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SUGGESTED TITLE: ARGENTINA, THE WHIPPING BOY OF INTERNATIONAL ARBITRATION

"Some multinational companies take over our natural resources, privatize basic services, fail to pay taxes and then, when they have no arguments in their defense, they go to the so-called ICSID. And then, in that World Bank tribunal, no country wins against the multinationals. So why do we need an ICSID where only the multinational companies can win?"

President Evo Morales of Bolivia

[…] the vultures' biggest target yet — Argentina. Hardly one of the world's poorest countries, Argentina is a self-confident Latin powerhouse with a booming economy. Its heated struggle with the vultures is being watched by investors around the world. The outcome will reverberate in global capital and financial markets and influence the behavior of dozens of other governments. Debt forgiveness may have captured the imagination of Hollywood activists, but debt collecting is still a critical part of how the world's financial system works, and Argentina is putting that part of the system to the test.

Foreign Policy, July 1, 2007, the debt frenzy; Vulture funds, Bosco, David

"This is a threat to the entire international system of lending to developing countries. It's a threat to the flows of business investment to developing countries, and, it is very important that the United States and The European Union say to Argentina: "No! You cannot behave differently to every other country which defaults and expect to enjoy access to ***our*** *capital markets, [and] expect to enjoy any special trade concessions as they do in the United States under the General System of Preferences. You must play by the rules as a responsible member of the Global Economy."*

Robert Schapiro, Co-founder/Chairman, Sonecon LLC, (Economic Advisers/Lobbyists),
Co-Chair American Task Force Argentina
Former Clinton Administration Undersecretary for Commerce,
Speaking about the Argentine default on "Bloomberg on the Markets"

BACKGROUND

On the 4th of February 2008, news came from over the wires from Rome that the World Bank had appointed Robert Briner to head up an arbitration tribunal to decide yet another claim against the Argentine government, this time by Italian corporate lawyers. The arbitration will be held in the Washington-based "International Centre for Settlement of Investment Disputes" (ICSID), an obscure World Bank arbitration forum[1], obscure that is, outside of Latin America. Mention the "ICSID" in London or Melbourne and you will most likely get a blank stare of incomprehension, in La Paz or Buenos Aires they are more likely to know what you are talking about. ICSID activities are commonly covered in Latin American dailies.

Argentina is the ICSID's best customer and ICSID represents a significant economic agent in Argentine. A single negative ruling from the ICSID can costs the Argentina Public hundreds or thousands of millions of US dollars, equivalent to a significant tax loss or the price of constructing many much needed hospitals. This latest claim from Rome is for a cool US$4.4Bn.

This article takes a looks at the role of this World Bank arbitration committee looking at Argentina and Latin America in a political, legal and especially in a financial context.

THE ITALIAN LITIGANTS

The Italian legal consortium refers to itself as "Task Force Argentina" (TFA)[2]. Headed up by the Italian corporate law firm *Grimaldi and Associates*, the Task Force Argentina[3] has legal partners in Washington and Buenos Aires. Their clients are called "hold-outs" because they are owners of defaulted Argentine bonds and held out against an offer by Argentina to convert them to something more liquid.

The name "Task Force" one gets an image of some UN aid workers loading up with milk powder and tents and shipping out across the South Atlantic to clean up after a tsunami or a hurricane. Quite the contrary! Neither the Roman Task Force Argentina nor its US-counterpart — The American Task Force Argentina[4] — are flying south with care packages. These *task forces* don't come with aid, instead they bring a whole new meaning to the term "clean up."

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1 In Spanish: El Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI)

2 Italian Task Force Argentina: http://www.tfargentina.it/ similar US pressure group http://www.atfa.org/

3 Yes the name is in English (not Italian or Spanish) which may say something about the intended audience.

4 The American lobbying group of the similar name is an all-star cast of Bill Clinton-era lobbyists and ambassadors. They are not directly involved in the Italian suit but fight the good fight from Arlington Virginia. They are supported by Elliott Associates a vulture capital fund affiliated with NML a DART family vulture fund.

In fact this task force does not even have to come South to Argentina to litigate their claim, the court they have chosen is in Washington D.C. However the ICSID is rather busy right, the TFA will have to take a ticket and stand in line.

TASK FORCE ARGENTINA AND THE ARGENTINE FINANCIAL CRISIS

The TFA represents Italian hold-outs, funds that hold Argentine sovereign bonds, i.e. they bought Argentine national debt way back when (or more recently at a discount). Argentine sovereign bonds are risky investments but they come with high returns, in economics this is referred as a risk/reward tradeoff. A *hold-out* is the owner of a bond in default who refused to accept deals to buy out the defaulted bonds made by the country who issued the bond, in this case Argentina.

When Argentina defaulted in 2002 its bonds lay in limbo till someone could deal with them. Robert Lavagna (a professional economist turned politician) was chosen by former President Nestor Kirchner in 2004 to broker a deal. His task was to clean up after the largest national default in World history, the coffers were bare, and his offer was none too generous[5]. Bond holders were offered a deal which paid about a third of the face value of the bonds and no interest. Most accepted, however some, including these Italian "investors" decided to hold out for a better offer. In bond markets defaulted bonds are referred to as "distressed debt". Rather like shares of worthless companies they are not worth much. This leads to "secondary consolidation", vulture funds buying up these bonds on the cheap. Vulture capital firms make a business of buying up distressed bonds until they have enough to make it worth their while to pay the corporate lawyers to take Argentina to court. This kind of litigation has happened to Argentina in the past but this time it is different.

Vulture capital funds are more than a smart play on words[6], they are the Repo' Men[7] of the international sovereign bond market. Their tactics are even more violent than repossessing (stealing) a vehicle from the street when an owner falls behind in their payments. A Repo' man might break into the vehicle and drive it back to the seller's lot which means the owner has to take the bus the next day. Vulture funds have tried tactics such as putting a lien on Argentina's publicly owned National Reserves held with the US Treasury, this can lead to shortages of funds for essential social programs. Vulture funds buy up unwanted government bonds of poor countries for cents on the dollar then hire international law firms (and lobbyists) to press for full face value, plus interest. They are more inclined to do this if the economy is in recovery. The TFA are doing just that pushing for the full face value of the "tango" bonds with interest in the ICSID case.

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[5] Nestor Kirchner offered the 450,000 Italian bond-holders an offer for their US$14Bn. In bonds on the 12th Jan 2005, holders of the US$5.5Bn accepted the offer, the others are the hold-outs

[6] A distortion of the term *venture capital*

[7] "Repo man" is an Alex Cox movie from the Eighties which chronicles the lives of people whose job it is to repossess vehicles whose owners have fallen behind in their payments.

With the go-ahead from Washington, the president of the TFA in Rome, Nicola Stock, was ebullient. He expressed great satisfaction at overcoming the obstructions that he said were put in place by Argentine defense lawyers to block the suit getting to the ICSID.

THE ARGENTINE CASELOAD WITH THE ICSID

The Argentine Inspector General[8] receives ICSID notifications of pending cases. He's extremely busy these days. Argentina currently has thirty-four cases pending in the ICSID, most for quite astronomical figures. This means Argentina alone faces more that one quarter of the World's total pending caseload in the ICSID!

To put this in perspective, the ICSID has 155 members. There are currently 123 pending cases. More than one half of those pending are against Latin American governments. Interestingly Brazil, Latin America's largest economy, faces no litigation in the ICSID. It can't! It isn't a member of the ICSID. Brazil has signed Bilateral Investment Treaties but its legislature never ratifies them, it is thus immune in this court.[9]

Why?

The 'I' in FDI (Foreign Direct Investment) is what the 'I' in 'BIT' (Bilateral Investment Treaties) is designed to protect. To do this bilateral investment treaties protect "Investment" from the source country in the destination country, in this case Italian investments in Argentina. At least that is the theory.

Compare Latin America's 63 outstanding cases with the World's leading centers of investment the OECD. All OECD countries are members of the ICSID but they face just 11 pending cases (four against Mexico, four against Turkey, one against Canada, the Czech Republic, and the Republic of Slovenia). None of the original 15 Member States of the European Union have pending cases[10] against them, nor does the United States. The US has defended itself in the ICSID four times and has even won twice (which is statistically very unlikely).

OECD MEMBERSHIP INVESTMENT

The OECD is an invite only membership club. Membership of the ICSID is encouraged, (in some cases required), so as to be able to participate in Bilateral Investment Treaties (hereafter BITs). Much of the internal discussions over foreign investment within the OECD relates to investments in

[8] Spanish: "Procurador General de la Nación"

[9] It should be noted this does not result in Brazil having problems attracting Foreign Direct Investment (FDI).

[10] Depending on jurisdiction European regional courts can be more appropriate for litigating between EU countries.

the OECD countries themselves. It is revealing to monitor the discussions within the OECD that speak of protecting them from inward investment in key "strategic sectors." There is a tacit recognition for the need for limited protectionist concerns around sensitive issues such as *security sectors*, *energy security* and investments within their own borders by Sovereign Wealth Funds (SWF). Some of these issues even creep into their BITs.

OECD discussions replete with terminology like "*freedom of investment*"[sic.] contrast sharply with the recent protectionist reality inside OECD countries. Examples include the decision by the United States to prevent FDI in *strategic* US port-handling facilities and in the oil sector[11].

WHAT IS THE ICSID?

For an excellent introduction to the ICSID, its shortfalls and alternatives to resolving investment litigation, please see the revealing report entitled "Challenging Corporate Investment Rules"[12] by US NGO's Food and Water Watch and the Institute for Policy Studies 2007.

In an effort to put a face to this obscure arm of the World bank this analysis focuses on the types of cases being brought to the ICSID, which companies are bringing these cases and for what kinds of "investments", and which are the countries facing the litigation. The following tables examine the diversity of cases pending in the ICSID in February 2008 with an emphasis on Latin America[13].

Many "pending" cases are listed as being in "annulment" proceedings (more on this later). This first set of tables below analyses the range of cases by region country and industry sector. In the second section you will find an analysis of the Argentine caseload related to recent Argentine economic history and the Bilaterals signed by Argentina in the 1990's.

SUB-DIVIDING CASES BY REGION

Who is claiming against whom?	Number of cases
Corporations/Individuals suing states and state agencies	122

11 See discussions on this topic in the OECD Global Fora on International Investment (GFI) on the OECD website http://www.oecd.org/ particularly revealing are the round table discussions, "NATIONAL SECURITY AND "STRATEGIC" INDUSTRIES"

12 http://www.foodandwaterwatch.org/water/pubs/reports/corporate-investor-rule

13 This list of pending cases is compiled from the ICSID section of the World Bank website http://icsid.worldbank.org/ICSID/Index.jsp on february 15th. 2008

Who is claiming against whom?	Number of cases
States suing Corporations	1

World By Region	Number of cases
Latin America	63
Former USSR Republics	23
Asia including the Middle East region (non-USSR States)	14
Africa	14
Others (many OECD)	9

Latin American Countries ranking by country	Number of cases
Argentina	34
Ecuador	7
Venezuela	5
Mexico	4
Peru	3
Paraguay, Bolivia, Costa Rica	2 each
Honduras, Guatemala, Panama, Grenada	1 each

The situation that Argentina, Latin America and most of the developing world currently faces, represents an entirely new and somewhat perverse shift in power. A new legal mechanism is been used to allow for litigation between corporations and sovereign countries and the countries being litigated against are mostly poor ones. Unlike the UN and the WTO and centuries of diplomacy this mechanism allows multinationals to act directly against sovereign states. Sovereign nations now find themselves forced to defend lawsuits by foreign corporations in foreign Jurisdiction (The ICSID

in Washington D.C., USA). This bring ceding sovereignty to an entirely new level. This new concept parallels the shift in power, not from sovereign state to globalized "modern" state but from State to transnational corporation. Diplomacy has always been closely aligned with domestic commercial as well as domestic political motives. Corporate influence back home has been shown to be extremely influential in diplomatic and even military actions, but the ICSID takes diplomacy out of the picture and allows the multinational to act directly.

WHY BILATERAL INVESTMENT TREATIES?

Bilateral Investment Treaties are typically signed between developing countries and OECD national investment centers. The clauses protect corporate investments in both countries. Not all bilateral treaties mandate the jurisdiction over claims, and still fewer mandate that the ICSID is the exclusive forum but some do.

Bilateral means *two-way* meaning BITs theoretically protect investments made by firms in either direction. The problem is that Bilaterals are one-way, most flows of investment travel from OECD countries to developing countries so OECD investments benefit from the "bilateral" protection. Developing countries, in effect, accept ceding national jurisdiction in the case of an investor claim.

Given that Bilaterals are, in effect, more unilateral than bilateral (especially in the case of investment protection) why would a developing country sign such a treaty? The fact is that some do not but they are the exception rather than the rule.

The mainstream economic argument most prevalent in the neoliberal 1990's cited the need for investment in developing countries as reason enough for them to sign bilateral treaties even though those treaties were written on investor's terms. While such treaties do protect investments they do not protect the rights of taxpayers.

In the commercial sector the argument is that investment brings jobs, technology and much needed hard currency into investment-starved developing countries to foster internal growth. The fact is that though many developing countries have relatively high savings rates, they often have weak currencies and an aversion to paying taxes so their savings are often placed abroad. The money is invested in other countries economies and this causes a domestic shortage of credit. The idea is that (at least green field) long term international investment is a good thing for the economy and to attract such investment signing a bilateral is warranted.

While it is reasonable, and arguably necessary, to encourage flows of capital and at least theoretical transfers of technology to industry in developed economies, the nature of the investment is important. A bilateral treaty that is used as the basis for vulture capital litigation is not the same as that which one might use for building a major infrastructure project such as a train service or an airport. However some BITs facilitate both kinds of "investors".

Most BITs specify the jurisdiction in which commercial litigation can take place and OECD diplomatic services strongly encourage the prioritization of jurisdiction where they have more influence

and capacity to litigate. The ICSID is becoming more prevalent. Legal experts suggest that ceding national sovereignty over public coffers is taking global financial dependence to another level. When a country is sued the taxpayer eventually pays. The ICSID represent not only a change of jurisdiction (ceding legal rights to a foreign legal forum to a suit from a foreign power), as is the case in the WTO for example. The ICSID takes one step further ceding sovereign control over foreign investments within its borders (even in nationally sensitive industries or resources) to BITs and the ICSID forum allowing multinational corporations to sue a government directly. This is without precedent.

ARGENTINE BILATERAL TREATIES SIGNED AND UPDATED

A bilateral trade treaty should be just that, a treaty that governs trade between two countries[14]. Some Bilaterals have clauses relate to international investment too, but in other cases they simply deal with the trade of goods. In economics "investments" are treated as a special kind of "service" and BITs are signed between countries to protect these "investments".

Argentina signed many Bilaterals and BITs in the early nineties. It also changed extant Bilaterals upgrading them to make them more "modern". It is always easier to convince a cash starved trading partner of the value of a BIT, especially if the trading partner is deeply in debt and hugely dependent on investment. It is easier still if the partner's government is rife with corruption.

1990'S ARGENTINA, THE MIRACLE OF MENEM

In the 1990's Argentina finally reached the zenith of its privatization phase, planned since the 1976 military coup by the Junta Minister for Economics, Jose Martinez de Hoz.

The privatizations were presided over by the IMF and President Carlos Saul Menem (two term president from 1989 to 1999). Menem's Presidency was the golden days of the peso parity with the dollar (1:1). Argentina's debt had reached critical and un-payable levels. The IMF said that privatization was the only way out. Politicians were convinced to comply using bribery. Many knew it could never last but mounting debt meant Argentina was having a fire sale of its national industries and there were willing investors especially from Europe. The BITs protected these investments but the ICSID was crucial too.

90% of all nationally owned assets were privatized and sold off to mainly European and US companies. These included the most critical jewel in the crown which went to Spain's oil multinational Repsol, Argentina's national oil and gas company YPF. President Menem also privatized the water

[14] They are often referred to as WTO+ agreements as they add rules to trade between two countries which are above and beyond what those countries are bound to as members of the WTO.

services concessions, telecommunications (including the television spectrum), the national highways, the national mail, among many others. There is little left to sell.

The artificially high dollar-peg of the Argentine peso had various effects: it made the local Argentine market attractive for investors from abroad selling services within Argentina. On the other hand it should have made the privatized firms in Argentina expensive as they were priced in overvalued pesos. In reality prices were reduced due to high "country risk", debt for shares transactions, and corruption. It does not appear that signing BITs effected "country risk" significantly.

The high peso also had very negative effects on exporting Argentine companies. They found their goods and services difficult to sell abroad and at the same time found it difficult to compete with cheaper imports. Rising imports (helped by lower import duties also implemented during Menem's term) worsened the economic position of the Argentine economy increasing deficits and foreign debt and this became a vicious circle of public and private external debt leading to the crisis and default in January 2002 (see figure 1).

In an attempt to improve the image of Argentina, and to compete for inward investment from abroad, the Argentine Chancellery signed or renewed a number of bilateral trade agreements and BITs with key trading and investment partners including (United States — various in the 1990's including specific BITs, Germany 1995, Spain 1998, Italy 1999 etc. etc.) and most important, President Menem signed Argentina on as a member signed of the ICSID in 1991. ICSID arbitration was mandated in some bilateral agreements or in privatization contracts. The die was cast.

Country	Signature Date
Italy	May 22 1990
Belgium-Luxembourg	Jun 28 1990
United Kingdom	December 11 1990
Germany	April 9 1991
Switzerland	April 12 1991
France	July 3 1991
Poland	July 31 1991
Chile	August 2 1991
Spain	October 3 1991

Country	Signature Date
Canada	November 5 1991
United States of America	November 14 1991
Sweden	November 22 1991

Argentine bilateral treaties signed during the first two years of President Menem's 1st term
Source http://icsid.worldbank.org/icsid database of bilateral investment treaties

Signing the Bilaterals opened up Argentina to the litigation explosion it now faces. Many lawsuits are the result of foreign investors litigating for dollarized income from their investments while the rest of the economic system has been peso-ized at the currently stable rate of three pesos to one dollar. Of course local industry, what is left of it, has no such recourse to alternative legislative protection against currency risk. It can be argued that this is a blemish on the pure complexion of neoliberal perfect competition. It gives multinationals an unfair competitive advantage in the Argentine market.

THE COUNTRY RISK PROVES WARRANTED

Within two years of the end of President Menem's term economic chaos reigned in Argentina and between December 10th. 1999 and may 25th. 2003 there were five acting heads of government. None completed their term. The government entered into default first during the eight-day tenure of Adolfo Rodriguez Saa. The parity mechanism failed, the peso broke with the dollar, the banking system failed, poverty and indigence increased to never before seen levels. In short Argentina faced total societal and economic meltdown. The period is euphemistically referred to as "The Crisis".

The Argentine Crisis isn't over yet. However Argentina is in recovery and the foreign corporations that wish claim "losses" related to expected are litigating to make good their assumed losses in the ICSID (see table below).

WHO IS SUING ARGENTINA AND WHY?

The following table breaks down the pending suits against the Argentine Government by sector listing the names of the companies that are claimants. Many of the corporations litigating in the ICSID are the same firms that were allocated privatized public service contracts.

Sector	Claimant Companies
13 x Oil, Gas or Energy	AES Corporation & Camuzzi International S.A. & Gas Natural SDG, S.A. & Pan American Energy LLC and BP Argentina Exploration Company & El Paso Energy International Company & Enersis S.A. and others & Electricidad Argentina S.A. and EDF International S.A. & EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A. & Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. & Total S.A. & BP America Production Company and others & LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. & Compañía General de Electricidad S.A. and CGE Argentina S.A.
9 x Water or Sewer Svcs.	Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A & Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A & Azurix Corp. (water division of Enron corporation) & SAUR International & Compañía de Aguas del Aconquija S.A. and Vivendi Universal & Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa & Impregilo S.p.A. & Giovanni Alemanni and others & Azurix Corp. (second suit)
2 x Highway Construction	Wintershall Aktiengesellschaft & HOCHTIEF Aktiengesellschaft
2 x Telecommunications	TSA Spectrum de Argentina, S.A. & Telefónica S.A
2 x Information Services	Siemens A.G. & Unisys Corporation
3 x Debt instruments[sic.]	Giovanna a Beccara and others, Giovanni Alemanni and others and Asset Recovery Trust S.A.
1 x Motor vehicles	Metalpar S.A. and Buen Aire S.A. &
1 x Insurance	Continental Casualty Company
1 x Leasing	CIT Group Inc.

THE ARGENTINE DEBT CRISIS

The Argentine debt tragedy is infamous in the annals of international debt. The debt was relatively low the middle of the seventies but increased 480% between 1976-1983 under the economic leadership of the Junta's Finance Minister[15] Jose Martinez de Hoz. Minister Martinez de Hoz came

15 Minister José Martinéz de Hoz is from a landed Argentine family which includes the founder of the Argentine agricultural society: "La Rural". He is western trained economist and friend of David Rockefeller. The IMF provided their first loans to his ministry during the Junta/Dictatorship government within a week of the military coup d'État. Minister Martinéz de Hoz was brought to justice after the junta fell from power but was pardoned by President Carlos Menem who finally completed Minister De Hoz's plans to privatize almost all Argentine national industry & services. These included the national mail, water, sewage, gas, electricity, tele-

to power espousing a classic neoliberal economic plan. He suggested that the economy should be opened up to foreign investment and that the state should take a secondary role trusting the economy to the market[16]. He promoted privatization of state industries from day one, using the classic theoretical assertion that private companies are less corrupt and inherently more efficient.

Would that this were true!

In the early Eighties the disastrous war with Margaret Thatcher in the South Atlantic brought about an incomplete return to democracy and little change in economic policy (much the same as the recent experience in Chile after Pinochet). The rest of the decade was also bad for Argentina not just in terms of debt growth (see Figure 1) but in terms of negative economic growth too. The same was true for most of South America but especially those countries front-loaded with foreign debt in hard currencies. The eighties were known in South America as the "lost decade" as debt rose with high global interest rates.

In the early part of President Menem's first term the debt growth was stabilized by privatization of the state oil company YPF and almost all of the Argentine infrastructure and utilities. The respite (1990-1993) was short-lived. In 1994 the debt took a severe turn for the worse that eventually forced the country into default in the so-called crisis of 2001/2002. Never before was so much money defaulted by one country in one fell swoop. The size of the default (US$82Bn) is even more extraordinary when compared with the national product of Argentina or its population of less that 40 million people.

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phones, and YPF, the national oil company. These privatizations are the indirect cause of nearly all of the current law suits facing Argentina today in the ICSID. The money borrowed by the Argentine state and the private debt made public during the dictatorship is approx. 20% of Argentina's current public external debt.

The corporate law firm Grondona Benites, Arntsen & Jos´é Martinéz de Hoz, (Jr.) (Buenos Aires) are among the legal partners prosecuting Argentina in the ICSID in the US$4,400 Million case representing Task Force Argentina: Italian Holders of Argentine Sovereign Tango v. Argentina Republic, ICSID, n° ARB/07/5. http://www.practicallaw.com/1-101-1605

16 See p 21, Tomo 1 Ministry of Economics memoir: "Memoría 29-3-1976 - 29-3-1981"

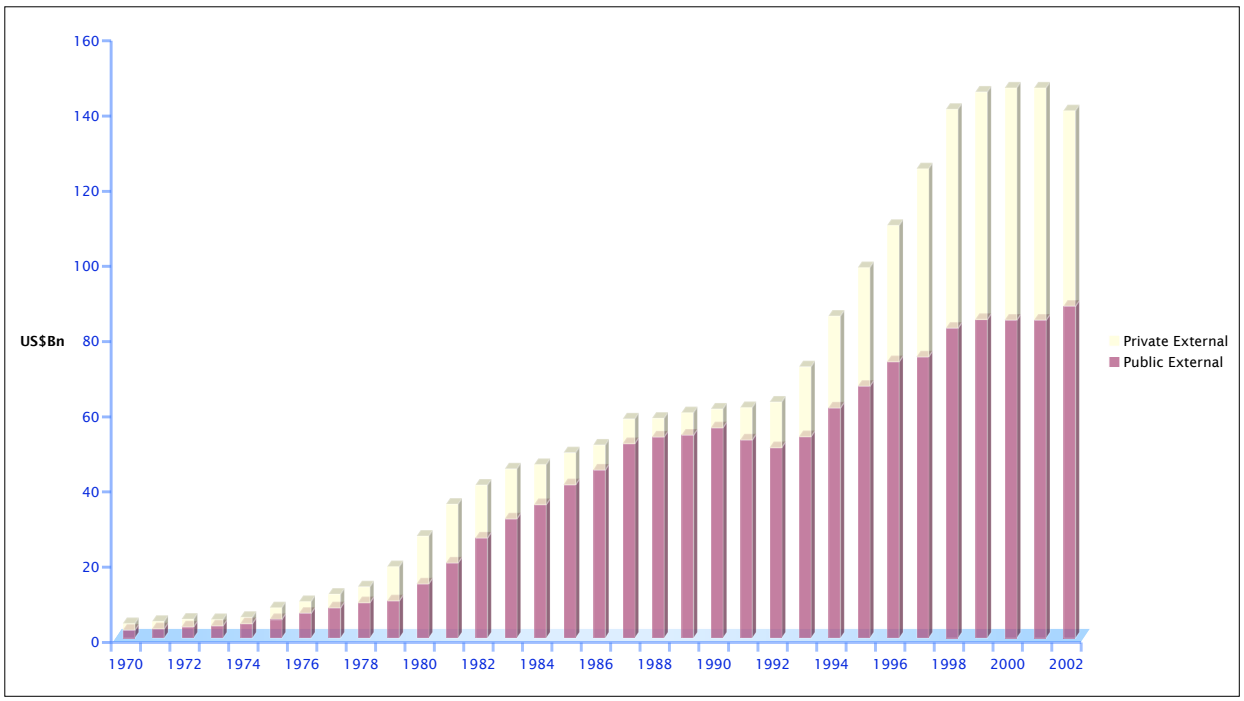

Figure 1 Argentine Sovereign and Private intl. Debt 1970 to 2002

THE DEFAULT

Argentine bondholders with a face value of approximately USD 80,000 million — approximately half of Argentina's foreign debt — were forced to take a haircut on the bond's value. A "Haircut" is a financial term for a loss in face value on bonds (usually by this time rated as "junk"). The haircut is offered to the bond owners by the bond issuer for their bonds in default. Haircuts are common occurrences in high yield bonds that are a speculative investment. High risk brings high payout. Sovereign bonds have defaulted before but the losses in face value of the Argentine bonds in percentage terms were quite severe.

Robert Lavagna, President Kirchner's Minister for Economics at the time, engineered the offer referred to as the "Argentine default" ("mega canje", "mega exchange"). The haircut offered by Lavagna was a buzz cut recognizing the severity of the crisis. The offer (about 30% of face value of the bonds) was accepted by about 60% of the bond owners. The rest held-out or sold their distressed bonds to vulture funds.

In some cases the vulture funds were seeking enormous compensation for what were in fact other people's losses. In the infamous Dart Family vulture fund case (litigated in New York and not in the ICSID) a demand of approximately US$750 Million was made against Argentina. It was first granted

then successfully appealed. Hundreds of similar lawsuits are currently underway in Argentine and foreign courts (many in New York).

LEGAL ARGUMENTS

It is clear that protection of investments abroad (commercial and financial) is a positive thing for the investors and, potentially, also for the state in which the investment is made. In the case of foreign debt the problem goes beyond the issue of jurisdiction of the claim, or the legitimacy of a debt, the problem itself is a difficult one and it is complicated by the fact that the owners of the bonds often reside in different jurisdictions[17].

The state cannot restructure its debt unilaterally without significant damage to its financial reputation therefore it needs to try to renegotiate as Argentina did. However this implies that the restructuring plan be accepted by the various owners of the bonds which is difficult to co-ordinate and leads, typically, to a division of the groups into those who accept the offer and the hold-outs (who do not).

There are also grave secondary issues with vulture funds whose business it is to buy up distressed debt and to litigate as hold-outs (typically holding out for 100%[18] of the face value of the debt which is at odds with any restructuring effort[19]).

Finally there are the issues of taxpayer's interests often being at odds with private interests. This can be because taxpayers eventually fund the payment of sovereign debt or because they too fund multilateral organizations such as the IMF (or the World Bank for that matter) which eventually take losses not to mention privatization.

SOVEREIGNTY ISSUES

Investment from abroad is an investment in a country with all the ensuing risks and legal jurisdiction that that entails. If a foreign factory is built (green field development) using Foreign Direct Investment (FDI) or simply bought out (as was more common in the privatization frenzy in Argentina in the

[17] The fact that there are many bond-holders in many jurisdictions leads to the need to coordinate an offer which does argue for common jurisdiction and coordination. The question is not that coordination is bad simply what form of coordination is appropriate and fair.

[18] Investors are attracted to emerging market debt because of the returns that it offers as a risk premium. If the risk is assuaged by a litigation friendly system that enables (even encourages) vulture activity then the arbitration system is clearly distorting the risk and at odds with the needs of both the bond-holders and the sovereign state.

[19] The practice of litigating for someone else's debt has been recognized as problematic for centuries and has lead to laws against such "Champertous" behavior.

1990's). The foreign investor is investing within the borders of the country, which, it can be argued, means they should be bound by local laws[20]. The corporation, it's workers, many raw materials, the infrastructure the company uses and the taxes it pays locally are in the country in local currency. The customers too pay with (and earn) local currency.

More importantly from an economic competitive standpoint, local investment made in local competitors do not have recourse to an alternative legal framework like the ICSID. The question, therefore, is why should foreign laws guarantee the investment using BITs and/or ICSID litigation? Does this give unfair advantage to foreign direct investment when compared to domestic investment?

LOCAL LAW: THE CALVO DOCTRINE

Whatever the legal arguments are the presence of alternative jurisdiction is problematic and in the case of Argentina there are efforts to question the legitimacy of ICSID jurisdiction on constitutional grounds. In a Latin American context there is also the precedent of the Calvo Doctrine that suggests that local jurisdiction is preferable.

Carlos Calvo was an Argentine diplomat, historian, and specialist in international law born in Buenos Aires in 1824. His diplomatic career spanned many European capitals representing both his homeland and Paraguay. He is best remembered for his contributions to international law. His great work, "The Theoretical and Practical International Law of Europe and America", came out in 1863, he also compiled fifteen volumes of Latin American treaties so, it can be said, was an expert on international treaties. His theories on sovereignty came to be called the "Calvo Doctrine" and have been incorporated into many Latin American constitutions. This doctrine states that people living in a foreign nation should settle claims and complaints by submitting to the jurisdiction of local courts and that foreign nations should refrain from using neither diplomatic pressure nor armed intervention. He justified his doctrine as necessary to prevent the abuse of the jurisdiction of weak nations by more powerful nations.

One suspects Dr. Calvo would turn in his grave if he heard of BITs and the ICSID.

CONCLUSION

It should be apparent that the use of international courts and arbitration has its advantages and disadvantages but like many of the Washington institutions the ICSID is facing a nationalist chal-

[20] Note that the country may have multilateral agreements with other states, such as Argentina's membership in MERCOSUR, which can influence jurisdiction but even within this context it cedes very little sovereignty on key matters and when it does it does only to its neighbors, so it can be argued, the reciprocity of such an arrangement is likely to be greater than might be the case with say a BIT with the United States or Spain.

lenge from Latin American countries. There have been calls to coordinate such a challenge among nations in Latin America but the current actions of Bolivia and Ecuador distancing themselves from the ICSID (and from Bilaterals in general) are motivated in nation interest and cannot be seen to be a regional movement. The question is what will Argentina do? Can it continue to resist the multination onslaught in the ICSID?

Many Latin American governments, at least in rhetorical terms, have been moving away from Washington Consensus economics and have distanced themselves from many of the Washington Institutions such as the IMF and the World Bank. It is argued that populist movements demonize many of these multilateral institutions for their own political gain, and this is certainly true, but calls for reform of these multinational institutions (the WTO included) are heard but seem to have been largely ignored.

The sentiment in Latin America is that national interests have been unduly damaged by the neoliberal experiment that began just a few decades ago. The resurgence of nationalism and regionalism is a global phenomenon and can be partially interpreted as a counterweight to global transnational influence (neoliberalism), it is just more obvious in Latin America and Latin America governments have been doing something about it.

Multilateral legal frameworks can be very positive instruments as evidenced by positive global sentiment for various arms of the United Nations (human rights, indigenous rights, health etc.), the Geneva Convention, Kyoto and the International Court for Human Justice. The ICSID has instituted some basic reforms including improved transparency but there is room for improvement. The problem is only partially the forum. Litigation in the ICSID is governed less by its own rules than by the BITs (and the corporate lawyers that argue them). At a minimum it would seem that these treaties may need to be adjusted[21] to reflect the experience of their benefits and their problems to date. The effect of a BIT adjustment typically takes ten years to come into effect. This is a problem as it could be argued Argentina does not have ten years.

Recent incarnations of economic globalization have not been kind to Argentina and some of its neighbors. They have not yet recovered from the debt crisis that drastically reformed their economies. It seems inappropriate that the ICSID should be used as an instrument to punish them for their recovery.

WHAT IS AN INVESTMENT?

These current suits facing Argentina are extraordinary because of the jurisdiction. The ICSID is being tasked to reach a decision on the value of the bonds after the default. Legally speaking the ICSID may or may not be a suitable forum for dealing with sovereign debt defaults. Even less so for claims made by hold-outs and their associated vulture funds.

[21] For some modern thoughts on adjustment see: http://www.iisd.org/

Normally sovereign debt issues are worked out by meeting the major creditor nations called the Paris Club. A debtor nation normally meets a certain number of prerequisites and then schedules a meeting with the Paris Club (about every six weeks) to resolve the latest international debt crisis[22].

As each country has influence over its own IFI's with the help of the IMF the deal is worked out and all go home happy until the next debt crisis. Argentina is anxious to negotiate with the Paris Club (again) but the hold-out litigation gets in the way of such negotiation.

A vulture firm cannot go to the ICSID to litigate against a country for defaulted debt unless the BIT between the two countries counts a bond purchase as an "investment". In the case of Argentina the BIT between Argentina and the USA does not but the BIT between Argentina and Italy does.

There are examples of multinational firms creating a presence in a country to take advantage of the fact it has a BIT with a third country who receives their claim. Both Bechtel and ENTEL[23] established a "post office" presence in Holland to sue Bolivia using the Holland-Bolivia Bilateral. It is not clear whether this is the case in the TFA litigation against Argentina (using the Italian-Argentine BIT). Until a full list of plaintiffs is made public it will remain difficult to distinguish between pension funds and vulture fund litigants.

The ICSID is a strange forum for commercial and for debt litigation for many reasons:

- It is powerful and a call for payment is backed up by the clout of the World Bank
- It is a direct forum for a company to sue a sovereign state for their public funds
- Major public interest issues affected by contracts are rarely aired
- Three people make the decision based on prosecuting evidence from a group of corporate lawyers and defending state lawyers (amicus briefs etc are discouraged)
- The decision is irrevocable, i.e. there is no appeals process
- The ICSID assigns the State the role of just another commercial partner[24]
- There is an annulment process that can (rarely) be invoked after a decision has been reached in the favor of the plaintiff and the defendant wishes to annul the decision. The annulment procedure is very strict and even if irregularities are discovered while the annulment procedure investigation is in process (as happened in the Argentina vs. CMS gas case which Argentina lost) the annulment committee cannot overturn the case unless the irregularities fit in the narrow category of problems that are grounds for an annulment (again, the lack of appeals makes this an issue)

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[22] For the standard treatment of debt see the following: http://www.clubdeparis.org/sections/termes-de-traitement/termes-de-traitements

[23] For more details on the recent ENTEL case see: http://www.corporateeurope.org/bolivia-eti.html#note11

[24] For more information see: Leubuscher,S., The Privatisation of Justice: International Arbitration and the Re-definition of the State, June 2003. http://www.fern.org/pubs/reports/dispute%20resolution%20essay.pdf

- The ICSID is not designed to protect the rights of a citizen being sued, in the words of Yves L. Fortier QC, (a chairman on a board at ICSID).

> *"Commercial arbitration exists for one purpose only: to serve the commercial man."* [25]

The other reason that the ICSID might be a strange forum for such claims is that it is designed to be appropriate for commercial investment litigation. A sovereign bond is a sovereign debt instrument, it isn't an investment in the commercial sense; i.e. it isn't used to build a factory nor to buy a factory. Do bond-holders invest in the country whose bonds they buy, do their investments contribute to the economic function of the state? This has yet to be decided, it depends on the definition of the term "investment".

If a bond bought from a country to loan it money might be considered an investment (and it might not) it is difficult to imagine then a vulture fund buying up distressed bonds on secondary markets with the express purpose of litigating against a nation could be considered to be investing in the nation[26].

A CLOSING STATEMENT

While economists, politicians, diplomats, journalists, human rights experts and ecologists can debate the relative effectiveness of one dispute resolution mechanism over another, in the end the complexity of the system will mean we leave the last word to the experts and the lawyers. The author is not one to break with tradition.

> *Multinational Enterprises have effectively employed bilateral investment treaties and commercial arbitration to cripple the ability of developing States to improve their compliance with international human rights and environment norms, stabilize their land tenure regimes in order to regularize domestic capital formation, determine the best use of their natural resources and set basic public policy, and have used their contract rights to deprive already poor populations throughout the developing world of their customary rights to land, environmental protection, safety from private security forces within their own villages and access to justice. Given the enormous disparities in assets and power between the parties to those contracts and the important disadvantages developing countries face in the case of dispute, international investment contracts represent bargaining 'as much in the shadow of power as in the shadow of the law'. The result is not, there-*

[25] Fortier, Y., "New Trends in Governing Law: The New, New Lex Mercatoria, or, Back to the Future", ICSID Review, 2001, p.10-19. Cited in http://www.corporateeurope.org/bolivia-eti.html#note11

[26] (in this case via the ICSID)

fore, the neutral procedure praised by the supporters of commercial arbitration, but rather a privatization of justice, for the benefit of the few who can afford to pay for it.

Clearly, public intrusion is indeed required, and urgently, in order to 'confront the betrayal of our deepest ideals'.[27]

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[27] For more information see: Leubuscher,S., The Privatisation of Justice: International Arbitration and the Re-definition of the State, June 2003. http://www.fern.org/pubs/reports/dispute%20resolution%20essay.pdf