SOVEREIGNTY IN FRAMING CONTESTATION: ARGENTINA'S 2001-2016 LITIGATIONS AT THE SOUTHERN DISTRICT COURT OF NEW YORK

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Abstract

Can Argentina's 2001-2016 sovereign debt litigations at the Southern District Court of New York (SDNY) be understood as a chapter of its high stakes' political battles, and under frame contestations? What scholarship or policymaking value would such framing bring? First, this socio-legal paper describes the disputed landscape. Second, it establishes the sovereignty and sovereign debt nexus under New York law. Third, it intersects scholarships on frames and sovereign debt disputes. Fourth, the paper substantiates sovereignty as a master frame in sovereign debt litigations, and *pari passu* as a frame turning point. The transition point would enable the judge to fulfill his dispute settlement goals and bring holdout success—rendering the outstanding debt obligations no longer sovereign. The paper contributes to further understanding the critical roles of master and collective action frames in international sovereign debt disputes. It contributes to the framing literature and the socio-legal analyses of international law, international economic law and sovereign debt. SDNY litigations ex-ante, Argentina may have won the economic dispute. SDNY litigations ex-post, it may have lost the sovereign debt dispute resolution framing battle.

Keywords: sovereign debt litigations, frames, sovereignty, Argentina.

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LA SOBERANÍA HACIA EL ENMARCAMIENTO (*FRAMING*): PROCESOS JUDICIALES DE ARGENTINA (2001-2016) ANTE LOS TRIBUNALES DE NUEVA YORK[2]

Resumen

¿Pueden los juicios de la "deuda soberana" de Argentina (2001-2016), que tramitan ante los Tribunales del Distrito Sur de Nueva York (SDNY), ser entendidos como un episodio de batallas políticas de alto impacto y de un proceso de enmarcamiento (*framing*)? ¿Qué aleccionamiento o valores políticos podría generar este proceso de enmarcamiento? En primer lugar, este artículo describe el contexto y el conflicto relativo a estos procesos judiciales. En segundo lugar, establece cuál es la relación entre el concepto de soberanía y la "deuda soberana" conforme a las normas de Nueva York. En tercer lugar, contrapone la imposición de los "marcos de referencia" (*frame*) en los procesos judiciales de la "deuda soberana". En cuarto lugar, establece que la soberanía es el "marco maestro" (*master frame*) en los litigios de la "deuda soberana" y las cláusulas del *pari passu* constituyen un punto de inflexión en ese *frame*. Esta transición legitimaría la competencia jurisdiccional de los jueces de los Tribunales del Distrito Sur de Nueva York a las causas relativas a la "deuda soberana" y así garantizaría el éxito de los *holdouts* - interpretando que las obligaciones de las deudas pendientes dejarían de ser soberanas. Este artículo pretende contribuir al conocimiento del rol fundamental de los *master frame* y marco de acción colectiva (*collective action frames*) en los litigios internacionales de "deuda soberana"; también contribuye a profundizar los estudios acerca de los *framing* y los análisis socio-legales del derecho internacional, el derecho económico internacional y las "deudas soberanas". Entendiendo que en un análisis ex ante a la mencionada imposición del frame, Argentina podría ganar los juicios de la "deuda soberana" y que una interpretación ex post, podría perder los juicios de "deuda soberana" y la batalla del *framing*.

Palabras clave: litigios de "deuda soberana", marco de referencia (*frame),* soberanía, Argentina.

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SOBERANIA PARA O *FRAMING*: OS PROCESSOS JUDICIAIS DA ARGENTINA (2001-2016) ANTES DOS TRIBUNAIS DE NOVA YORK[3]

Resumo

As ações judiciais de "dívida soberana" da Argentina (2001-2016), que tramitam nos Tribunais do Distrito Sul de Nova York (SDNY), podem ser entendidas como um episódio de lutas políticas de alto impacto e um *framing*? Que disciplina ou valores políticos esse *framing* poderia gerar? Em primeiro lugar, este artigo descreve o contexto e o conflito relacionado a esses processos judiciais. Em segundo lugar, estabelece qual é a relação entre o conceito de soberania e "dívida soberana" de acordo com as regras de Nova York. Terceiro, opõe-se à imposição dos *frame* nos processos judiciais da "dívida soberana". Em quarto lugar, estabelece que a soberania é o *master frame* em litígios de "dívida soberana" e as cláusulas do *pari passu* constituem um ponto de inflexão nesse *frame*. Essa transição legitimaria a competência jurisdicional dos juízes dos Tribunais do Distrito Sul de Nova York para casos relacionados à "dívida soberana" e, assim, iria garantir o sucesso dos *holdouts* - interpretando que as obrigações das dívidas pendentes deixariam de ser soberanas . Este artigo visa contribuir para o conhecimento do papel fundamental dos *master* e *collective action frames* no contencioso internacional de "dívida soberana"; Contribui também para o aprofundamento dos estudos sobre *framing* e análise sócio-jurídica do direito internacional, do direito económico internacional e das "dívidas soberanas". Entendendo que em uma análise ex ante da mencionada imposição do *frame*, a Argentina poderia ganhar os processos de "dívida soberana" e que uma interpretação ex post poderia perder os processos de "dívida soberana" e a batalha do *framing*.

Palavras-chave: litígios de "dívida soberana", *frame*, soberania, Argentina.

[3] N.E. El título completo según la autora es: "SOBERANIA PARA O FRAMING: OS PROCESSOS JUDICIAIS DA ARGENTINA (2001-2016) ANTES DOS TRIBUNAIS DE DISTRITO SUL DE NOVA YORK"

1. Introduction

In December 2001, Argentina defaulted on its sovereign debt with significant local and international consequences (Nemina & Val, 2020; Gelpern, 2005). Consonant to the times, Argentina's government officials placed a bond exchange offer and responded to Southern District Court of New York (SDNY) claims on international holdout disputes. However, the bond exchange offer was market subpar (Edwards, 2015). Circa fifteen years of SDNY litigations would follow.

Post-default, Argentina fared well in the bond exchanges (Edwards, 2015) and economic developments (Weisbrot & Sandoval, 2007). Why did Argentina choose to engage in protracted international legal disputes with international holdout creditors, particularly at the SDNY?

An argument could be that Argentina required a commensurate holdout settlement for sovereign debt sustainability. Sovereign debt sustainability understood as "the capacity of a sovereign debtor to meet its debt commitments." (Guzman, 2018:1)[4]. However, Argentina was meeting exchanged bond payments.

Arguments for non-settlement included excessive hedge fund gains, compensated risks (on previous high bond interest rates) for other investors, inter-creditor injustice towards exchanged bonds, and future market discipline implications of a settlement. These fairness and discipline arguments would not sustain in dispute resolution.

Another plausible argument could be Argentina's Rights Upon Future Offers (RUFO) clauses in the exchanged bonds, which could have depleted economic restructuring gains if executed. However, after the RUFO clauses expired, Argentina held up on holdout settlements (Lopez, 2015).

[4] Sovereign debt sustainability is a highly contested concept. See Wyplosz, C. (2011). Two polarizing policy implications of unsustainable debt are broadly operationalized: austerity policies vs. deep debt relief. A conciliatory conception has not arisen.

During the litigations span, Argentina's economy had also been eventually slowing down (Vuletin, 2014). A preemptive continuous default on holdouts to maintain healthy economics was not a plausible non-deal justification.

Immediate economic arguments exhausted, Argentina elected to continue to face the holdouts at the SDNY (Vuletin, 2014), holding to its sovereign immunity from execution strategies, which had worked for over a decade.

2. The disputed landscape

2. 1. International sovereign debt financing and its challenges

Most countries have come to structurally rely on international financing. Since the 1990s' Brady plan sponsored by the US, a buoyant market of sovereign debt bonds has developed. This market is largely self-regulated.

New York law governs circa 70% of the outstanding international sovereign debt market volume (Tomz & Wright, 2013). Debtor states submit to the jurisdiction of New York law and courts – state and federal. Undoubtedly, the SDNY is the epicenter of litigious sovereign debt disputes.

Bond contracts stipulate these assets' financial and non-financial terms, including clauses for default events and dispute resolutions. During restructuring negotiations, creditors and debtors continue to evolve these contracts, including enhanced clauses. Given geopolitical sway and recurrent sovereign debt crises, countries of Latin America and Argentina particularly have also shaped most of these developments.

To reduce a perceived increased litigiousness of sovereign debt restructurings due to Argentina's 2001-2016 SDNY litigations, collective action clauses (CACs) are now standard in new issuances of New York sovereign bonds. Attempts at the International

Monetary Fund (IMF) and United Nations (UN) for an international dispute resolution mechanism, significantly sponsored by Argentina as it simultaneously battled international creditors in many courts of the world, obtained vast support of debtor states. Nevertheless, not the necessary support of creditor states. Additionally, sovereign debt restructurings are increasingly conceived as inseparable mixes of law, economics and politics (Gelpern, 2016).

2. 2. Argentina's sovereign debt moratorium and SDNY litigations

Argentina declared its debt moratorium in December 2001 (CNN World, 2001). Government officials will set their debt restructuring negotiation stand in the Dubai offer. The Dubai offer will be the base of the 2005 and 2010 bond exchanges. By all recounts, market aggressive offers that some saw as justified, others not (Gelpern, 2005). Circa 93% of investors will accept the aggressive terms. Circa 7% will sue all over the world and mainly at the SDNY.

Per SDNY records, claims against Argentina commenced shortly after the moratorium declaration. For example, *Lightwater Corp. v. Republic of Argentina* was launched in May 2002, five months post-moratorium. *H.W. Urban GmbH, et al v. Rep. of Argentina* was launched in July 2002, seven months post-moratorium. Cases in hundreds will be launched over circa fifteen years. They will be presided by Judge Thomas Griesa, a very senior SDNY judge[5].

In 2003, the first SDNY claims by infamous American distressed debt funds NML Capital Ltd. (NML) and Elliot Management Corporation (EM) would be launched. For example, *NML Capital, Ltd. v. Rep. of Argentina* in July 2003. This claim was raised one and a half years after the debt moratorium. Individual investors will also launch SDNY claims. For example, *Exposito v. Republic of Argentina* in December 2004, a claim from an Argentine

[5] For cases, see SDNY public records.

investor who eventually obtained a judgment satisfaction of $198,222. New claims will continue until the 2016 holdout agreements.

Over a decade of litigations, plaintiffs will customarily obtain money judgments that on Argentina's sovereignty prerogative will go on unsatisfied. NML claims will become the epicenter of attachment and execution claims. Argentina will not have assets in the court's jurisdiction that could be executed. On Argentina's sovereignty prerogative, requests for asset attachments and executions will not be granted or shortly vacated (Minuto uno, 2014). Although Argentina had waived its immunity from suit and execution on the disputed bonds, a senior foreign judge of the most respected federal court in the US was challenged in exerting court authority against Argentina's remaining sovereignty shield.

2. 3. NML and *pari passu*

The turning point in the litigations came in 2011. From 2003 until 2011, NML had unsuccessfully fought Argentina's sovereign immunity and launched worldwide hunts for executing Argentina's assets to satisfy SDNY judgments (Minuto uno, 2014).

In February 2004 Argentina had unsuccessfully attempted to clarify in court if NML would seek relief on its bonds' *pari passu* clauses. In 2000, in *Elliott Associates LP v. Peru*, the Court of Appeals of Brussels had ruled favorably to Elliot on a similar *pari passu* clause (Olivares-Caminal, 2013)[6].

The *pari passu* clause in the 1994 FAA of the litigated Argentina's NML New York law bonds required payment obligation ranking of the state towards its creditors of "at least equally…with all its other present and future unsecured and unsubordinated External

[6] Per Olivares-Caminal (2013), in September 2000 the Brussels Court of Appeals granted Elliott a restraining order. The order prohibited Chase Manhattan (the financial agent) and Euroclear from facilitating Peru's USD 80 million bond interest payment due October 2000. The Brussels Court of Appeals affirmed that "[t]he basic agreement regulating the reimbursement of the Peruvian foreign debt, also indicates that the different creditors enjoy a 'pari passu clause', which has as a result that the debt should be paid down equally towards all creditors in proportion to their claim." Elliott also obtained a restraining order at Clearstream's headquarters in Luxembourg, forcing the parties to settle.

Indebtedness" (Galvis, 2017: 206). The SDNY ruled that Argentina violated the FAA when it lowered any of its payment obligations' ranks. The court opined that this had occurred when, through Argentina's Lock law, Argentina "relegat[ed] NML's bonds to a non-paying class" (Galvis, 2017: 206).

In January 2012, the SDNY issued a temporary restraining order mandating Argentina not to alter the payment process. In February 2012, the SDNY ordered an injunction that Argentina should make ratable payments to NML every time it paid the exchange bondholders. The injunction also prohibited the agents of Argentina from facilitating payments (Second Circuit Court of Appeals, 2012).

The above orders were reviewed by the US Court of Appeals for the Second Circuit. In October 2012, this court affirmed SDNY's orders. Per the Court of Appeals, "the issuance of other superior debt (first sentence) and the giving of priority to other payment obligations (second sentence)" violates the *pari passu* clause in the FAA (Second Circuit Court of Appeals, 2012). Argentina's Lock law, along with other government measures, violated the bond's *pari passu* clause. Argentina had passed the Lock law in 2005, banning holdout payment or settlement (Second Circuit Court of Appeals, 2012). In June 2014, the US Supreme Court declined Argentina's appeal of the SDNY's *pari passu* breach and payment injunction decisions (Galvis, 2017).

3. The sovereignty and sovereign debt nexus under New York law

3. 1. International background and sovereign debt

Under international customary law, states enjoy immunity from jurisdiction and execution (enforcement) before other states' courts. This immunity is grounded on the theory of equality of states at the center of international law.

States have always been able to waive their state immunities. Up to the midst of the twentieth century, waiver compliance was challenging. Investors had informal sanctions as their almost exclusive action recourse with defaulting debtors (Weidemaier, 2020).

In the twentieth century, some states also commenced applying a restrictive understanding of state immunity via judicial decisions or codification (Greenwood, 2010). Under a restrictive state immunity understanding, the nature of the transaction that the state engages in with international actors matters. Generally, while sovereign acts enjoy state immunity – unless waived by the state and with practically no much contestation of other conflicts of law claims (including human rights and *jus cogen*) – states' commercial activities do not (Greenwood, 2010). The not yet in force 2004 United Nations Convention on Jurisdictional Immunities of States and their Property concurs with this approach and under is article 5 is specific on exceptions to state immunity, which are broadly in accordance with the Foreign Sovereign Immunities Act (FSIA) of 1976.

3. 2. The scope of the FSIA

The FSIA is one of the most widely relevant state immunity codifications in the world, and it is particularly relevant for international commercial transactions. The FSIA is codified under Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611 of the United States Code (USC). Under this act, commercial transactions of states also do not enjoy state immunity.

The FSIA § 1603(a) defines a foreign state as the state itself, its political subdivisions, or its agencies or instrumentalities. Under the FSIA, foreign states enjoy suit and attachment immunity unless one of its specified exceptions is met (Berger & Sun, 2011). Exceptions are listed under §§ 1605, 1605A, and 1607 of the act. The most prominent sovereign debt FSIA exceptions are immunity waivers and claims related to a commercial activity are most pertinent.

3. 3. The FSIA's commercial activity exception and sovereign debt: immunity from suit

Examining first the engagement of a state in commercial activity (§ 1605(a)(2)) for a US court to assert its jurisdiction on a claim presented against a foreign state, one of three conditions must be met for the commercial exception to be satisfied. The conditions are that the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. Additionally, § 1603(d) of the FSIA stipulates that not the purpose but the conduct's nature determines an activity's commercial character.

The first FSIA's litigations on sovereign debt included two 1983 Costa Rica's cases. In the 1980s, Costa Rica faced a foreign currency shortage, and the Board of Directors of the Central Bank of Costa Rica prohibited state entities from paying interest or principal on foreign debts (foreign creditors and foreign currency) (Fisch & Gentile, 2004).

In *Libra Bank Ltd. v. Banco Nacional De Costa Rica* (Banco Nacional), a syndicate of commercial banks pursued repayment of a $40 million loan to Banco Nacional de Costa Rica and successfully obtained an order of attachment of $800,000 from New York state court. The defendant successfully moved the claim to the SDNY. The sovereign immunity claim by Banco Nacional to vacate the attachment failed. The court argued that Costa Rica had explicitly waived its state immunity (Fisch & Gentile, 2004).

Costa Rica proceeded to argue that the events on the case were covered under the act of state doctrine. The court upheld that the debt situs was the US, not Costa Rica, and therefore not covered under the act of state doctrine. Costa Rica then argued that there existed a loan enforcement prohibition by virtue of Article VIII, section 2(b) of the IMF Bretton Woods Agreement. The court held that loans with situs in the US and New York

were not exchange contracts as the ones meant to be protected by the referred agreement (Fisch & Gentile, 2004).

In *Allied Bank International v. Banco Credito Agricola de Cartago*, a syndicate of commercial banks filed for missed debt payments due to Costa Rica's foreign debt payment banning. Supported by the act of state doctrine, the SDNY denied the claim. Based on comity, the Second Circuit Court of Appeals initially concurred with the SDNY. However, the Second Circuit re-heard the case. The court ruled that as the situs of the debt was New York, the act of state doctrine did not apply to the case. Furthermore, the court stated that by issuing debt under New York law, Costa Rica's state banks had conceded jurisdiction. Additionally, the court stated that Costa Rica had acted unilaterally to establish its foreign debt payment banning; therefore, comity principles would not be applicable. Lastly, the court also argued that its ruling was also congruent with US policy interests to maintain New York as an international commercial center (Fisch & Gentile, 2004).

In 1992 *Republic of Argentina v. Weltover* the US Supreme Court addressed whether a foreign state could be sued in a US court for a default of its bonds. Argentina and a bank as petitioners claimed to the court that the SDNY, under the basis of *forum non conveniens*, personal jurisdiction lack, and subject matter jurisdiction lack, should not have jurisdiction over the claim of Weltover. The court positively answered this question by reasoning that for this situation the FSIA's commercial activity exception had been met. Bond issuance by sovereigns is a commercial activity as private parties could buy and negotiate the bonds in international private markets. While the activity had occurred outside the US, it directly impacted the US as the bonds' contract performance place was New York (Republic of Argentina vs. Weltover, Inc., 1992).

Pravin Banker Associates v. Banco Popular Del Peru in 1994 addressed the enforcement of Pravin's claim conflicted with US interests on the participation of Peru in the Brady plan exchanges. The court ruled that while recognizing both competing interests, debt enforcement was a higher-order policy concern. The court upheld Pravin's claim on the debt guaranteed by Peru. It dismissed Peru's arguments emphasizing that comity does not

prevent summary judgments, and that the invalid debt assignment claim (as Pravin was not a financial institution) was not to hold as it was not an expressed limitation as required by New York law (Fisch & Gentile, 2004).

In *CIBC Bank & Trust Co. (Cayman) v. Banco Central do Brasil*, CIBC Bank on behalf of the Dart family, did not agree to participate in Brasil's debt restructuring and sued for debt acceleration and full repayment. However, the court ruled that champerty – the argument that CIBC was buying debt to litigate – did not proceed. It also ruled that CIBC Bank did not own the necessary participation to accelerate the debt. Therefore, the court granted CIBC Bank a $60 million claim instead of the requested $1.4 billion (Fisch & Gentile, 2004).

The champerty claim failed in this case as it would fail in subsequent cases, such as *Elliott Associates, L.P. v. Republic of Peru* in 1998. In this case, the Second Circuit on reversal of the SDNY decision ruled that Elliott did not incur in champerty as it intended to litigate only if the debt was not repaid (Blackman & Mukhi, 2010). On remand, the SDNY awarded Elliott a $55 million summary judgment (Fisch & Gentile, 2004).

3. 4. The FSIA's immunity from execution and sovereign debt

The state immunity doctrine treats immunity from jurisdiction and execution separately. Under relative state immunity theory, a second and more challenging hurdle for claimants suing states in foreign courts remains on state immunity from execution.

FSIA's provisions on state immunity from execution are specified under its § 1610. To avoid violation of a state's immunity, under § 1610(d) US foreign state's commercial property located in the US is only subject to pre-judgment attachments if the foreign state explicitly waived its attachment immunity before judgment, and the attachment secures a judgment satisfaction by the foreign state and not jurisdiction.

FSIA § 1610 does, however, permits post-judgment executions of commercial property of a foreign state in the US when meeting one of seven exceptions, including implicit or explicit execution immunity wave by the state, execution of a property in use in commercial activity in connection to the claim, judgment is for arbitral award against the foreign state and consistent with the arbitral agreement, and judgment is for a claim not under § 1605A (Terrorism exception), whether or not the property is or was involved with the claim's act.

FSIA § 1611 lists three types of properties that are not attachable or executable: properties of organizations enjoying immunity as granted by the International Organizations Immunities Act, property of a foreign central bank/monetary authority unless "immunity from attachment in aid of execution" has been waived, military activity property, or property engaged under "section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes".

3. 5. Waivers of immunity from suit and execution and sovereign debt contracts

Per the FSIA, waivers of state immunity can be explicit or implicit (§ 1605(a)(1)). US court jurisprudence on implicit state immunity is established. An explicit immunity waiver for a given matter cannot be revoked (McCoy, 2000). The FSIA does not acknowledge state immunity execution waivers for property used or to be used in military activities by a foreign state (Weidemaier, 2009).

By the FSIA, bond issuance already falls under the commercial activity exception. However, an immunity waiver does provide a broader scope of property for judgment execution as it eliminates other possible jurisdictional issues (Weidemaier, 2009). Therefore, sovereign debt agreements nowadays customarily waive state immunity (Weidemaier, 2011).

Contract terms on modern sovereign debt agreements follow three modalities on state immunity waivers. Seldomly and only a few states do not waive state immunity in their

contract terms. Some states waive immunity from suit and not attachment or execution. The majority of the states waive immunity from suit, attachment, and execution except only (but not always) on property under public/government purpose use (Weidemaier, 2009).

3. 6. The FSIA, market regulation and new frames

Some economists have suggested that the impact of sovereign debt litigation developments in the international sovereign debt market equilibrium can be at least twofold. Bolton and Jeanne (2009) care for too strong creditor rights preventing necessary restructurings. Eaton (1990), Dooley (2000), and Shleifer (2003) see stronger creditor rights curtailing over-borrowing and strategic defaults. Therefore, improving market quality through improved enforcement commitment devices (Schumacher, Trebesch, & Enderlein, 2018).

None of these studies has identified an optimal point of market enforcement. However, they reiterate the centrality of enforcement devices on the quality of markets and the role of creditor rights in that regard. In international community alignment, the FSIA is a considered necessary legal frame rebalancing towards more substantial investor rights.

4. Frames and sovereign debt disputes

4. 1. Legal frames

Pedriana (2006: 1723) has argued that "law is a central meaning-making institution within which challengers do 'interpretative work' (Snow, 2004: 380) … and socially construct their grievances, identity and objectives". Under this law conception, he argues that law itself is a master frame, itself under significant interaction and contestation amongst groups.

Individuals and collectives must translate their frames into legal frames to interact with the law. For example, Vanhala (2009) proposes the transformation of disability claims in Canada from a medical condition framing (deserving society's charity and sympathy) into a social framing with the Canadian Charter of Rights and Freedoms. The charter would

enable the translation from a medical condition into a legal right of non-societal discrimination of individuals with disabilities.

4. 2. Frames

From the seminal work of Erving Goffman, frames are today an amply developed concept in the social sciences. Broadly, frames are a "schemata of interpretation" that allow actors to structure their experiences into sense-full accounts. They can be individual or collective. Individuals will devise frames that can disentangle, co-create, and oppose others' frames. Frames would develop, they will not remain static. Therefore, agency would be critical to framing (Benford & Snow, 2000). Frames would be the rules and organization defining an activity to which actors conform their actions based (Peräkylä, 1988). Frames are associated with social groups and their culture.

On collective action frames, a master frame refers to the clustering of social movements to mobilize on a cause without the existence of a Political Opportunity Structure (POS). Previously, the social movements literature had theorized on POS as a condition for protest cycles (Benford, 2013). A master frame would be a resonant collective action frame that transcends standard social movement frames (Snow & Benford, 1992). Collective action frames are context-specific, however, master frames "are sufficiently elastic, flexible, and inclusive enough so that any number of other social movements can successfully adopt and deploy it in their campaigns" (Benford, 2013: 1).

The equal rights and opportunities frame of the 1950s' and 1960s' US civil rights movement is an example. The frame has been adopted by many other rights movements and persists to date. Research has also proposed other master frames such as injustice and justice, amongst others (Benford, 2013).

Scholars have demonstrated that master frames are essential to broad mobilizations of diverse groups (Gerhards & Rucht 1992; Noonan 1995). However, scholars do not know

yet about the most detailed conditions which allow collective frames to become master frames and master frames to trespass cultures (Benford, 2013).

Per Benford & Snow (2000: 613), framing (framing contests) is a process in which social movements are "actively engaged as agents in a struggle over the production of mobilizing and counter-mobilizing ideas and meanings". It is also a contentious process that transcends societies' activities, from political arenas and to the courts.

4. 3. The sovereignty master frame in sovereign debt disputes

Some legal scholars of sovereign debt have suggested that sovereign debt restructurings and litigations are highly driven by social context. Frames, including the law (Pedriana, 2006), are associated with social groups and their culture and therefore their social context.

Social context is the setting where social interaction occurs. It encompasses unique understandings of the setting ascribed by individuals within given groups (Given, 2008). Weidemaier & Gulati (2015) provide paradigmatic arguments on how social contexts (amongst other factors) drive sovereign debt restructurings and litigations. They see the law as a dynamic system and state that legal rules reflect an evolving social context. They argue that as social contexts on sovereign debt restructurings may gradually change, courts may rule differently. As illustrations, potentially becoming amicable to new doctrines (such as odious debt) or narrowing reliefs through adaptations of existing doctrines. They state that "[t]he law of sovereign debt is the product of broader social, political, and economic forces" (Weidemaier & Gulati, 2015: 13). However, they see that how these forces, including social context, influence the law is unclear.

Along this line, they see legal rules and actors determining how the legal fiction of sovereign immunity is interpreted in sovereign debt litigations. These legal rules and actors determine fundamental sovereign debt assumptions, such as debt persistence/continuity. Additionally, they determine who and what is deemed sovereign and therefore enjoys sovereign immunity (Weidemaier & Gulati, 2015). They also express a gradual relaxation

in the current social context towards more encompassing sovereign immunity waivers (Weidemaier, 2014) and greater asset seizure (Weidemaier & Gulati, 2015). They advocate for a fundamental role of social context in sovereign debt restructurings and litigations. This advocation can be understood as an argument for the law in practice, over the law in books.

Lienau (2017) also argues how the law in practice (over the law in books) dominates the global legal order, global finance law, and sovereign debt. She sees law as a social dynamic of continuous constitution of states, actors, critical institutions, and other social structures over time, rather than a constituted dispute resolution mechanism. Legal legitimacy is formed "by the interaction between law and collective social practice" (Lineau, 2017: 599). She also questions how the social world (social context) forms practice and expectations of what the law is and who can make it.

She focuses on market principles and defines them as "collective beliefs about how markets work as an objective matter" (Lineau, 2017: 546). These market principles are not morally grounded or understood (although they could be) but are treated as universals unaltered by the law. She explains how these principles constitute law (by reputational sanctions), who their policymakers and enforcement authorities are (unclear), which legal scholarship scrutiny they get (none) and their high degree of changeability. She concludes that market principles can quietly set norms, which actors may later codify and strengthen. She also states that market principles can prevail in establishing contrarian rules to the law in the books.

On the sovereign debt continuity case, and the inevitability of sovereign debt repayments as market rule, Lineau (20017) highlights three incorrect assumptions supporting this premise. The first of these assumptions is that politics do not form sovereign debt repayment decisions by creditors and debtors. The second is that historical individual political views do not determine how sovereign reputations are assessed on debt repayment judgements. The third is that rational creditors are a homogenous group. Therefore their debt repayment expectations cannot be altered.

Likewise Weidemaier & Gulati (2015), Lineau (2017) sees interpretations of the sovereign/sovereignty as dependent on social context and significantly problematizing debt repayment as market rule. Periods of debt continuity support are historically and politically situated, and that they condition support, punishment, and policy leeway on non-repayments.

As the recount of the law in section 2 demonstrates, these scholars also clearly establish sovereignty (and its consequential sovereign debt continuity implications) as a critical master collective action frame in the court sovereign debt proceedings. They also see it evolving and changing according to social context (such market principles or historical and political contexts). However, they do not provide cases to attest these dynamics. That is the undertaking of the next section.

5. Framing contestations in Argentina's 2001-2016 SDNY's litigations

5. 1. The sovereignty frame

Until 2011, undoubtedly, the dominating master collective action frame/schemata of interpretation operating in Argentina's sovereign debt restructuring and litigations to allow actors to structure their experiences into sense-full accounts was state sovereignty.

As a prevailing and powerful international master collective action frame, sovereignty would enable Argentina ample agency (Benford & Snow, 2000) to provide rules (Peräkylä, 1988) and organization to set demarcations for the restructuring process, exchange offers, and the litigations. Argentina would utilize its sovereignty space, conforming to other social and cultural frames, to curtail creditors (actors) to conform their actions based on the country's sovereignty prerogatives and needs as government assessed. For example, to obtain utmost sovereignty in the country's economic dealings, in 2005, President Nestor Kirchner would pursue the country's IMF debt cancellation (Diego, 2011).

The sovereignty master collective action frame would also represent a robust frame to mobilize, cluster, and maintain Argentina's social movements on the pursued sovereign debt causes, independent of context-specific and clear Political Opportunity Structures. Antagonizing outside forces against the sovereign would be critical, as media analysis confirms (Mwangi, 2020).

The sovereignty master frame, being also the master legal frame of the SDNY litigations, would certainly facilitate non-legal to legal frame translations and re-enforcements.

In the legal proceedings, Argentina's primary defenses included act of state doctrine. This sovereignty defense would not stand in any of the cases. Once judgments awarded, the sovereignty master frame would also be instrumental for Argentina in successfully fencing out asset discoveries, attachments, and executions for judgment satisfactions. Only a handful of US hedge funds appear to have had abundance of resources, rewards and legal consciousness to pursue assets that could be linked to Argentina.

US hedge funds thrive from contesting the autonomy of entities in distress. An "activist" strategy entails intervening in a company's management and directing its actions for the sake of good governance and increased shareholder's value (Dorn, 2016). Policing the autonomy of others for a high profit and social concern is at the core of their business model. From all creditors, these hedge funds were best situated to disrupt Argentina's sovereignty. Indeed, they did.

Out of court, these hedge funds most epically contested Argentina's sovereignty by at least two critical channels. First, through their American Task Force Argentina (AFTA) lobbying efforts, rivaling Argentina's diplomacy and political capacity as a state to affect the law to sustain its dominant sovereignty legal master frame (Hornbeck, 2010). No other creditor would possess such legal framing sway.

However, Argentina's political and diplomacy capacity in framing the debt cause under its sovereignty shield was also quite astonishing. Argentina's political authorities would

sustain strong sovereignty lines towards their people and the international community, antagonizing the debt and the bond market sponsor (the US). Yet, they would not receive a backlash and would even sustain US conservative government backing (Helleiner, 2005).

Some argue that confluence of political and diplomatic interests, and ideologies among the US and Argentina governments could explain the situation. First, retail Argentina's debt holdings in the US were not as politically significant nor direct, but through the diversification and anonymity of pension funds. Second, given Argentina's role in US-Latin America relationships and US' higher-order interests on that regard. These convergences could be understood under Goffman's frame alignment theory, given the shared sovereignty master frames of the US and Argentinean governments. Additionally, they could be understood under the asseverations of Foster (2008) that states customarily do not cooperate in seizing assets of other states.

Third, on neoliberal ideology confluences among Argentina's government and the US Republican administration. For example, in May 2003 president Kirchner would champion a 'national capitalism'. Also in 2003, Lavagna (Argentina's Minister of Economics) would provide a discourse on his approach to the debt restructuring that could be aligned to similar US interests. Lavagna's message, some argue, could be read as support for sovereign debt bail-ins for distressed debtor states rather than bail-outs by other states:

> I agree that you must not use the money of American plumbers and carpenters or German dentists to bail out Argentina, Turkey or any other country. But if you take that decision many other things have to happen too…That is the reality. It was not Argentina's decision. It was the US's, and it means we have to carry out a restructuring deal with our own resources. The US would also favor states' bail-ins vs. bail-outs (Helleiner, 2005).

From a framing perspective, should this apparent ideological confluence among US and Argentina governments be interpreted as economic ideology frame alignment? Should it be more aptly conceived as framing keying? Keying referring to the re-purpose of a primary frame in society that is not a real transformation of the frame (Brooks, 2007).

The second channel by which the US hedge funds most epically contested Argentina's sovereignty was media mobilization. Likewise Argentina, these hedge funds could significantly mobilize media attempting to affect the social context that sovereign debt scholars identify as critical shaping sovereign debt law (frame(s)) (Weidemaier & Gulati, 2015; Lineau, 2017).

An element of the hedge funds' media strategy would seek to discredit Argentina's government officials (Hudson Institute, 2014), such as portraying them as corrupt (American Task Force Argentina, 2014). How could such framing aid debt repayment? Could it hinder debt repayment?

On the latter, sovereign debt scholars and allies have fostered the development of a legal odious debt doctrine, adding to the collective action frames available in sovereign debt disputes. The core of the doctrine is to legally rid the sovereign character of otherwise sovereign debts according to issuance attributes (such as the debt being issued by a corrupt government) (Howse, 2007). Odious debt is illegitimate and therefore unpayable (Hanlon, 2006). This doctrine is not yet in practice in any national legal system.

On the former, AFTA's media actions on corruption and individual discredit of Argentina's government officials have included NML's lead counsel at its SDNY litigations against Argentina. Consequently, one must derive that such actions target aiding success in NML's SDNY litigations – in court or settlements. From this analysis, neither mechanism nor precise target (court or settlement) is transparent. Nevertheless, what is uncontested is that these NML allegations could significantly alter Argentina's sovereignty master frame impacting the disputed debt.

Argentina's government media mobilization capacity was also outstanding. It also centrally included the discredit of the hedge funds (BBC, 2014). However, beyond this approach it also included alliances with a vast, diverse, and strong international network of Argentina's debt cause advocates. Regardless of their collective action frames, such as human rights (Farfan & Rubio, 2014), debt relief (Pérez Esquivel, 2014), or trade and development for all

(UNCTAD, 2014), these organizations or individuals found grounds of adhesion to Argentina's cause. As if united under an injustice master frame (Marshall, 2003) that Argentina's bold sovereignty master frame stand in the debt case could provide some righteousness for, as well as a unique opportunity to elevate their own agendas. Through their direct support, and indirectly by not contesting any of Argentina's government sovereignty actions in regard to the debt litigations, these partners would boost Argentina's sovereignty master frame.

5. 2. *Pari passu:* An equal rights frame?

In court and holdout debt settlement, Argentina's biggest sovereignty framing contestation and holdouts' success would be Argentina's 1994 FAA's *pari-passu* clause.

Latin *pari passu* means "in equal step". Pari-passu clauses originate in nineteenth-century credit instruments. Nowadays, they are standard in international sovereign debt contracts. They have been characterized as short, and therefore necessarily opaque. A traditional formulation of these clauses would be: "The Notes rank, and will rank, *pari passu* in right of payment with all other present and future unsecured and unsubordinated External Indebtedness of the Issuer." (Buchheit & Pam, 2004: 1).

Pari passu clauses are not common in US domestic credit transactions. The US law already prohibits involuntary creditor subordination.

In the sovereign debt case, there is agreement that these clauses entail "ranking equally" and debate if that is in reference to creditors' legal standing or creditors' payments or even the fidelity of such distinction. There is also consensus as to the entanglement of the clause with creditors' "in equal steps" rights (Buchheit & Pam, 2004; Hayes, 2020; Weidemaier, Scott, & Gulati, 2013).

Beyond the creditors' equal rights consensus for the sovereign debt case, global expansive master collective action frames of equal rights are on the move. From the US equal rights

movements of the 1950s and 1960s to date, equal rights' master collective action frames and their evolution into legal frames, resonate with the American public and its courts (Gluck Mezey, 2009; Balkin, 2007).

Equal rights' master collective action frames also resonate well in Argentina. The country hosts creative and expansive human rights' movements, who have conquered expansive rights (Jost-Creegan, 2017) and with many rights activists taking government positions (Vázquez, 2014). However, Argentina's social movements have also developed strong standings against the country's international indebtedness and its detriments to social rights, including citizens' equal rights (Rivkin, 2008).

From the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948, equal rights situate themselves within universal human rights principles:

> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom (United Nations General Assembly, 1948).

Sovereignty and human rights master frames, and so equal rights master frames, are generally conceived as "mutually contradictory regimes in international society", with sovereignty trumping human rights (Reus-Smit, 2001: 519). However, with the modern legitimacy of sovereigns based also on their record placing limits on their treatment of peoples.

In its SDNY's *NML Capital, Ltd. v. Rep. of Argentina pari-passu* ruling affirmation on August 23, 2013, the Second Circuit Court stated that:

> We further observed that cases like this one are unlikely to occur in the future because Argentina has been a uniquely recalcitrant debtor and because newer bonds almost universally include collective action clauses ("CACs") which permit a super-majority of

> bondholders to impose a restructuring on potential holdouts (Second Circuit Court of Appeals, 2013).

This ruling affirmation had much more argumentation on supporting the extraordinary judicial actions necessary to address a uniquely recalcitrant debtor, than on court reasonings of equal rights master frames as a *pari passu* clause entail. The ruling will be a framing inflection point in Argentina's sovereignty. Framed as necessary extraordinary measures to a unique situation.

Recalcitrant is a subject "obstinately defiant of authority or restraint", "difficult to manage or operate" or "not responsive to treatment" (Merriam Webster Dictionary, n.d.).

On May 31, 2014, the Financial Times reported on a leaked memo from Argentina's lead legal counsel to its client in the SDNY's holdout litigations. In the memo, Argentina's lead legal counsel advised its client on circumventing Judge Griesa's *pari passu* ruling (Cotterill, 2014).

Through circa fifteen years of court proceedings, Judge Griesa had insisted with the parties that "The way to ultimately resolve this litigation must come through settlement" (Raymond, 2015). Judge Griesa's rulings also provided Argentina and the holdouts ample space (over a decade) for a negotiated agreement. Moreover, in 2014 Judge Griesa assigned a special master negotiator to the cases (Bases, 2017).

Gulati & Weidemaier (2015) and Lineau (2017) state that the judicial system would temperate sovereign interpretations to social context. Argentina's 2001 turmoil economic times had ended. Lineau states that legal legitimacy is formed "by the interaction between law and collective social practice" (Lineau, 2017: 599). Argentina and its lead legal counsel had openly defied the authority of utmost prestigious US courts and their ultimate regulation capacity over 70% of one of the biggest international financial markets in the world, the international sovereign debt market.

On December 22, 2016 – after Argentina's SDNY holdout settlements of early 2016 – the same Judge Griesa issued the *White Hawthorne, LLC v. Republic of Argentina* opinion. This opinion confirmed that "a sovereign's decision to pay some of its creditors and not others does not, on its own, breach the [*pari passu*] clause" (Blackemore & Lockman, 2017: 1). This ruling confirmed that the SDNY's *NML Capital, Ltd. v. Rep. of Argentina pari passu* ruling was for now unique. Not a new equal (creditors) rights master frame for sovereign debt litigations.

5. 3. The politics of Argentina's 2001 restructuring and an equal rights master frame

In 2003, before unveiling the Dubai offer, Lavagna stated that: "when Argentina explains the guidelines of its offer, there will be lots of long faces in many languages. In Italian, In German, In Japanese and certainly in English" (Helleiner, 2005: 955).

Argentina's government officials will offer 25 cents on the dollar (Laudonia, 2020). Most creditors will settle at 30 cents on the dollar (Dube & Scurria, 2020). The creditors had requested 60 cents on the dollar (Gelpern, 2005).

After fifteen years of litigations, some major holdout settlements (not all) would total 6,251,614,438.72 USD. Those settlement would include legal expenses (total of 235,000,000 USD), compensatory interests (total of 19,342,051.00 USD) and payments (total of 5,997,272,387.72) (Guzman, 2016). The settlement deal with the four largest holdouts will be for "75 percent of the amount outstanding on their judgments, including principal and interest" (Bases, Lough & Marsh, 2016).

Majority retail creditors had received the lowest settlements. They settled early and avoided litigations (Gelpern, 2005).

From equal rights master frame perspectives of significant sectors of Argentines and others, the holdout settlements were highly undesirable.

Argentina's sovereign debt market politics have shown an ability to influence international sovereign debt markets significantly. No economic studies yet analyze Argentina's 2001 restructuring alternate negotiation paths, including earlier holdout settlements and in contrast to the committed fifteen years of expensive litigations and settlements that followed. However, Argentina's 2020 sovereign debt restructuring under a repeated configuration of Argentina's government officials as in 2003 can be indicative.

During the 2020 default, the sudden global economic stop of the Coronavirus pandemic would also significantly impact Argentina's economy. Under those conditions, Argentina's government officials would conduct the 2020 restructuring deal. The deal would be negotiated with major creditor groups and accepted by 90% of creditors (Orlando & Carrillo, 2020). Initially, Argentina's confrontational tactics (Nemina & Val, 2020) and low offer starting point (33 cents on the dollar) (Swissinfo, 2020) would mimic the 2003 restructuring offers. However, within short of a year of negotiations, Argentina's officials would settle on a deal much closer to creditors' initial requests – 55 cents on the dollar (Sullivan, 2020).

Argentina's government officials would indicate that this deal met Argentina's debt sustainability needs (Sader, 2020). In hindsight, the deal also fostered the return to greater creditors' equals rights to sovereign debt markets. Those same rights that Argentina's 2001 litigious restructuring had hampered. However, it is still unclear if this new level of creditors' equals rights master frame would restore retail investors' participation in these markets and if desired.

A principle of Argentina's 2020 restructuring deal was to offer equal treatment to local debt as it would offer to international indebtedness (Spaltro, 2020). This was not necessary. Under pressing economic conditions and local law advantage, Argentina through its sovereignty master frame, could impose a deal on local debt creditors. However, the approach pursued the development of enlarged quality local sovereign debt markets. Proof of the further potential of equal rights master frames also for international sovereign debt markets and Argentina's international sovereign debt politics?

6. Conclusion

This paper's two questions were: Can Argentina's 2001-2016 sovereign debt litigations at the Southern District Court of New York (SDNY) be understood as a chapter of its high stakes' political battles, and under frame contestations? What scholarship or policymaking value would such framing bring?

In its introduction, the paper proposed that Argentina's engaging in protracted international legal disputes with international holdout creditors, appear not to be of the politics of immediate country economic condition character, leaving the doors opened for other political explanations. Therefore proposing that Argentina's 2001-2016 sovereign debt litigations at SDNY could be understood as also a chapter of Argentina's high stakes' political battles.

In the disputed landscape, the paper addressed international sovereign debt financing and its challenges. It also established the core of Argentina's 2001 restructuring SDNY litigations. Over the next two sections, the paper established the legal and social theoretical frames for the analysis. In its analysis section, the paper substantiated sovereignty as a litigation master frame, and *pari passu* as a frame turning point in Argentina's 2001 restructuring SDNY sovereign debt litigations. In this section, the paper also analyzed merits of an enlarged creditors' equal rights master frame for sovereign future sovereign debt restructurings and disputes.

By analyzing these SDNY litigations beyond traditional legal and economic theoretical frames, the paper exposes the framing contests of actors, also transcending to court disputes. Therefore, this paper contributes to further understanding the critical roles of collective action frames in international sovereign debt disputes, including master and legal frames.

These contributions should particularly extend the framing literature and the socio-legal analyses of international law, international economic law and sovereign debt.

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