracts; the number of individual Italian claimants in *Abaclat & Others* would later be reduced to under 60,000.

31. *Abaclat & Others v. The Argentine Republic*, ICSID Case No. ARB/07/5 (Aug. 4, 2011).

32. Donald Francis Donovan, *Abaclat & Others v. Argentine Republic: As a Collective Claims Proceeding*, 27 ICSID REV. 261 (2012); Céline Lévesque, *Abaclat & Others v. Argentine Republic: The Definition of Investment*, 27 ICSID REV. 247 (2012); Ryan McCarl, *ICSID Jurisdiction Over International Mass Investment Arbitrations: Due Process and Default Rules*, 51 STAN. J. INT’L L. 173 (2015); Andrea Marco Steingruber, *Abaclat & Others v. Argentine Republic: Consent in Large-scale Arbitration Proceedings*, 27 ICSID REV. 237

expected to be announced in early 2016, with a potential award to bondholders that could easily run into the billions of dollars, but the proceedings were suspended after the new government in Argentina settled with these and other holdout bondholders.

Two other (much smaller) groups of Italian bondholders had also decided to pursue arbitration against Argentina under ICSID: *Giovanni Alemanni and Others v. Argentine Republic*, registered in March 2007, and *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, registered in July 2008. Decisions on jurisdiction and admissibility favorable to the claimants were issued in November 2014 and February 2013, respectively, but both arbitrations were discontinued during the course of 2015 due to lack of payment of the required advances.³³ In sum, although the aforementioned three arbitration cases never reached finality and thus did not see awards being rendered, they represented a turning point in the investment arbitration regime, having carved a path that could lead to a change in the dynamics of sovereign debt restructurings via the investment arbitration option.³⁴

Argentina's international arbitration saga will also be remembered because the country broke with tradition and for many years refused to pay the awards against it, exposing for all to see a vulnerability inherent in the "gentlemen's agreement" nature of arbitration enforcement against sovereigns. In the threefold arbitral strategy followed by Argentina during 2002-2015, the country pressured claimants into entering into "amicable settlements" (e.g., by conditioning regulatory relief at home on achieving a settlement of claims abroad); then, in the case of unfavorable awards, it always filed for the annulment of the awards on whatever basis could possibly be claimed; and finally, whenever such annulment motions were unsuccessful, through continued stays of enforcement of the awards based on the novel interpretation (of Art. 54 of the ICSID

(2012); Samuel Wordsworth, *Abaclat & Others v. Argentine Republic: Jurisdiction, Admissibility and Pre-conditions to Arbitration*, 27 ICSID REV. 255 (2012).

33. *Giovanni Alemanni & Others v. Argentine Republic*, ICSID Case No. ARB/07/8 (Dec. 14, 2015); *Ambiente Ufficio S.p.A. & Others v. Argentine Republic*, ICSID Case No. ARB/08/9 (May 28, 2015).

34. Belen Olmos Giupponi, *ICSID Tribunals and Sovereign Debt Restructuring-Related Litigation: Mapping the Further Implications of the Alemanni Decision*, 30 ICSID REV. 556 (2015); Joanna Simões, *Sovereign Bond Disputes before ICSID Tribunals: Lessons from the Argentina Crisis*, 17 LAW & BUS. REV. AM. 683 (2011).

Convention) that international arbitral awards were subject to approval by the courts of Argentina.³⁵

II. ORIGINS OF BONDHOLDER LITIGATION

Litigation against sovereign states is a fairly modern vehicle for the redress of material claims. During most of recorded history, private lenders and investors did not have the necessary legal rights to demand, and thus the legal mechanisms to compel, payment from foreign States. Governments and private parties accepted that sovereigns could not be held accountable outside their domestic courts, under what came to be known as the doctrine of “absolute” sovereign immunity. Faced with an event of default, and lacking any legal remedies, private creditors would: accept non-payment or else new payment terms decided unilaterally by foreign States; band together to limit a sovereign debtor’s access to new capital, thereby gaining some leverage to discuss a settlement; or they would pressure their own governments to take up their cause and negotiate on their behalf, retaliate against the deadbeat sovereign by imposing (usually trade) sanctions, or in the extreme, intervene militarily for the purpose of collecting on unpaid debts—“gunboat diplomacy.”³⁶

After the end of World War II, governments increasingly sought ways to minimize their being dragged into disputes involving cross-border business transactions, and also ways to start holding accountable the growing number of state-owned enterprises, including Soviet firms, whose legal immunity gave them an unfair advantage over private companies.³⁷ In 1952, the US Department of State

35. Inna Uchkunova & Oleg Temnikov, *Enforcement of Awards under the ICSID Convention: What Solutions to the Problem of State Immunity?*, 29 ICSID REV. 187 (2014); Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina’s State of Necessity and the Current Fight in the ICSID*, 41 GEO. WASH. INT’L L. REV. 709 (2010).

36. FEDERICO STURZENEGGER & JEROMIN ZETTELMEYER, *DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES* 11 (2007). The most institutionalized, powerful, and celebrated such creditor association was the British Corporation of Foreign Bondholders (“CFB”), established in London in 1868. By approving or withholding access to the London financial market, it was able to negotiate with the governments of Argentina, Brazil, Greece, Mexico, Peru, Spain, Portugal, and Turkey, among others. CFB-type organizations were eventually set up in France and Belgium (1898), Switzerland (1912), Germany (1927), and the United States (1933). The CFB and its counterpart organizations in other countries remained active until the 1950s, when most of the sovereign defaults of the 1930s were settled. *Id.*

37. Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder’s View*, 35 INT’L & COMP. L.Q. 302 (1986).

adopted what is nowadays referred to as the “restrictive” theory of foreign sovereign immunity, under which foreign States are entitled to immunity from suit for their sovereign (public) acts but not for their commercial activities—the classic distinction between acts *jure imperii* and acts *jure gestionis*. The State Department retained for itself initial responsibility to decide questions of sovereign immunity using the new immunity framework, but the policy’s application left a great deal to be desired because State did not always issue an opinion on misbehaving sovereigns, or else it was biased by foreign-policy considerations.³⁸ Moreover, the property of foreign States continued to be absolutely immune from execution to satisfy any judgments obtained through the US courts.

The restrictive theory of sovereign immunity was codified into US law through the aforementioned FSIA of 1976, and shortly thereafter, the United Kingdom passed a similar law, the State Immunity Act of 1978. Many other countries have since followed in their footsteps or else their courts have expressly accepted the concept of restrictive (or relative) sovereign immunity – one that the Council of Europe had already adopted via the European Convention on State Immunity of 1972, which became effective in 1976.³⁹

The FSIA was passed to provide a statutory framework for resolving issues of sovereign immunity through the judicial branch without reliance on the State Department. The law established the general rule that foreign government property is immune, but setting out exceptions (28 U.S.C. §§ 1330, 1602-11) under which US courts may exercise jurisdiction over a foreign State (e.g., when it has waived its immunity or engaged in commercial activities) and may subject foreign state assets to attachment, arrest, or execution. Passage of the FSIA and its equivalents elsewhere gave rise to the first cases of litigation against sovereign debtors in the 1980s, including commercial banks seeking to collect on their defaulted loans to governments or their entities.

A recent, comprehensive study of litigation against sovereigns during the period 1976-2010, focused on foreign commercial banks or institutional investors with claims related to loan or bond contracts, identified 120 instances of legal actions against a total of twenty-five

38. *Id.* at 303-04.

39. ALICE DE JONGE, TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT 112 (2011).

defaulting sovereigns.⁴⁰ Interestingly, 102 of them (eighty five percent) comprised cases filed in the United States, mostly in the Southern District of New York, suggestive of the dominance of New York law as a venue for contract-writing and the US courts for contract-dispute resolution. Only thirty out of 180 sovereign defaults in sixty-eight countries, or less than one-fifth of total, engendered any litigation at all—half of them a single lawsuit—suggesting that most defaults and ensuing debt restructurings were accepted by the parties involved.

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

At first glance, the scale of Argentina-related litigation might be explained by the sheer size of the government's 2001 default. At the time, it was the largest in history, involving potentially US\$145 billion in public indebtedness, although it soon became clear that the default would apply to less than US\$95 billion in obligations largely to non-resident bondholders and to a lesser extent to official creditors such as trade-finance banks (e.g., the US Export-Import Bank) and foreign-aid agencies.⁴¹ However, in early 2012, Greece's own default set a new world record with a restructuring involving approximately US\$265 billion (more precisely, EUR€196 billion) of obligations to domestic and foreign bondholders.⁴² The gigantic Greek default attracted not a single lawsuit, nonetheless, even though in the days

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

41. Most resident bondholders had already been subject to a restructuring in November 2001. The official bilateral creditors mentioned were owed less than US\$5 billion as of the end of 2001. See Deuda del Sector Publico Nacional por Instrumento y por Tipo de Plazo, Ministerio de Economía/Secretaría de Finanzas (Dec. 31, 2001), <http://www.mecon.gov.ar/onp/html/boletin/4totrim01/pdf/fisc25.pdf>.

42. Jeromin Zettelmeyer, Christoph Trebesch, & Mitu Gulati, *The Greek Debt Restructuring: An Autopsy*, 28 *ECON. POL'Y* 513 (2013).

before the restructuring a “wave of potential litigation” reportedly was a threat.⁴³ This was the case despite the fact that the Greek restructuring imposed even heavier losses on bondholders than did the Argentine restructuring, something which could have prompted the proverbial runs to the courthouse.⁴⁴ A single arbitral claim against Greece was lodged with ICSID by a Slovak bank in 2013 in connection with the 2012 debt restructuring, but it was dismissed in April 2015.⁴⁵ There are other factors that provide the most valid explanation for the origins of the Argentina litigation, and they relate to the unilateral, coercive and aggressive way the authorities in that country went about managing, defaulting and restructuring their debt obligations.

III. DEPARTURES FROM BEST PRACTICE

As detailed below, Argentina's behavior did not conform to best practices as settled already in the early 2000s, by which time plenty of experience had been accumulated from a multitude of sovereigns having encountered debt-servicing difficulties in the 1980s and 1990s. Indeed, it was partly out of concern that Argentina's errant behavior would set an undesirable precedent that the “Principles for Stable Capital Flows and Fair Debt Restructuring” were conceived. They constitute a voluntary code of conduct between sovereign debt issuers and their private-sector creditors that was agreed in the early 2000s, encouraged by the G20 Ministerial Meeting of 2002, and welcomed

43. Sarah White & Tommy Wilkes, *Hedge Funds Prepare Legal Battle with Greece*, REUTERS (Jan. 24, 2012, 6:52 AM), <http://www.reuters.com/article/2012/01/24/greece-hedge-funds-idUSL5E8CN0OR20120124>.

44. According to rating agency Moody's, Argentina's restructuring in 2005 imposed losses of seventy-one percent and Greece's in 2012 entailed losses of seventy-six percent, as measured by average issuer-weighted prices of sovereign bonds the day before the close of their respective distressed-debt exchanges. Elena Duggar, *Investor Losses in Modern-Era Sovereign Bond Restructurings*, MOODY'S INV. SERV. (Aug. 7, 2012), <https://ftalphaville-cdn.ft.com/wp-content/uploads/2012/09/Sovereign-Default-Series-Investor-Losses-in-Modern-Era-Sovereign-Bond-Restructurings.pdf>.

45. Poštová banka a.s., a Slovak bank that alleged to have purchased Greek sovereign bonds in 2010 and its Cypriot shareholder, Istrokapital SE, filed an arbitral claim with ICSID in May 2013 under the Greece-Slovak Republic and the Cyprus-Greece bilateral investment treaties, challenging measures taken by the Hellenic Republic in 2012 to address its financial crisis. A decision against the claimants was rendered by the ICSID tribunal on April 9, 2015 on the basis that the definition of “investment” in the BIT at issue in this case does not extend to Poštová banka's ownership of Greek government bonds. Francesco Montanaro, *Poštová Banka SA and Istrokapital SE v Hellenic Republic Sovereign Bonds and the Puzzling Definition of 'Investment' in International Investment Law*, 30 ICSID REV. 549 (2015).

by the same body in Berlin two years later.⁴⁶ Best practices in the early 2000s are also distilled in an informative book published in 2003, which explained how sovereign debt-restructurings had been handled during the 1980s and 1990s by the official and private sectors.⁴⁷ It is on the basis of these two sources, plus personal experience,⁴⁸ that the following table has been prepared.

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

Best Practice	Argentina
Engage in regular dialogue with creditors on key economic and financial policies	Not practiced
Consult with creditors on how to forestall debt-service problems before defaulting	Not practiced
If a debt restructuring becomes inevitable, enter into timely, good-faith negotiations	Not practiced
Stop incurring debt when already burdened by too much debt	Not practiced
Seek debt relief appropriate to the nature of the liquidity or solvency problem	Not practiced
Recognize interest arrears and treat them preferentially versus past-due principal	Not practiced
Seek the financial support and endorsement of multilateral agencies	Not practiced

46. *Principles for Stable Capital Flows and Fair Debt Restructuring: Report on Implementation by The Principles Consultative Group*, INST. INT'L FIN. 33 (Oct. 2014), <https://www.iif.com/file/6573/download?token=sVzJwuyF>. The seed of the Principles was planted in 2001 when Banque de France Gov. Jean-Claude Trichet floated the idea of devising a code of conduct for sovereign debt restructuring, to be embraced by the public as well as the private sector. See Raymond Ritter, *Transnational Governance in Global Finance: Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets*, 11 INT'L STUD. PERSP. 225 (2010).

47. LEX RIEFFEL, *RESTRUCTURING SOVEREIGN DEBT: THE CASE FOR AD HOC MACHINERY* 95 (2003).

48. This author was a senior international economist for various Wall Street firms from 1977 through early 2005 and was directly involved in several sovereign debt restructurings during his tenure. See *Faculty Profile: Arturo Porzecanski*, AM. UNIV. SCH. INT'L SERV., <http://www.american.edu/sis/faculty/aporzeca.cfm> (last visited Oct. 1, 2016).

Make a good-will, up-front cash payment—especially when circumstances permit	Not practiced
Aim for 100% creditor participation in order to minimize a holdout problem	Not practiced

Starting in 2001, as Argentine economic and financial problems worsened, communications with the country's lenders and investors broke down just when they should have intensified. The International Monetary Fund ("IMF") became Argentina's single-largest creditor in 2001, with net disbursements of nearly US\$9 billion that year which brought the Fund's exposure to a peak of US\$14 billion.⁴⁹ The authorities took numerous economic measures in 2001 to kick-start the economy, eliminate the fiscal deficit, and restore investor confidence under extraordinary powers granted by the Argentine congress, but most of them were announced or adopted without prior consultation with the IMF—never mind with private creditors.⁵⁰ The measures backfired, engendering capital flight, social protests, and political instability, which in turn provoked the resignation of President Fernando de la Rúa on December 20, 2001.

There followed two chaotic weeks during which a default on the public-sector debt was announced by Acting President Adolfo Rodríguez Saá. The venue was his inaugural address to the legislature right after his swearing-in, and the justification provided for the moratorium was the need to redirect debt-service funds to an emergency jobs program and to increase social spending—a decision greeted by the assembled legislators with a standing ovation.⁵¹ The default was confirmed in early January 2002 by President Eduardo Duhalde, who had been elected by the Legislative Assembly to serve through 2003. Subsequently, a raft of additional economic measures was announced which likewise were undertaken without consulting the IMF, and which not only failed to stabilize the economic situation,

49. The IMF provided five successive financing arrangements to Argentina during 1991-2001. From early 2000 onward, the IMF-supported programs attempted to address the country's worsening recession and, increasingly, the government's inability to access the international capital markets through the provision of substantial funds. See *Evaluation Report: The IMF and Argentina, 1991-2001*, INT'L MONETARY FUND 9 (2004).

50. *Id.* at 46-47, 60-61.

51. See *Versión Taquigráfica*, ASAMBLEA LEGISLATIVA DE LA REPÚBLICA ARGENTINA (Dec. 22, 2001), <http://www1.hcdn.gov.ar/dependencias/dip/documentos/asuncion/22.12.01.RodriguezSaa.pdf>.

but complicated the eventual resolution of the financial crisis.⁵² In sum, Argentina neither maintained a dialogue with its creditors about its key economic and financial policies, nor did it consult with them on how to forestall a default.

In terms of engaging in timely, good faith negotiations with its creditors, there was none of that. In February 2002, the then-Economy Minister issued a first press release, explaining that the government was “devoting every effort to formulate and implement the various elements of its new economic program” and that it was preparing “plans for a proper basis for engaging in a fruitful dialogue with Argentina’s external creditors.”⁵³ It was followed in April by a second communication stating that while Argentina was committed to a dialogue with its bondholders, the government had concluded “that it [is] preferable to initiate such a dialogue once greater certainty has been achieved.”⁵⁴ Other such press releases followed, yet despite the formation of several bondholder groups ready to advise or negotiate, and the filing of the first lawsuits against Argentina,⁵⁵ no dialogue was initiated in 2002 or 2003—never mind a negotiation. The following is how a recent IMF study summarized the post-default situation:

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

52. See IMF, *Lessons from the Crisis in Argentina*, Occasional Paper No. 236 (2004).

53. Press Release, Argentina Ministry of the Economy and Infrastructure (Feb. 8, 2002) (on file with author).

54. Letter from Argentina Secretary of Finance, to Bondholders (Apr. 10, 2002) (on file with author).

55. For example, an attachment order was issued on July 19, 2002 by a court in Rome against the Republic of Argentina on behalf of a group of individual Italian bondholders. Press Release, Argentina Ministry of the Economy and Infrastructure (July 29, 2002) (on file with author).

to a restructuring of eligible debt and past-due interest of about two-fifths of total debt, more than three years after the default.⁵⁶

It is also good practice for sovereigns claiming to be over-indebted to stop accumulating new liabilities, but the authorities in Argentina did just the opposite. Especially damaging was the government's announcement in February 2002 that banks' assets and liabilities would be subject to an asymmetric conversion from US dollars into Argentine pesos. Their existing stock of dollar-denominated assets and liabilities would be forcibly converted at the pre-existing, one-to-one exchange rate in the case of loans to the private sector but at a different, 1.4-to-one rate for loans to the government and for dollar deposits, which henceforth were also indexed to inflation.⁵⁷ The measure was intended to cushion firms and households with foreign-currency denominated debt to banks, by shifting the cost of the devaluation to the banking industry. However, since the banks could not possibly cope and most were rendered insolvent as a result, the burden was ultimately shifted to taxpayers and to the government's creditors, because banks had to be reimbursed for their losses through "compensation bonds" issued by the government.⁵⁸ Other policy decisions which added to the central government's debt burden were the takeover of liabilities incurred by provincial governments in prior years and the issuance of still more bonds to settle previously contingent liabilities with pensioners, civil servants, victims of human rights abuses, and others.⁵⁹

Perhaps the one decision on Argentina's part that grated on investors the most was the authorities' demand for massive debt forgiveness despite the fact that, by the time a take-it-or-leave-it restructuring plan was put to them in early 2005, the economy had substantially recovered.⁶⁰ In general, governments seek debt relief

56. Yan Liu et al., *Sovereign Debt Restructuring: Recent Developments and Implications for the Fund's Legal and Policy Framework*, INT'L MONETARY FUND 36 (Apr. 26, 2013), <https://www.imf.org/external/np/pp/eng/2013/042613.pdf>.

57. Martin Kanenguiser, *Se pesifican todas las deudas uno a uno*, LA NACIÓN (Feb. 3, 2002), <http://www.lanacion.com.ar/371402-se-pesifican-todas-las-deudas-uno-a-uno>; STURZENEGGER & ZETTELMEYER, *supra* note 36, at 182-86.

58. IMF, *supra* note 52, at 38.

59. Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 315, 318 (2005).

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

appropriate to the magnitude and nature of their liquidity or solvency problem, and their calculations are usually vetted by multilateral institutions like the IMF and the World Bank. That way, bondholders have some assurance that the losses (in market parlance, the “haircut”) they are asked to take are in accordance with the sovereign’s present and potential ability to pay. The irony is that if Argentina had sought major debt relief in 2002, soon after the default and when the economy was in a depression, it probably would have been received with greater sympathy.

But by waiting for three excruciatingly long years to put a unilateral restructuring plan forward, giving time for an intervening commodity export boom to power a vigorous economic recovery which substantially replenished Argentina’s coffers, the authorities undermined their case. For example, the government’s tax revenues had already doubled between 2002 and 2004 measured in dollars, and the country’s official international reserves had recovered similarly, from under US\$10 billion in early 2003 to over US\$20 billion by early 2005.⁶¹ And yet, the forecasting model used by Argentina’s economic team to plead poverty to its creditors was never updated to reflect the strong economic rebound underway. It was also loaded with excessively pessimistic assumptions as to what the future would bring in terms of crucial variables such as exports and tax revenues. During 2006-2012, the economy ended up growing twice as fast as the government’s forecasts vintage late 2004, with actual export earnings and tax revenues outperforming the gloomy official assumptions by even greater multiples.⁶² Therefore, by early 2005, Argentina was positioned to justify only a modest amount of debt and debt-service relief from its creditors—and quite a few of them knew it.⁶³ The impression thus conveyed by the authorities was that

61. Arturo C. Porzecanski, *Don’t Cry for Rogue Debtor Argentina*, *FIN. TIMES* (June 12, 2014), <http://blogs.ft.com/beyond-brics/2014/06/12/guest-post-dont-cry-for-rogue-debtor-argentina/>.

62. *Id.*

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

Argentina was suffering from a case of unwillingness, more than inability, to pay.

Argentina's debt-restructuring proposal of early 2005 departed from best, or even usual, practice in several other ways. While other sovereigns in financial trouble, including Argentina itself in the past, had actively sought to avoid an event of default or had moved promptly to cure any default, in this case the government dragged its feet for more than three years and, adding insult to injury, largely refused to recognize the interest arrears that its own delay had generated.⁶⁴ Contrary to other restructurings before, including those of Argentina previously, the 2005 plan was not accompanied by the usual reassuring endorsement—never mind backed with financial support—from the IMF, World Bank, or even a regional development agency like the Inter-American Development Bank.⁶⁵ And in another break from tradition, Argentina's 2005 restructuring failed to include an upfront payment to clear a portion of interest or principal arrears, a common “sweetener” to ensure success, which the country could afford.⁶⁶

IV. THE HOLDOUT PROBLEM

With the benefit of hindsight, probably the most self-defeating departure from convention was Argentina's decision not to aim for 100 percent participation of its bondholders in the debt restructuring, or even to set a high bar (e.g., eighty-five or ninety percent approval) for the transaction to go forth, in order to prevent a holdout problem. In fact, when launching the debt-restructuring proposal, Economy Minister Roberto Lavagna went so far as to state that the government would regard any participation rate above fifty percent as having effectively cured the country's default.⁶⁷

64. Argentina refused to pay the interest arrears accumulated in 2002 and 2003, whether calculated at contractual or lower interest rates—until that time, the only government to have taken this stance with bondholders. STURZENEGGER & ZETTELMEYER, *supra* note 36, at 190.

65. Porzecanski, *supra* note 59, at 325; STURZENEGGER & ZETTELMEYER, *supra* note 36, at 196.

66. Porzecanski, *supra* note 59, at 325.

67. Lavagna dijo que 'con el 50% de aceptación' se saldría del default, LA NACIÓN (Jan. 12, 2005), <http://www.lanacion.com.ar/670384-lavagna-dijo-que-con-el-50-de-aceptacion-se-saldria-del-default>; Annabella Quiroga, Lavagna lanzó el canje y reiteró que no habrá una nueva oferta, CLARÍN (Jan. 13, 2005), <http://edant.clarin.com/diario/2005/01/13/elpais/p-00301.htm>.

The clear implication was that even if nearly half of all bondholders failed to accept the terms of the punishing debt restructuring, they would and could be ignored. To ensure the message was heard loud and clear, three weeks into the transaction, the government sent a draft law to the legislature forbidding the Executive from reopening the transaction in the future, and engaging in any dealings with bondholders arising from any court order or otherwise, without prior approval by the legislature.⁶⁸ This infamous “Lock Law” (or “Cram-Down Law”) was passed within one week. The law thus complemented Argentina’s warnings in the deal’s prospectus, and in all presentations in the major capitals, that any existing defaulted bonds that were eligible to be restructured but were not tendered would remain in default indefinitely—because the government had no intention of ever resuming payments on those bonds.⁶⁹

A recent scholarly study of sovereign defaults, which provides the first comprehensive and systematic assessment of debtor-government behavior during financial crises, puts the above observations into comparative context.⁷⁰ The authors developed an objective index of government coerciveness, capturing confrontational debtor policies vis-à-vis private external creditors in times of debt distress, drawing on criteria suggested by the IMF and the Institute of International Finance, one of the main contributors to the aforementioned Principles.⁷¹ Their sample includes just over 100 restructurings involving commercial banks and bondholders, whether domestic or foreign, during the 1980-2007 period—the universe of sovereign default and restructuring relevant to private-sector lenders and investors. The following is the study’s most pertinent result:

68. The law (Law No. 26.017, adopted on February 9, 2005) also mandated the government to do everything in its power to delist all bonds not tendered into the exchange and to unilaterally exchange all bonds tied up in litigation against Argentina into new Par bonds denominated in pesos maturing in 2038. *Addendum to Prospectus Supplement dated Jan. 10, 2005*, REPUBLIC OF ARGENTINA (Feb. 4, 2005), http://www.mecon.gov.ar/finanzas/sfinan/english/download/addendum_feb_4.pdf.

69. *Prospectus Supplement (to Prospectus Dated Dec. 27, 2004), S-29*, REPUBLIC OF ARGENTINA (Jan. 10, 2005), <http://www.sec.gov/Archives/edgar/data/914021/000095012305000302/y04567e424b5.htm> [hereinafter *Prospectus Supplement*].

70. Henrik Enderlein, Christoph Trebesch, & Laura von Daniels, *Sovereign Debt Disputes: A Database on Government Coerciveness during Debt Crises*, 31 J. INT’L MONEY & FIN. 250 (2012). The index consists of nine sub-indicators grouped into two broad categories capturing payment and negotiation behaviors, including patterns and rhetoric employed.

71. *Id.* at 251.

The well-known case of Argentina from 2001 to 2005 displays an exceptional degree of coerciveness, as the government officially declares a default, sticks to the proclaimed moratorium by stopping all payments to its bondholders for four years, freezes foreign assets, and rejects any meaningful negotiations.⁷²

Argentina's choice to defy convention and rely heavily on a "stick" rather than "carrot" approach to creditor participation in its debt restructuring was a risky strategy. The 2005 restructuring was accepted by a mere seventy-six percent of total bondholders (namely, the owners of US\$62.3 billion of defaulted bonds out of a target universe of US\$81.8 billion), far below the ninety-five percent average degree of creditor participation registered in thirty-four sovereign bond restructurings from 1997 through early 2013.⁷³ On the one hand, the transaction succeeded in erasing US\$27 billion of principal owed and in achieving also significant concessions in terms of greatly extended maturities, drastically lower coupons, and forgiveness of 2002-03 past-due interest payments incorporated into the US\$35.3 billion of new bonds issued: all in all, a "haircut" to participating bondholders of at least seventy percent. On the other hand, Argentina created for itself a holdout constituency without precedent: the owners of nearly US\$20 billion in defaulted bonds accruing contractual interest from December 2001 at high coupons and high penalty rates on any arrears. The holdouts featured mostly foreign investors whose participation rate in the restructuring was much lower (an estimated sixty-three percent) than Argentine investors (around ninety-five percent).⁷⁴ These holdouts included institutional and retail investors from all around the world.

Evidently, while the threat of indefinite non-payment for holdouts helped to persuade most bondholders to capitulate and accept the harsh terms on offer, it also motivated many to spurn the deal and either file suit or else await better treatment on the part of some future government. And investors who had purchased any of the numerous bonds that Argentina had issued under New York State law according to a Fiscal Agency Agreement ("FAA") structure certainly had strong legal rights: as was typical of indentures up until the early

72. *Id.* at 261.

73. *The Role of Holdout Creditors and CACs in Sovereign Debt Restructurings*, MOODY'S INV. SERV. 32-33 (2013), https://www.moody.com/researchdocumentcontentpage.aspx?docid=PBC_150162.

74. STURZENEGGER & ZETTELMEYER, *supra* note 36, at 192-93.

2000s, the 1994 FAA contained provisions to protect purchasers of its bonds from subordination, and provided that a holder's right to receive payment of principal and interest on their respective due dates could not be impaired without their consent.⁷⁵ In the past decade, in contrast, the typical bond indentures used by sovereign borrowers, whether in New York or in Europe, have come to include collective-action clauses enabling a qualified majority of bondholders (typically seventy-five percent) to approve payment and other modifications in a vote that binds the minority of dissenting bondholders.

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

Bondholders have initiated numerous lawsuits against Argentina in the United States, Italy and Germany based on the Government's default on its public debt obligations. In the United States, approximately 39 suits, including one suit certified as a class action and 14 suits purporting to be class actions, have been filed since March 2002, and judgment has been entered against the Government in seven cases in a total amount of approximately \$740 million. In Italy the total amount claimed in bondholder proceedings against the government is €64 million plus interest, while in Germany the total amount claimed is €58 million plus interest. We can give no assurance that further litigation will not result in even more substantial judgments granted against the Government. Present or future litigation could result in the attachment or injunction of assets of Argentina that the Government intends for other uses, and could have a material adverse effect on public finances and on the market price of new securities we issue in an exchange offer.⁷⁶

In a lengthy insider's account of the transaction by one of its leading architects published in March 2006, a year after the transaction closed, then Finance Secretary of Argentina Guillermo Nielsen spent

75. David J. Johnson Jr., *Some Lessons for Distressed Debt Participants from the Argentina-NML Dispute*, O'MELVENY & MYERS (July 3, 2014), <https://www.omm.com/resources/alerts-and-publications/publications/some-lessons-for-distressed-debt-participants-from-the-argentina-nml-dispute/>.

76. *Prospectus Supplement*, *supra* note 69, at 27.

more than 5,000 words describing everything that transpired behind closed doors in the run-up to the landmark debt restructuring.⁷⁷ Surprisingly, the words “holdout” or “litigation” never even came up in his narrative. Apparently, the Argentine authorities and their financial and legal advisors—mainly Barclays Capital and Cleary, Gottlieb, respectively—must have been persuaded that achieving large-scale debt relief, even if by confrontational means, was a goal worthy of the risk of generating a major holdout problem. This was possibly because, as of that date, investor litigation had not yet caused major headaches for Argentina.⁷⁸ Private creditors, after all, had faced daunting challenges in executing judgments and collecting assets from Argentina.

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

As time passed and it became evident that, whether they litigated or not, holdout investors would neither collect nor get better terms from an intransigent Argentina, most of them gradually came to accept the idea that recovering something was better than nothing. Therefore, upon advice from its leading banks (mainly Barclays Capital, again), in late 2009 the government requested the Argentine congress to temporarily suspend the “Lock Law,” so that the debt-restructuring window could be opened anew to bondholders who had rejected the 2005 transaction.⁷⁹ Tenders of defaulted bonds were

77. *Inside Argentina's Financial Crisis*, 37 EUROMONEY 64 (2006).

78. The government at the time and its successors through 2015 did not return to international capital markets, such that lack of access evidently was not viewed as a problem worth solving by settling with holdout creditors.

79. Later that year, Argentina started informal conversations with member countries of the so-called Paris Club, a gathering of representatives from official trade-finance and foreign-aid agencies, because its obligations to them had remained in default since the end of 2001. However, it was not until May 2014 that Argentina finally agreed to pay one hundred percent of the principal and interest payments it owed its official bilateral creditors, albeit on a five-year installment plan, and the government made its first payment on July 30, 2014, as scheduled. See Press Release, The Paris Club and the Argentine Republic Agree to a Resumption of Payments and to Clearance of All Arrears (May 29, 2014),

accepted during May-September and again in December of 2010 on slightly worse exchange terms than those applied in 2005.⁸⁰ The result was that approximately two-thirds of the holdouts accepted the conditions, such that about US\$12.4 billion of defaulted principal was tendered in exchange for new bonds. Consequently, the bondholder participation rate in Argentina's restructuring increased from the initial seventy-six percent to over ninety-two percent of the universe of defaulted bonds, thus greatly reducing the holdout universe from twenty-four percent to just over seven percent of the original bonds—an estimated US\$6 billion plus accrued interest and penalty interest.⁸¹

The dramatic reduction in the universe of holdouts had mixed consequences. On the one hand, fewer holdouts meant that in 2010 Argentina came closer to achieving its original restructuring objectives—over ninety-two percent of its 2001 bonded debt in default had been put through the wringer and was now performing—and to normalizing its relations with the international investor community.⁸² On the other hand, after spurning two opportunities to take their losses and conform, the remaining holdouts now constituted a committed, hard core of disgruntled investors who were seemingly determined to litigate against Argentina until the bitter end. An illustration of the latter aspect is that in Argentina's Form 18-K Annual Report filed with the SEC in 2011, the authorities had to devote about 4,400 words to describe the litigation challenges they faced in the United States, Europe, and Japan, versus fewer than 200 words devoted to the subject in the aforementioned filing in 2005.

In particular, the 2011 filing detailed litigation in the United States involving over 150 individual lawsuits, on which judgments

<http://www.clubdeparis.org/sections/communication/communiqués/argentine/switchLanguage/en>.

80. In the 2005 debt exchange, past-due interest for 2004 was paid in cash; in the 2010 reopening, past-due interest since 2003 was paid with bonds.

81. *Argentine State Public Debt*, NAT'L BUREAU PUB. CREDIT (Sept. 30, 2010), http://www.mecon.gob.ar/finanzas/sfinan/english/download/informe_deuda_publica_30-09-10_english.pdf; *Argentine State Public Debt*, NAT'L BUREAU PUB. CREDIT (Dec. 31, 2011), http://www.mecon.gob.ar/finanzas/sfinan/english/download/informe_deuda_publica_31-12-10_ingles.pdf.

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

had been entered in almost 110 cases for nearly US\$5.9 billion of past-due principal and interest; eighteen class-action suits representing groups of retail investors, of which thirteen had been certified; and multiple attempts to attach Argentine commercial and other property in the United States. In Germany, nearly 650 legal proceedings had been initiated against Argentina by bondholders, and more than 460 judgments had been rendered against it, for some EUR€240 million in principal plus interest. The government also had to contend with ongoing litigation in Belgium, France, Italy, Japan and Switzerland.⁸³

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

V. ORIGINS OF INVESTOR ARBITRATION

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

The government also broke with nationalistic traditions and sought out foreign investment by partnering up with foreign countries interested in signing bilateral investment-protection agreements, to the point where Argentina concluded and ratified more BITs than any other nation in Latin America. Between 1990 and 2001, Argentina signed fifty-eight different BITs, of which fifty-five were ratified and entered into force by 2001 or shortly thereafter. In contrast, even fifteen years later, in mid-2016, Chile had ratified fewer than forty BITs; Mexico, Peru and Venezuela, thirty or fewer; Colombia, six; and Brazil, none—just to mention the larger countries in the region.⁸⁴

Furthermore, Argentina firmly accepted recourse to international arbitration, a major about-face because prior to the 1990s the country always had been opposed to signing any agreements containing international arbitration clauses out of its adherence to the Calvo Doctrine and its commitment to insert “Calvo Clauses” in investment contracts. Named after a nineteenth century Argentine diplomat and

83. Republic of Argentina, Annual Report (Form 18-K) (Sept. 30, 2011), 181-88, http://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.htm.

84. *International Investment Agreements Navigator*, U.N. CONFERENCE TRADE & DEV., <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> (last visited Oct. 1, 2016).

jurist, Carlos Calvo, the Doctrine stated that legal disputes regarding foreign (private) investors should be adjudicated and resolved by the local courts of the host country, rather than by international legal remedies entailing an unacceptable surrender of national sovereignty.⁸⁵

This new attitude and business climate enticed many multinational corporations to set up affiliates or purchase existing concerns in the country, and it also persuaded foreign portfolio investors to buy stocks issued by local companies, as well as bonds floated by private and government issuers. During the period 1992-2000, a cumulative US\$74 billion of foreign direct investment came into Argentina,⁸⁶ as did an additional US\$85 billion of foreign portfolio investment⁸⁷—by far the largest amounts of such capital inflows in so short a period in the country’s history.

Early on, the authorities engaged in a remarkable privatization program: within a few years mainly in the early 1990s, the government sold off virtually all of its state-owned enterprises (e.g., the leading oil company plus electricity generation and gas distribution firms, as well as its telephone company once split into two entities), or else invited private investors to bid for the right to operate them (e.g., railways, airports, and water and sewage services) under long-term concession agreements. Proceeds from privatizations during 1990-1999 totaled almost US\$24 billion, and the majority of the funds for investment in previously state-owned entities were provided by foreign lenders and investors.⁸⁸

In the wake of the privatizations and concessions, new regulatory structures were created with a mandate to set utility rates and other prices at levels that were “fair and reasonable” and allowed for a “reasonable rate of return.”⁸⁹ Investors, most of them foreign, came to benefit from a number of guarantees, measures, or mechanisms; for example, public-utility rates were to be set for five-year periods, at the end of which they would be reviewed and

85. Kasenetz, *supra* note 35, at 718.

86. *La Inversión Extranjera Directa en Argentina 1992-2002*, DIRECCIÓN NACIONAL DE CUENTAS INTERNACIONALES 9 (Dec. 2003), http://www.mecon.gov.ar/cuentas/internacionales/documentos/inversion_extranjera_directa_arg1992-200.pdf.

87. *Id.* at 10.

88. *Prospectus Supplement*, *supra* note 69, at 68.

89. José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in *The YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008/2009* 379 (Karl P. Sauvant ed., 2009).

adjusted according to the aforementioned criteria. Investors subject to the regulatory process had a right to calculate prices in US dollars and then convert them to Argentine pesos at the time of billing. They also had a right to a semi-annual rate review based on inflation in the United States. The government could not rescind or modify licenses granted without the consent of the licensees. Utility rates and prices were not to be subject to any other controls, and in the event that any such controls were imposed, the government was to compensate the licensees fully for any resulting losses. Other relevant reforms included passage of the 1991 Convertibility Law, which provided for the free exchange of the Argentine currency pegged to the US dollar on a one-to-one basis, an arrangement which foreign investors found particularly convenient—at least during the decade while it lasted—because it was perceived to minimize exchange-rate risks.⁹⁰

However, the investment climate changed abruptly in early 2002, when the Duhalde Administration confirmed the debt default and passed the Public Emergency and Exchange Rate Reform Law #25.561 (the “Public Emergency Law”) in an attempt to end an economic recession and defuse social tensions by making major adjustments to economic policies.⁹¹ This law abolished the peg of the Argentine peso to the dollar, opening the way for a severe devaluation of the peso.⁹² It also decreed the compulsory switch from dollars into pesos, at the old exchange rate of one-to-one, in the denomination of all existing loan contracts of up to US\$100,000 with financial intermediaries—effectively, most such dollar contracts outstanding, including credit card debt and mortgages, all contracts entered into by the public sector in connection with the delivery of public services, and also all contracts entered into in Argentina among private parties.

Moreover, the law terminated the right of privatized public utilities to rates calculated in dollars and adjusted according to US inflation, and required the renegotiation of agreements to adapt them to the new exchange-rate system. In the weeks that followed, many other arbitrary economic measures were adopted. Dollar-denominated deposits, which represented three-quarters of total deposits as of end-2001, were ordered frozen until at least 2003. To dampen inflationary pressures, rates charged by public (but privately owned) utilities (e.g., gas, electricity, telephones and water) were frozen indefinitely at their

90. *Id.*

91. Law No. 25561, Jan. 6, 2002, [29810] B.O. 1 (Arg.).

92. Kasenetz, *supra* note 35, at 709.

new peso equivalents. Companies were also affected by restrictions on foreign-exchange transactions that prevented them from making dividend and capital-repatriation transfers abroad. Moreover, the government rescinded certain contracts (e.g., postal and railway concessions were revoked) and the legislature approved an emergency law that severely curtailed creditor rights, in order to forestall a potential wave of liquidations.⁹³

VI. DEPARTURES FROM BEST PRACTICE

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

While the authorities claimed throughout the 2002-2015 period that the many measures taken were absolutely necessary to resolve their economic emergency, the policy mix as a whole was understandably regarded by most foreign investors as akin to an expropriation without adequate compensation. And indeed, a comparison of how Argentina behaved in the face of its economic and financial woes versus how other countries did so during the 1980s and 1990 is instructive, as it reveals the extent to which the authorities in Buenos Aires departed from best practices in investment-climate promotion.⁹⁴

93. *Id.* See also William R. Cline, *Restoring Economic Growth in Argentina* 91 (World Bank Pol'y Res., Working Paper No. 3158, 2003), <http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-3158>.

94. WORLD BANK, GLOBAL MONITORING REPORT: A DEVELOPMENT EMERGENCY 51 (2009); WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE (2004); SIMEON DJANKOV, CARALEE MCLIESH, & MICHAEL U. KLEIN, DOING BUSINESS IN 2004: UNDERSTANDING REGULATION 83 (2004); WORLD BANK, GOVERNANCE AND DEVELOPMENT 22 (1992); WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD (1997); Sunita Kikeri, Thomas Kenyon, & Vincent Palmade, *Reforming the Investment Climate: Lessons for Practitioners* (World Bank Pol'y Res., Working Paper 3986, 2006), <https://openknowledge.worldbank.org/bitstream/handle/10986/8365/wps3986.pdf?sequence=1>; *Investment Climate, Growth, and Poverty* (Gudrun Kochendörfer-Lucius & Boris Pleskovic eds., 2005), <http://documents.worldbank.org/curated/en/344951468315354127/pdf/344200PAPER0In101Official0use0only1.pdf>.

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

Best Practice	Argentina
Respect contracts allowing for price increases in line with currency depreciation	Not practiced
Refrain from applying selective price controls	Not practiced
Respect the currency denomination of financial assets and liabilities	Not practiced
Establish a contract renegotiation process open to firms in litigation or arbitration	Not practiced
Refrain from applying controls on capital inflows and/or outflows, disrupting cross-border flows	Not practiced
Refrain from imposing a freeze on bank deposits	Not practiced
Refrain from suspending the application of bankruptcy and/or foreclosure laws	Not practiced
Refrain from claiming that the state of public emergency continues despite the passage of time	Not practiced
Seek debt relief justified by the nature of the liquidity or solvency problem	Not practiced
Honor court judgments and arbitral awards	Not practiced

The measures adopted under Argentina's Public Emergency Law invalidated contracts and gravely affected the financial well-being especially of foreign investors. The measures amounted to a complete dismantling of the legal, economic, and financial frameworks put in place in Argentina during the 1990s to attract precisely those investors.⁹⁵ While a state of economic emergency ("necessity") may justify the temporary suspension of investor-friendly policies and the adoption of discriminatory and arbitrary measures, what unfolded in

95. Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. INT'L ARB. 265, 270 (2007) (quoting *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 139 (Oct. 6, 2006)).

Argentina starting in 2002 was the *de facto* permanent abrogation of rights previously granted to investors.⁹⁶

The Public Emergency Law as passed was scheduled to sunset at the end of 2003, but successive administrations in Argentina went on to request time and again that the legislature approve replacement laws extending the deadline for the expiration of their emergency powers. In the event, ten different laws were passed prolonging the state of public emergency and the powers conferred on the Executive, with the latest version (Law #27.200) enacted in November 2015 keeping the status quo through the end of 2017.⁹⁷ Therefore, by early 2016, Argentina had spent fourteen years in an uninterrupted “emergency,” despite “the principle expressly stated in Argentina’s Constitution and in precedents from [its] Federal Supreme Court, according to which such emergency powers must only be of a transitory, non-permanent character.”⁹⁸

Argentina’s claim that a state of economic emergency justified the ripping up of contracts was made again and again for over a dozen years, and it quickly rung hollow on objective economic grounds. After nose-diving in the first half of 2002, the Argentine economy hit a bottom later that year, and the exchange rate and other financial variables began to stabilize, albeit at very depressed levels. As discussed previously, the Argentine economy began to rebound in 2003 and continued to grow in 2004 and subsequent years.⁹⁹ For example, in 2000 GDP per capita exceeded US\$9,000 but fell to US\$3,200 in 2002, only to skyrocket to more than US\$14,500 in 2012 and 2013.¹⁰⁰ Since there were no natural disasters or economic crises in Argentina warranting an emergency designation after 2002, the state of public emergency and the extraordinary powers conferred on the Executive served as an excuse for Argentina to delay indefinitely

96. See *generally id.* at 285 (“[A] state of necessity would not allow a state to completely and permanently abrogate the rights granted to foreign investors . . . necessity only justifies a temporary suspension of the state’s international obligations.”).

97. See María Lorena Schiariti & Enrique V. Veramendi, *New Extension of the Emergency*, MARVAL O’FARRELL & MAIRAL (Oct. 30, 2015), <http://www.marval.com/publicacion/?id=12689&lang=en>; Law No. 27200, Nov. 3, 2015 (Arg.), available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/250000-254999/254341/norma.htm>.

98. *Id.*

99. See *supra* Part III.

100. *Argentina: Gross domestic product per capita (US Currency)*, INT’L MONETARY FUND (Apr. 2016), <https://www.imf.org/external/pubs/ft/weo/2016/01/weodata/weorept.aspx?pr.x=12&pr.y=4&sy=2000&ey=2013&scsm=1&ssd=1&sort=country&ds=.&br=1&c=213&s=NGDPDPC&grp=0&a=>.

the restoration of investor rights, repair of broken contracts, and payment of compensation for the grievous losses incurred by investors.

Indeed, the state of economic emergency and its continuous renewal discouraged new strategic investors and curtailed pre-existing investors' rights in various ways. In this connection, the aforementioned case involving the BG Group is illustrative.¹⁰¹ In the early 1990s, the BG Group had participated in a consortium that purchased a majority interest in MetroGAS, a privatized Argentine gas distributor.¹⁰² The company was awarded a thirty-five year exclusive license to distribute natural gas in Buenos Aires, and the government at the time passed legislation that calculated gas tariffs in US dollars and set these tariffs at a sufficient level to assure reasonable returns to gas distributors such as MetroGAS.

However, in early 2002, at the start of the state of economic emergency, the government decreed that gas prices would henceforth be set in Argentine pesos, which would soon be worth a fraction of their former exchange value. This change caused MetroGAS's input prices to triple (in reflection of the currency's initial devaluation) while its output prices remained stagnant and in pesos.¹⁰³ This measure turned MetroGAS from a modestly profitable company into a money-losing operation—potentially, permanently so.

Argentina subsequently established by statute a renegotiation process for contracts like the one with MetroGAS, but simultaneously barred any firm from participating in that process if the firm was litigating against Argentina in court or in arbitration.¹⁰⁴ This caught the BG Group and many other investors between the proverbial “rock and a hard place.” Under the Argentina-UK BIT, parties could not submit their claims directly to arbitration absent an agreement to do so.¹⁰⁵ Without an arbitration agreement, the parties could not proceed to arbitration without first failing to receive a final decision from a local Argentine court within eighteen months of filing the claim or

101. *See supra* Part I discussing *BG Grp. PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014).

102. *BG Grp. PLC*, 134 S. Ct. at 1204.

103. *See id.* (explaining that the tariff was originally converted from dollars to pesos at a rate of 1:1 but the actual exchange rate at that time was 1:3).

104. *Id.* at 1205 (citing Appendix to Petition for Certiorari at 129a, 131a, 168a-71a, *BG Grp.*, 134 S. Ct. 1198 (No. 12-138)).

105. *See id.* at 1203 (construing Agreement for the Promotion and Protection of Investments, Arg.-U.K., art. 8(1), 8(2)(b), Dec. 11, 1990, 1765 U.N.T.S. 38).

failing to resolve the dispute despite the local court's final decision.¹⁰⁶ As was eventually established by the BG Group without contest, the impact of the government's decree nullified the ability of a local Argentine court to conduct the process envisioned by the BIT within the specified timetable, and instead created what was characterized as an "absurd and unreasonable" process whereby the BG Group would never be able to complete the eighteen-month process required to proceed to arbitration.¹⁰⁷

When the BG Group company nevertheless initiated the arbitration claim, Argentina contended that the tribunal lacked jurisdiction to hear the dispute, because the BG Group had failed to comply with the first step in the process, namely, litigating the dispute initially in Argentina's courts. The arbitration panel was sympathetic to the BG Group's dilemma and so years later was the US Supreme Court. The latter reversed the US Court of Appeals for the District of Columbia Circuit by ruling arbitrators had authority to determine whether the matter was properly submitted to arbitration.¹⁰⁸

VII. THE ARBITRATION OPTION

Many multinational companies came to Argentina during the 1990s under the umbrella of dozens of bilateral investment treaties that were signed and ratified by Argentina and their own governments. Foreign portfolio investors, particularly retail and institutional bondholders, were likewise reassured by the existence of

106. *See id.* (quoting Agreement for the Promotion and Protection of Investments, *infra* note 107, art. 8(2)(a)(i)-(ii)).

107. *See* BG Grp. PLC v. Republic of Argentina (UK v. Arg.), Final Award, ¶¶ 147-57 (Dec. 24, 2007), available at <http://www.italaw.com/sites/default/files/case-documents/ita0081.pdf> ("Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation [that local remedies prevented access to arbitration] would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication."). For additional background, *see* Lionel M. Schooler, *Arbitrators as Gatekeepers in International Investment Dispute Arbitration Involving a Sovereign State: BG Group PLC v. Republic of Argentina*, 23 *ALTERNATIVE RESOL.* 31 (2014).

108. *See* *BG Grp. PLC*, 134 S. Ct. at 1210 ("The interpretation and application of the local litigation provision is primarily for the arbitrators."), *rev'g* 665 F.3d 1363, 1371, 1373 (D.C. Cir. 2012) (holding that the issue of jurisdiction, namely the impact of the local litigation requirement, was a question of law for courts to decide independently, and further that the circumstances in question did not excuse BG Group's failure to comply with the treaty's requirement); *accord* Andrea K. Bjorklund, Comment, *Republic of Argentina v. BG Group PLC*, 27 *ICSID REV.* 4, 6 (2012).

these agreements. Consequently, after the adverse economic events in 2001 and 2002, foreign investors could do more than merely lick their financial wounds and lobby for compensation: they could file requests for international arbitration, alleging breach of contract under their respective country's bilateral investment treaty.

As time passed and it became clear that the Argentine authorities would neither restore the investment climate nor compensate for damages caused, a growing number of arbitrations were indeed sought primarily through ICSID. By the middle of 2002, Argentina was the target of four new arbitrations at ICSID,¹⁰⁹ up from just one filed by mid-2001.¹¹⁰ A year later, namely by mid-2003, the number of new ICSID arbitrations requested against Argentina had soared to eleven.¹¹¹ In total through mid-2016, fifty-three arbitrations proceedings were filed with this venue¹¹²—the most ever to date against a single party to the ICSID Convention, which has been ratified by 153 countries.¹¹³

Most claimants would allege that the emergency measures taken in 2001 and 2002 were inconsistent with the fair and equitable treatment standards set forth in various bilateral investment treaties to which Argentina was a party. Frequently challenged measures included the suspension and eventual elimination of various rate-indexing mechanisms provided for in the contracts for public utilities and the forcible conversion from US dollars into Argentine pesos of certain contracts and rates charged by public utilities.¹¹⁴ Claimants often also highlighted the restrictions on foreign exchange transactions that prevented companies from sending dividend and other transfer payments abroad, and of course where applicable, the unilateral termination of contracts to operate in Argentina.

109. Ko-Yung Tung, *2002 Annual Report*, INT'L CTR. SETTLEMENT INV. DISP. 15-16 (Sep. 6, 2002), <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2002%20-%20Annual%20Report%20-%20-%20English.pdf>.

110. Ko-Yung Tung, *2001 Annual Report*, INT'L CTR. SETTLEMENT INV. DISP. 18 (Aug. 30, 2001), <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2001%20-%20Annual%20Report%20-%20-%20English.pdf>.

111. Antonio R. Parra, *ICSID Annual Report 2003*, INT'L CTR. SETTLEMENT INV. DISP. 25, 28-31 (Sep. 8, 2003), <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2003%20-%20Annual%20Report%20-%20-%20English.pdf>.

112. *See supra* note 23.

113. ICSID Convention, INT'L CTR. SETTLEMENT INV. DISP., <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx> (last visited Sept. 27, 2016).

114. Mercedes Ales, Leonardo Granato, & Carlos Nahuel Oddone, *Argentina Facing International Claims Over Foreign Investments*, 14 L. & BUS. REV. AM. 481, 490 (2008).

Argentina's prospectus presenting its debt-restructuring plan to the Securities and Exchange Commission ("SEC") in January 2005 greatly understated Argentina's involvement in arbitrations:

Several arbitration proceedings have been brought against Argentina before the International Centre for the Settlement of Investment Disputes (ICSID) challenging some of the emergency measures adopted by the Government in 2001 and 2002 and seeking compensation for damages. These proceedings have been brought primarily by foreign investors in a number of privatized entities under various bilateral investment treaties. We can offer no assurance that the Government will prevail in these claims. Rulings against the Government in these proceedings could have a material adverse effect on our finances and our ability to service our public debt, including any new securities we issue in an exchange offer.¹¹⁵

This understatement was likely related to Argentina's decision to dispute every claim vigorously. For example, the State frequently questioned the scope of the jurisdictional phase and the admissibility of the claim, the arbitrators' qualifications, the admissibility of documents for witness and expert examination, the conduct and language of the proceedings, and all other aspects of the arbitration including the post-award annulment proceedings.

The understatement presented to the SEC was likely also illustrative of Argentina's reluctance to pay the awards rendered against it. Early on, Argentina took the position that, under Articles 53 and 54 of the ICSID Convention, all award holders must submit to the authority of a national (Argentine) court and follow the formalities applicable for collecting on a judgment against Argentina in Argentina, which is basically a return to the aforementioned Calvo Doctrine.¹¹⁶ Such an interpretation of the enforceability of arbitral awards is unique and likely unpopular among most ICSID members, because if local review of "final" awards were to become the norm, then the ICSID arbitral process would become toothless.¹¹⁷ And of

115. *Prospectus Supplement*, *supra* note 69, at 28.

116. *See generally* Kasenetz, *supra* note 35, at 739-43 (explaining Argentina's interpretation of Articles 53 and 54 of the ICSID Convention and how this interpretation is a return to the Calvo Doctrine). For a discussion of the Calvo Doctrine, see discussion in Sec. V *supra* note 85.

117. Tsai-Yu Lin, *Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?*, 5 *CONT. ASIA ARB. J.* 22 (2012), *quoting* *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Proceeding, Decision on

course, Argentina's rogue behavior with regard to its non-payment of arbitral awards ran parallel to its dogged refusal to pay foreign court judgments—despite surrendering its immunity and committing itself to be bound by foreign judicial and arbitral rulings.

Six years later in 2011, the description of the nation's arbitration challenges included in Argentina's Form 18-K Annual Report filed with the SEC totaled nearly 1,350 words. This was a drastic increase from the 105-word description included in the 2005 Prospectus.¹¹⁸ The Form 18-K Annual Report included forty-five claims filed before ICSID against Argentina, of which eleven proceedings had been discontinued or had the claims withdrawn.¹¹⁹ That brought the total number of ICSID claims against Argentina to thirty-four, with their total damages totaling approximately US\$13.6 billion.¹²⁰ Nine of these thirty-four claims had been suspended by the time Form 18-K Annual Report was filed to allow for settlement negotiations with the government and eight more had already been decided against Argentina, totaling in aggregate an award of slightly more than US\$900 million.¹²¹ Argentina consistently applied for annulments of unfavorable awards pursuant to Chapter VII of the ICSID Arbitration Rules, and by 2011 two awards against Argentina had been successfully annulled and one more had been renounced by the victorious claimant, saving the State in total US\$452 million.¹²²

As of early 2016, various international arbitration tribunals had issued twelve final awards against Argentina, totaling US\$1.6 billion. The country was also involved in an additional eighteen ongoing arbitrations at that time with claims totaling US\$7.1 billion.¹²³ This excluded five arbitrations, which had been settled in 2013 for an aggregate total of US\$510 million against Argentina.¹²⁴ Of these ongoing ICSID arbitrations, the most monetarily significant was the previously discussed case (*Abaclat & Others v. The Argentine Republic*) involving more than 190,000 of an estimated 600,000

the Argentine Republic's Request for a Continued Stay (Aug. 10, 2010) (“[A]ny possible intervention by a judicial authority in the host State would render the awards simply a piece of paper deprived from any legal value and dependent on the will of state organs.”).

118. See Republic of Argentina, Annual Report (Form 18-K), *supra* note 83, at 190-92.

119. *Id.* at 190.

120. *Id.*

121. See *id.* at 190-91 (providing all available arbitral awards rendered against Argentina from 2005 to 2008).

122. See *id.* at 191.

123. See *Offering Memorandum*, REPUBLIC OF ARG. 29 (Apr. 19, 2016).

124. See *id.* at 29-30.

Italian retail bondholders whose claims totaled US\$4.4 billion, but was later reduced to some 60,000 investors with an estimated claim of US\$2.5 billion.¹²⁵ In April 2015, US\$405 million was reportedly awarded to claimants Suez of France and Sociedad General de Aguas de Barcelona of Spain, two water companies party to the arbitration *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17.¹²⁶ The authorities in Argentina immediately announced that, as usual, they would be filing for an annulment proceeding.¹²⁷ In addition to the ICSID arbitrations, Argentina faced investment disputes in UNCITRAL arbitrations as well, two of which—including *BG Group v. Republic of Argentina* discussed *supra*—had rendered awards against Argentina totaling US\$238 million.¹²⁸

CONCLUSION

In sum, the origins of Argentina's litigation and arbitration saga are to be found in the country's rogue behavior both at home and abroad, especially in the early years from 2002 to 2005. For ideological reasons, successive Argentine governments refused to follow the well-worn playbook of how economic policy adjustments are to be made in order to minimize damage to the investment climate, preserve access to the international capital markets, and promote rapid and sustainable economic growth. The Argentine government quite deliberately chose to sacrifice the strategic, portfolio, and other investors who had entered into Argentina during the 1990s and helped to catapult the country into the modern era. It did so pursuant to a nationalist and populist ideology that taxed or expropriated the income and wealth of international investors in order to redistribute it mainly to domestic urban consumers, especially through subsidized energy and artificially low prices for public utilities.

125. See *supra* Part I discussion of *Abaclat & Others v. The Argentine Republic*, *supra* notes 30-32.

126. Florencia Donovan, *Condena el Ciadi al país por US\$ 405 millones*, LA NACIÓN (Apr. 10, 2015), <http://www.lanacion.com.ar/1783236-condena-el-ciadi-al-pais-por-us-405-millones>.

127. *La Argentina apelará el fallo del Ciadi por el caso de Aguas Argentinas*, LA NACIÓN (Apr. 10, 2015), <http://www.lanacion.com.ar/1783304-la-argentina-apelara-el-fallo-del-ciadi-por-el-caso-de-aguas-argentinas>.

128. See Republic of Argentina, Annual Report (Form 18-K), *supra* note 83, at 191.

The benefits of the voluminous and protracted Argentina-related litigation and arbitration that transpired include the assertion and expansion of creditor rights against sovereigns, as well as the establishment of several major judicial and arbitral precedents. The costs of the Argentina saga, on the other hand, were the enormous legal expenses all around; the frustration of judicial and arbitral vehicles for the resolution of conflicts; reputational losses and financial isolation for the government of Argentina and its private sector; and the accumulation of a mountain of unpaid and contingent claims. It is good that in late 2015 the Argentine people elected a reformist government with an explicit mandate to finally settle all of the judgments and awards that were pending against it, and to change the direction of economic and foreign policy in a constructive manner—which is in fact what has transpired during the course of 2016.

