

**Too little, too late: principles of economics, politics or the law?**  
**The new Argentine international (external) debt restructuring saga**

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**Abstract**

Argentina and its policymakers have managed the art of seductive economic crises, sovereign debt litigations, and international sovereign debt policymaking lobbying. Distressed debt hedge funds too.

This short paper analyzes a recent public Council of the Americas' intervention of Argentina's Minister of Economy on the country's 2020 international (external) sovereign debt restructuring. In his intervention, the Minister argued that this time around the restructuring is different due to a different debt structure. The Minister also stated his principle-based position for the restructuring.

The paper concludes that while the Minister's statements may hold at a macro level, at a micro level, Argentina's 2001 and 2020 restructurings converge on debt structure as defined by the Minister. On those terms, this time would not be that different. Preference and priority should also be not to do too little, too late. By analyzing key discourse of Argentina's Minister of Economy, this paper contributes answers to two central and highly-argued questions on the country's 2020 restructuring: Would this time be different? Would it be too little, too late?

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## Introduction

The Minister of Economy of Argentina recently spoke to audiences of the Council of the Americas<sup>1</sup> on Argentina's economic status and international (external) sovereign debt negotiations. His messages were consistent with previous communications. Three main messages can be highlighted, and two main questions asked.<sup>2</sup>

For economic status messages, the Minister first discoursed in-depth on his target (long term) macroeconomic model for the state and the necessary (but not sufficient) external debt reduction needs.<sup>3</sup>

Second, at inquiries of economic growth, the Minister discoursed on his fiscal consolidation strategy as the driver, thereby bypassing explicating the necessary economic growth of exports and productivity aspects. Those areas are indeed the focus of other ministries and subjects of the government.<sup>4</sup>

Third, on external debt negotiations, the Minister discoursed on balances of negotiation advancements and challenges. As differentiator from Argentina's 2001 restructuring, the Minister pointed to a diverse debt structure this time around on terms of contractual language, the universe of bondholders, and the state of the economy already being on default. The Minister also highlighted unacceptable contractual language requests by investors, particularly on collective action clauses (CACs). Foremost, the Minister conclusively stated that while the *preference* is for the resolution of the present debt crisis sooner rather than later, the *priority* is to resolve the crisis in a way that works for the whole country.<sup>5</sup>

Argentina and its 2001 external debt saga creditors delivered the ugly, the long, and the unexpected on their negotiations and final litigations. Would this time be different? Would it be

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<sup>1</sup> Council of the Americas, About AS/COA, Council of the Americas, <https://www.as-coa.org/about/about-ascoa>.

<sup>2</sup> A Conversation with Argentine Minister of Finance Martín Guzmán, Youtube Americas Society/Council of the Americas (Jun. 23, 2020), <https://youtu.be/8G1EWGPbZy8>.

<sup>3</sup> Id.

<sup>4</sup> Id. Areas such as the Ministry of Productive Development would lead such economic policies. Ministerio de Desarrollo Productivo, Argentina.gob.ar, <https://www.argentina.gob.ar/produccion>.

<sup>5</sup> A Conversation with Argentine Minister of Finance Martín Guzmán, Youtube Americas Society/Council of the Americas (Jun. 23, 2020), <https://youtu.be/8G1EWGPbZy8>.

once again too little, too late? This article examines the Minister's asseverations on the external debt negotiations at this Council of the Americas' convening to answer these questions.

## 1. Principles of economics, politics or the law?

Generally, constituting an economically stable state is a challenging proposition. Development challenges often set the state into persisting patterns of prosperity or economic crises. Economic models of today also tend to frequent instabilities of high variance (black swans). Economically stable countries are the exception rather than the norm. Economic instabilities and non-payment of external sovereign debt obligations are widely repudiated.<sup>6</sup> Increasingly states rely on external sovereign debt financing and face court litigations for defaults.<sup>7</sup> Also, however argued by the parties, sovereign debt restructurings can be conceived as yet inseparable mixes of economics and politics.<sup>8</sup> Furthermore, no one nowadays doubts that they are also the result of the law and the courts.<sup>9</sup>

Sovereign bonds are the increasingly dominating sovereign debt asset type. They are issued by countries to finance development or expenditures. Likewise any financial asset, the issuance of sovereign debt requires complex legal documentation. The Prospectus will summarize the main economic and legal terms stipulated by the Financial Agency Agreement (FAA) or a Trust Indenture (the bond contracts).<sup>10</sup> In sovereign debt markets, the choice of law is fundamental for the economic sustainability of the credit. The choice of law is to drive contractual terms and the dispute resolution forum of potentially litigious restructurings or other dealings. English and New York law are the market standard set by the creditors and offered or accepted by the debtors.<sup>11</sup> Given Argentina's 2001 South District Court of New York (S.D.N.Y.) litigations, sovereign bond

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<sup>6</sup> For an accessible introduction to economic development challenges, see Ha-Joon Chang, Kicking Away the Ladder: Development Strategy in Historical Perspective (Anthem, 2002). For theories of black swan events, see Nassim Nicholas Taleb, The Black Swan: The Impact of the Highly Improbable (Random House, 2007). For examples of international sovereign debt condemnations, see Michael Waibel, Sovereign Defaults before International Courts and Tribunals, (Cambridge University Press, 2011).

<sup>7</sup> See Julian Schumacher & Christoph Trebesch & Henrik Enderlein, Sovereign Defaults in Court, CESifo Working Paper Series 6931 (2018).

<sup>8</sup> See Anna Gelpern, Sovereign Debt: Now What?, Georgetown Law Faculty Publications and Other Works 1832 (2016).

<sup>9</sup> See Mark C. Weidemaier, et al., Sovereign Debt and the 'Contracts Matter' Hypothesis, UNC Legal Studies Research Paper No. 2511251 (2014).

<sup>10</sup> See Lee C. Buchheit, Trustees versus fiscal agents for sovereign bonds, 13 *Capital Markets Law Journal* 410 (2018).

<sup>11</sup> See NYCBar, Governing Law in Sovereign Debt – Lessons from the Greek Crisis and Argentina Dispute of 2012, NYCBar (Feb. 2013), <https://www2.nycbar.org/pdf/report/uploads/20072390-GoverningLawinSovereignDebt.pdf>.

contractual language is on a journey of development of “enhanced” terms. Such “enhancements” reflect the concerns of debtors and creditors in maintaining sustainable sovereign debt.<sup>12</sup>

Sustainable sovereign debt is a matter of politics,<sup>13</sup> which is economically calculated and ultimately legally disputed. Political economy matters. Creditors and debtors agree on the principle of sustainable sovereign debt. From their vantage point in the economic equations, they however, have different understandings on the actions to achieve sustainability (for example fiscal consolidation vs. expansion) and who is to bear the costs of the economic change (for example, which segments of societies and to which proportions). In restructurings, the diverging understandings and interests of creditors and debtors of sustainable sovereign debt are at center stage.<sup>14</sup> The contractual terms of bonds reflect not only the statutes and case law of the chosen issuance jurisdiction but also the power balances and understandings of the parties to the contracts, including their understandings of debt sustainability and its economics, politics, and law.

### **1.1. Contractual language**

When Argentina’s Minister of Economy pointed to a diverse debt structure this time around (in relationship to the country’s 2001’s restructuring), contractual language was at forefront. While the Minister did not specify the signaled contractual language differences, one can at least suspect the inclusion of CACs as an upmost key contractual language difference. The Minister indeed highlighted unacceptable CAC language requests from creditors.<sup>15</sup> Tendered 2001’s Argentina bonds did not include CACs, exchanged bonds did include them.<sup>16</sup>

CACs were introduced in response to Argentina’s 2001 holdouts. They are a voting mechanism for creditors to accept restructurings’ bond exchange offers and avoid litigations. They set a minimum number of creditors by series of bonds and the overall restructuring who must accept a bond exchange offer for it to proceed. Boilerplates (standard contract definitions) of CACs exist. However, each state debtor may opt for contractual variations. CACs were implemented as no

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<sup>12</sup> See Antonia E. Stolper & Sean Dougherty, Collective action clauses: how the Argentina litigation changed the sovereign debt markets, 12 Capital Markets Law Journal 239 (2017).

<sup>13</sup> See Anna Gelpern, Sovereign Debt: Now What?, Georgetown Law Faculty Publications and Other Works 1832 (2016).

<sup>14</sup> Id. For the complexities on the economic calculation of debt sustainability, see See Charles Wyplosz, Debt Sustainability Assessment: Mission Impossible, 2 Review of Economics and Institutions (2011).

<sup>15</sup> A Conversation with Argentine Minister of Finance Martín Guzmán, Youtube Americas Society/Council of the Americas (Jun. 23, 2020), <https://youtu.be/8G1EWGPbZy8>.

<sup>16</sup> See Antonia E. Stolper & Sean Dougherty, Collective action clauses: how the Argentina litigation changed the sovereign debt markets, 12 Capital Markets Law Journal 239 (2017).

consensus could be reached on an international public law sovereign debt dispute resolution mechanism. While they are new contractual clauses in New York law bonds, they are established in English law bonds.<sup>17</sup>

During Argentina's 2001 litigations, debtor states and Argentina significantly leading, reintroduced international discussions on sovereign debt resolution frameworks. Bond buy-side market participants initially did not accept any market change need. As pressures mounted, they accepted the introduction of the less invasively-seen contractual solution of CACs (rather than a treaty-based international dispute resolution framework).<sup>18</sup> Increasingly disperse creditor communities and interests in sovereign debt bond markets have exacerbated the collective action problems (CAPs) that permeate sovereign debt restructurings and that CACs look to solve.<sup>19</sup>

CAPs require individuals to cooperate. However, incentives such as moral hazard and "winner-takes-all" deter this cooperation.<sup>20</sup> In sovereign debt restructurings, aggressive politicians may not act in good faith and attempt to corner creditors to render incommensurate debt haircuts and political gains. Creditors hold no duties for misuse of credit by states, nor ensuring repayment capacity. They can litigate to uphold creditors' rights (full repayment).

Since their introduction in New York law bonds in the 2000's, CACs have been included in modern restructurings and issuances, including Argentina's bonds since the 2005 exchange offer. The U.S. Second Circuit Court of Appeals has highlighted that "[c]ollective action clauses have been included in 99% of the aggregate value of New York-law bonds issued since January 2005."<sup>21</sup>

However, CACs were not grandfathered to international sovereign bond stocks, style diversity exists (such as per bond series, single-limb, and two-limb CACs) and their effectiveness avoiding a spectrum of litigations is untested. The desired cases of litigation avoidance are also not established. CACs, as they are defined today, may be effective under certain economic conditions; such as given levels of convergence of interests of creditors and debtors.

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<sup>17</sup> Id.

<sup>18</sup> See IMF, Strengthening the contractual framework to address collective action problems in sovereign debt restructuring, IMF Policy Paper (2014), <https://www.imf.org/external/np/pp/eng/2014/090214.pdf>.

<sup>19</sup> See Anna Gelpern, Sovereign Debt: Now What?, Georgetown Law Faculty Publications and Other Works 1832 (2016).

<sup>20</sup> See Britannica, Collective action problem, Britannica, <https://www.britannica.com/topic/collective-action-problem-1917157>.

<sup>21</sup> See NYCBar, Governing Law in Sovereign Debt – Lessons from the Greek Crisis and Argentina Dispute of 2012, NYCBar (Feb. 2013), <https://www2.nycbar.org/pdf/report/uploads/20072390-GoverningLawinSovereignDebt.pdf>.

Initially, a majority of sovereign debt academics and practitioners trusted CACs to avoid future sovereign debt crises.<sup>22</sup> However, in 2014, the International Monetary Fund (IMF) and prominent academics and practitioners were raising voices of caution.<sup>23</sup> CACs were certainly not yet the pursued solution to avoid litigations that block (significantly delay or prevent) restructurings.<sup>24</sup> Also, the 2014 NML S.D.N.Y. litigations may have increased holdout incentives.<sup>25</sup>

In per bond series restructurings, no aggregation of bond series occurs. In single-limb CACs, one vote on the overall restructuring occurs. If the minimum restructuring acceptance threshold is met, the restructuring proceeds. In two-limb CACs, two votes take place: for the overall of the restructuring and for debtor defined pools of one or more bond series.<sup>26</sup>

In the absence of CACs in Argentina's 2001's bonds for restructuring, under New York law, a single dissenting investor, could choose not to participate in the exchange and litigate. The bonds that the government announced for its 2020 restructuring are circa 69 billion USD and account for 35 securities. 23 of the 35 securities are under New York law. The 23 include 4 EUR, 1 CHF, and 18 USD (which are all the USD bonds in the restructuring stock) securities.<sup>27</sup>

A complex aspect of any restructuring is the non-discriminatory treatment of creditors under perceived zero-sum bargaining.<sup>28</sup> CAC diversity in bond pools is a new bond restructuring complexity as well. The restructuring stock includes Kirchner and Macri bonds.<sup>29</sup> Kirchner bonds

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<sup>22</sup> See Mitu Gulati & W. Mark C. Weidemaier, *A People's History of Collective Action Clauses*, Virginia Journal of International Law, 52. (2014): "In order to . . . [prevent future crises], standardized and identical collective action clauses (CACs) will be included . . . in the terms and conditions of all new euro area government bonds . . ." - Statement by the Eurogroup, Press Release, Council of the European Union, Statement by the Eurogroup 1–2 (Nov. 28, 2010), [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ecofin/118050.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/118050.pdf).

<sup>23</sup> See IMF, *Strengthening the contractual framework to address collective action problems in sovereign debt restructuring*, IMF Policy Paper (2014), <https://www.imf.org/external/np/pp/eng/2014/090214.pdf>. See Mitu Gulati & W. Mark C. Weidemaier, *A People's History of Collective Action Clauses*, Virginia Journal of International Law, 52. (2014).

<sup>24</sup> See Mitu Gulati & W. Mark C. Weidemaier, *A People's History of Collective Action Clauses*, Virginia Journal of International Law, 52. (2014).

<sup>25</sup> See IMF, *Strengthening the contractual framework to address collective action problems in sovereign debt restructuring*, IMF Policy Paper (2014), <https://www.imf.org/external/np/pp/eng/2014/090214.pdf>.

<sup>26</sup> See Antonia E. Stolper & Sean Dougherty, *Collective action clauses: how the Argentina litigation changed the sovereign debt markets*, 12 Capital Markets Law Journal 239 (2017).

<sup>27</sup> The Republic of Argentina, *Prospectus Supplement: The Republic of Argentina*, SEC (April 21, 2020), <https://www.sec.gov/Archives/edgar/data/914021/000119312520113997/d915520d424b5.htm#toc>.

<sup>28</sup> Program on Negotiation Harvard Law School, *Zero sum approach*, Program on Negotiation Harvard Law School, <https://www.pon.harvard.edu/tag/zero-sum-approach/>.

<sup>29</sup> The Republic of Argentina, *Prospectus Supplement: The Republic of Argentina*, SEC (April 21, 2020), <https://www.sec.gov/Archives/edgar/data/914021/000119312520113997/d915520d424b5.htm#toc>.

were issued under the presidencies of Nestor Kirchner and Cristina Fernández de Kirchner. They have two-limb CACs. The Macri bonds were issued under Mauricio Macri's presidency and have single-limb CACs. On CAC diversity, Kirchner and Macri bonds trade at a spread.<sup>30</sup> Based on their two-limb CACs, creditors favor Kirchner bonds. The Argentine voters also hold distinct political connotations for Kirchner vis-a-vis Macri bonds.

While it is not clear how CACs would play during potential 2020's Argentina's restructuring S.D.N.Y. litigations, voting thresholds of CACs within and cross-series are fundamental collective action problem solvers during pre-litigation restructuring negotiations.<sup>31</sup> As this Argentina 2020 restructuring demonstrates thus far, under current CAC styles, investors can yet afford to holdout.<sup>32</sup> However, per their creditors' requests for use of Argentina's 2005 Indenture and its provisions of CACs for the exchange bonds on this restructuring, to creditors and their investments in holdout, CAC styles matter.<sup>33</sup>

But certainly, CACs and the use of Argentina's 2005 Indenture are not the only contractual language of disagreement in this restructuring. Two of the three key investor groups holding out, have enumerated a significant list of contractual language requests for their agreement to the exchange. Other indenture changes requested by these creditors include that other new post-exchange bonds are also issued under the 2005 Indenture (identical legal terms), that no new instruments with most favorable terms are issued nor placed with creditors friendly to support bond changes proposed by the government, that any bond issued in not Argentine Pesos (ARS) is considered "External Indebtedness", a more precise definition of "Indebtedness", new "reserved matters",<sup>34</sup> requirements of public debt stock publications and IMF Article IV consultations, expanded Events of Default (including failing "to comply with the mandatory IMF Article IV Consultation"), expanded waiver of alter egos and presumption of commercial activities, and a new

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<sup>30</sup> See Sebastian Grund, *Restructuring Argentina's Sovereign Debt: Navigating the Legal Labyrinth*, The CLS Blue Sky Blog (December 23, 2019), <https://clsbluesky.law.columbia.edu/2019/12/03/restructuring-argentinas-sovereign-debt-navigating-the-legal-labyrinth/>.

<sup>31</sup> See Antonia E. Stolper & Sean Dougherty, *Collective action clauses: how the Argentina litigation changed the sovereign debt markets*, 12 *Capital Markets Law Journal* 239 (2017).

<sup>32</sup> As evidence of yet holdout affordability by creditors under current CAC styles, see the formation of commanding bondholder committees in this 2020 Argentina restructuring, see Román Lejtman, *Alberto Fernández analiza dictar un DNU para rescatar la negociación con los fondos que entró en un callejón sin salida*, Infobae (May 29, 2020), <https://www.infobae.com/economia/2020/05/29/alberto-fernandez-analiza-dictar-un-dnu-para-rescatar-la-negociacion-con-los-fondos-que-entro-en-un-callejon-sin-salida/>.

<sup>33</sup> The Republic of Argentina as Issuer and The Bank of New York as Trustee, *Trust Indenture dated as of June 2, 2005*, Shearman (June 02, 2005), <https://argentine.shearman.com/sitefiles/11605/exhibit%20a.pdf>

<sup>34</sup> For examples of reserved matters clauses, see Law Insider, *Reserved Matters Sample Clauses*, Law Insider, <https://www.lawinsider.com/clause/reserved-matters>.



“creditor committee engagement clause”, restrictions on re-designations, an information delivery requirement pre-voting and the Rights Upon Future Offers clause “in the Republic’s prospectus supplement dated April 21, 2020”.<sup>35</sup>

These creditors cite recurring Argentina’s sovereign debt restructuring needs as reason for such contractual language requests.<sup>36</sup>

As previously stated, the Minister has highlighted that the CAC contractual requests of these creditors are unacceptable. For the exchange bonds, creditors have requested two-limb CACs (likewise the Kirchner bonds), instead of single-limb CACs (likewise the Macri bonds). Two-limb CACs would facilitate holdouts/upholding of creditors’ rights.

While states are free of implementing CAC styles of their preference, the Minister highlighted Argentina’s commitment as a G-20 country to single-limb (enhanced CACs) as implemented by the country in 2016. The Minister cites that Argentina is a G-20 country and that those CACs are promoted by the G-20, the IMF, International Capital Markets Association (ICMA) and the international community.

Thus far, creditors had not requested CAC style nor contractual language divergences based on the development level of countries, economic health, restructuring re-occurrences or other differentiators. This 2020 Argentine restructuring may point to a market change on these matters due to accumulated learnings of repeat market players.

## 1.2. The universe of bondholders

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<sup>35</sup> For a discussion on RUFO clauses, see Inversor Global, *Letra chica: ¿qué es la cláusula RUFO y por qué es la clave para terminar con el conflicto buitre?*, Igdigital (July 7, 2014) <https://igdigital.com/2014/07/letra-chica-que-es-la-clausula-rufo-y-por-que-es-la-clave-para-terminar-con-el-conflicto-buitre/>. For the requests of legal clauses of these creditors’ groups, see Ad Hoc Bondholder Group and Exchange Bondholder Group, *Without Prejudice Joint Debt Restructuring Proposal of Ad Hoc Bondholder Group and Exchange Bondholder Group*, Ad Hoc Bondholder Group and Exchange Bondholder Group (June 14, 2020), <https://static1.squarespace.com/static/5eb2e6606e11e67a7b983448/t/5eebb678d756ab0890810946/1592505979102/Argentina+Joint+Revised+Restructuring+Terms+EN+061420.pdf>.

<sup>36</sup> See Ad Hoc Bondholder Group and Exchange Bondholder Group, *Without Prejudice Joint Debt Restructuring Proposal of Ad Hoc Bondholder Group and Exchange Bondholder Group*, Ad Hoc Bondholder Group and Exchange Bondholder Group (June 14, 2020), <https://static1.squarespace.com/static/5eb2e6606e11e67a7b983448/t/5eebb678d756ab0890810946/1592505979102/Argentina+Joint+Revised+Restructuring+Terms+EN+061420.pdf>.



As sovereign bonds trade in open international markets and no records are easily kept of the bondholders, most sovereign debt creditors to states remain unknown until default and restructuring events occur.<sup>37</sup> In Argentina's 2001 restructuring, besides investment funds (including hedge funds) and a significant contingent of individual investors, institutional investors such as the International Monetary Fund (IMF), the World Bank (WB) and the Paris Club were also creditors. Overall, this macro creditor mix, perhaps to a lesser extent of individual investors this time around (which cannot be confirmed), should hold for Argentina's 2020 restructuring. So the diverse universe of bondholders that the Minister refers to must be at micro level and at the investment fund level which currently holdout and are therefore known.

Investment fund creditors to engage in negotiations (and potential litigations) are becoming transparent. Initially, indeed, as the Minister points, not the usual suspects.

Three most significant creditor committees have formed in Argentina's 2020 restructuring. Led by Blackrock, Fidelity, and Ashmore, the "Ad Hoc Argentine Bondholder Group" has been the most prominently clear and bold in their requests.<sup>38</sup>

They have openly published counter-exchange proposals and their argumentations. Amongst other funds, they manage insurance, pensions, and retirement funds. These funds request no capital haircut and are willing to extend payments and reduce interest rates. They do not agree with Argentina's nor IMF's calculations of sovereign debt levels. They see Argentina as illiquid, not insolvent. They are also discouraged with what they interpret as aggressive negotiations' tactics of the government to have only sovereign debt investors pay for the country's economic crisis.<sup>39</sup>

They have been joined in their latest exchange proposal by the "Exchange Bondholders". This group includes Monarch, Cyrus, HBK and VR, amongst other funds. VR also litigated Argentina in its 2001 restructuring at the S.D.N.Y.<sup>40</sup>

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<sup>37</sup> See Task Force on Finance Statistics, Chapter 7: Identifying the Holders of Trade Debt Securities, Task Force on Finance Statistics, <http://tffs.org/pdf/method/2013/psds13ch7.pdf>.

<sup>38</sup> See Leandro Gabin, Pulseada por la deuda: grandes fondos exigirán a Guzmán que no haya quita en el capital, Notiar (March 03, 2020), <http://www.notiar.com.ar/index.php/economia/99490-pulseada-por-la-deuda-grandes-fondos-exigiran-a-guzman-que-no-haya-quita-en-el-capital-por-leandro-gabin>.

<sup>39</sup> Id.

<sup>40</sup> See Larry Neumeister, Argentina resolves bond debt claims for \$250M and 185M euros, Business Insider (February 23, 2016), <https://www.businessinsider.com/ap-argentina-resolves-bond-debt-claims-for-250m-and-185m-euros-2016-2>.

The third significant creditor committee thus far formed is the group of ““Argentina Creditors’ Committee”. This group is led by Greylock Capital, Gramercy and Fintech.<sup>41</sup> In the 2001 restructuring, Greylock Capital and Gramercy litigated Argentina.<sup>42</sup> Gramercy has turned to be a creditor-friend of Argentina’s government.<sup>43</sup>

This micro level universe of bondholders, therefore, also includes many repeat players of the 2001 exchanges and litigations. Amongst other negotiation critical assets, these creditors share credit resolution preferences, litigation power and foremost high caliber legal advisors from Argentina’s 2001 S.D.N.Y. litigations.<sup>44</sup>

Three prominent litigators can be thus far highlighted, one representing the Republic of Argentina and two representing holdout creditors. Legal counsels in sovereign debt advise their clients in litigations, as well as pre-litigation (restructuring) proceedings.

Cleary Gottlieb Steen & Hamilton LLP (Cleary Gottlieb) is known as the top caliber firm representing governments in sovereign debt litigations. It has also become the most common representative of Latin America countries in sovereign debt proceedings.<sup>45</sup> Cleary Gottlieb is said to be known for its aggressive litigation style.<sup>46</sup> The firm represented Argentina in its 2001 restructuring and S.D.N.Y. litigations.

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<sup>41</sup> See Leandro Gabin, Pulseada por la deuda: grandes fondos exigirán a Guzmán que no haya quita en el capital, Notiar (March 03, 2020), <http://www.notiar.com.ar/index.php/economia/99490-pulseada-por-la-deuda-grandes-fondos-exigiran-a-guzman-que-no-haya-quita-en-el-capital-por-leandro-gabin>.

<sup>42</sup> See La Nación, Hans Humes. El hombre que se convirtió en pieza clave de la discusión por la deuda, La Nación (May 15, 2020), <https://www.lanacion.com.ar/economia/hans-humes-el-hombre-se-convirtio-pieza-nid2365766>. See Karin Strohecker & Marc Jones & Rodrigo Campos & Cassandra Garrison, Argentina creditors jockey for lead ahead of \$100 billion debt talks, Reuters (November 11, 2019), <https://www.reuters.com/article/us-argentina-bonds/argentina-creditors-jockey-for-lead-ahead-of-100-billion-debt-talks-idUSKBN1XW23O>.

<sup>43</sup> See Jorge Ignacio Frechero, El nido de los buitres. Naturaleza, visión y objetivos de la American Task Force Argentina (Atfa), 2006-2013, SEDICI – Repositorio Institucional de la UNLP (October 10, 2014), [http://sedici.unlp.edu.ar/bitstream/handle/10915/43913/Documento\\_completo.pdf?sequence=1&isAllowed=y](http://sedici.unlp.edu.ar/bitstream/handle/10915/43913/Documento_completo.pdf?sequence=1&isAllowed=y).

<sup>44</sup> See White & Case LLP, Statement of Ad Hoc Bondholder Group on Argentina Restructuring Terms, White & Case LLP (April 04, 2020), <https://www.prnewswire.com/news-releases/statement-of-ad-hoc-bondholder-group-on-argentina-restructuring-terms-301043232.html>. See Bloomberglaw, Ex-Elliott Lawyer Builds Creditor Group in Argentina Rematch, Bloomberglaw (January 24, 2020), <https://news.bloomberglaw.com/securities-law/ex-elliott-lawyer-builds-creditor-group-in-argentina-rematch>.

<sup>45</sup> See The Economist, The legal business: the default choice, The Economist (September 27, 2014), <https://www.economist.com/business/2014/09/27/the-default-choice>. See Reuters, Argentina debt battle puts NY law firm in spotlight, Reuters (December 5, 2012), <https://www.reuters.com/article/argentina-debt-cleary/argentina-debt-battle-puts-ny-law-firm-in-spotlight-idUSL1E8MTFH920121205>.

<sup>46</sup> See Reuters, Argentina debt battle puts NY law firm in spotlight, Reuters (December 5, 2012), <https://www.reuters.com/article/argentina-debt-cleary/argentina-debt-battle-puts-ny-law-firm-in-spotlight-idUSL1E8MTFH920121205>.

White & Case LLP is the legal front of the Ad Hoc Bondholder Group and the Exchange Bondholder Group Argentina in their Joint Debt Restructuring Proposal. In Argentina's 2001 restructuring, White & Case represented Italian creditors on World Bank (WB)'s International Centre for Settlement of Investment Disputes (ICSID) proceedings based on the Italy-Argentina bilateral investment treaty.<sup>47</sup> Likewise Cleary Gottlieb, White & Case is a global legal firm with a "Sovereigns" (sovereign debt) practice.<sup>48</sup>

Besides these two sovereign debt litigation powerhouses, Dennis Hranitzky, a previous lawyer of Elliot Management in Argentina's 2001 S.D.N.Y. litigations, has formed for this 2020 restructuring the creditor group of "Exchange Bondholders".<sup>49</sup>

These firms and star lawyer were at the heart of Argentina' 2001 key litigations. They are expected to reuse, standardize and gain commercial positions from their previous learnings on restructuring and litigations for this 2020 restructuring. These legal advisors, as per their advises, make certainly not for a different universe of bondholders.

### **1.3. The state already facing default conditions and immediately starting a restructuring process**

The formal moment of sovereign debt default of a state is unprecise. On economic terms, credit rating agencies or any other international organizations (such as the IMF) may grade states under not favoring grades that may close markets for certain creditors to invest. A debtor can declare its default or stop payments. On legal terms, an enumerated contract default event may occur.<sup>50</sup>

The Minister also refers to the state already facing default conditions, which is an undefined event in sovereign debt markets and may not necessarily be a single function of the state of the country's international (external) sovereign debt being on default.

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<sup>47</sup> See Financial Times, How Argentina pulled off a deal in creditor impasse, Financial Times (December 6, 2016), <https://www.ft.com/content/88a56580-a2c5-11e6-aa83-bcb58d1d2193>.

<sup>48</sup> See White & Case, Sovereigns, White & Case, <https://www.whitecase.com/law/industries/sovereigns>.

<sup>49</sup> See Bloomberglaw, Ex-Elliott Lawyer Builds Creditor Group in Argentina Rematch, Bloomberglaw (January 24, 2020), <https://news.bloomberglaw.com/securities-law/ex-elliott-lawyer-builds-creditor-group-in-argentina-rematch>.

<sup>50</sup> See Abbas, S. Ali et al., Sovereign Debt: A Guide for Economists and Practitioners, Oxford, Oxford University Press, 2019, p.275-277.

In addition, how an event of default may render a different “debt structure”, which matters in form and results for a restructuring is not clear. When approaching a restructuring, a debtor must be in a sovereign debt payment default or close to it.

Immediately starting a restructuring process also does not alter the “debt structure” of a country, finishing it with immediacy does.

However, would acting with immediacy render a desired final “debt structure” by the Minister? If the Minister believes in Argentina's immediate export and productive capacity, moving with immediacy to an affordable deal may be most appropriate. Such a strategy would avoid continued costly negotiations and potential litigations. As this economic scenario is not highly likely and the Minister has emphasized the need of any deal to have the legitimacy of given Argentina’s society interest groups (for example, the Unions and the governors of the states),<sup>51</sup> the Minister must act in the rest of the negotiation spectrum.

The Minister can pursue a less affordable final “debt structure” that can provide economic breathing space to the country and can be yet legitimized by the concerned interest groups. This solution may not exist. Foremost, it may go against the intellectual stand of the Minister and partisans. Such debt structure deal is most likely not sustainable per the Minister’s calculations of the country's desired macroeconomic model and its realization timeframe. Therefore, the Minister is taking Argentina-IMF deals ransom (no new deals) until the restructuring of Argentina’s debt is finalized with private credit international (external) creditors.<sup>52</sup>

## 2. Too little, too late? Preference vs. priority

The 2001 Argentina debt restructuring has come to be known as a “saga”. A long narrative of heroic achievements.<sup>53</sup> A seductive story on dull financial matters. A perceived sassiness of Argentine life and policymakers, also on popular myth, shining through.

So, certainly to amusement but no surprise to creditors, in this Council of the Americas’ convening (a creditors’ forum), the Minister conclusively stated that while the *preference* is for the

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<sup>51</sup> A Conversation with Argentine Minister of Finance Martín Guzmán, Youtube Americas Society/Council of the Americas (Jun. 23, 2020), <https://youtu.be/8G1EWGPbZy8>.

<sup>52</sup> Id.

<sup>53</sup> See Merriam-Webster, *Saga*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/saga>.

resolution of the present debt crisis sooner rather than later, the *priority* is to resolve the crisis in a way that works for the whole country.

Argentina, and his Minister of Economy on his pre-office work and discourse on “Too little, too late” sovereign debt restructurings, has successfully driven international campaigns on the hazards to the economic development of debt restructurings that come too late and address too little of the debt stock of a state.<sup>54</sup> If now as a politician economist, the Minister yet commits to his intellectual work on sovereign debt restructurings and their economics, the priority of the Minister would equate his preference. Resolving the sovereign debt crisis in a way that works for the whole country would entail resolving the present debt crisis sooner rather than later.

Creditors such as Gramercy share the “too little, too late” concern. Too little, too late is also not positive for the economics of the creditors in Argentina’s debt. One of Gramercy’s “principles for successful debt solutions” in its Argentina’s 2020 restructuring asseverates that: “Implement a solution (considering steps 1-4 above) in a timely and transparent fashion, while catalyzing a virtuous shock.” So, creditor and debtor, indeed share concerns for the timeliness of debt restructurings. Its focus on “catalyzing a virtuous shock” certainly a concern with debt sustainability.<sup>55</sup>

However, in Argentina’s 2020 restructuring, Gramercy may state that Argentina is violating three other fundamental “principles for successful debt solutions” (1) “Determine the material challenge/problem” (2) “Solve for that problem” (3) “Do not try to solve problems that do not exist or that provide limited benefits when solved” (4) “Do not create new problems”. Gramercy proposes that Argentina’s debt is illiquid and not insolvent. Argentina’s too little, too late potentially being a wrong problem definition by Argentina and its policymakers.<sup>56</sup>

## Conclusion

As Argentina enters a new sovereign debt restructuring saga, many, including its Minister of Economy on pre-office work, have asked if this restructuring would be different from the 2001 restructuring or if it would be too little, too late?

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<sup>54</sup> Guzman, Martin et al., Too little, too late, New York, Columbia University Press, 2016.

<sup>55</sup> Gramercy, Argentina 2020: The Path to a Successful Sovereign Debt Resolution, Gramercy (March 19, 2020) ,[https://www.gramercy.com/2020/03/2020\\_argentina\\_sovereign\\_debt\\_resolution/](https://www.gramercy.com/2020/03/2020_argentina_sovereign_debt_resolution/).

<sup>56</sup> Id.

This short paper analyzed a recent public Council of the Americas' intervention of the Minister. In his intervention, the Minister argued that this time around is different due to a different debt structure and substantiated this statement with three arguments.

The paper concluded that while the diverging debt structures argued by the Minister may hold at a macro level, they converge at a micro level. This time is not that different, and if the principles of economics of the intellectual commitment of the Minister reign, his restructuring preferences, and priorities should also converge. Resolving the sovereign debt crisis in a way that works for the whole country would entail resolving the present debt crisis sooner rather than later. Otherwise, it would be too little, too late. S.D.N.Y. litigations would follow suit. At court, the economics of states are no longer at the forefront. Common economics would have not been found. At this point, politics would have reigned over the pertinent economic theories. The law of contracts ought to prevail.