

Repayment of sovereign debts from a legal perspective – the example of Argentina¹

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Introduction

In present day Argentina, not a day passes in which one is not, on the one hand, reminded of the extreme poverty in which large parts of the country's population live, and of the ongoing negotiation of debt repayment between the Argentinean Government and its foreign creditors, on the other. Without wanting to minimise other factors that have a negative effect on Argentina's economic recovery and on the possibility of the Argentinean State to protect the economic and social rights of its citizens, debt repayment plays a predominant role because instead of being able to use its financial resources in order to revive its economy and provide social assistance to citizens in need, the country needs to dedicate an important percentage of its resources to debt repayment. In fact, even during the last few years of acute economic crisis, Argentina repaid more of its debts than it received from IFI in the context of debt refinancing.² More importantly still, the IMF, the World Bank, and the Governments of the G7 States use Argentina's dependency on debt-restructuring etc. in order to influence Argentinean economic policies. Applying the logic of capitalism, they require that the fulfilment of the country's obligations towards its creditors be regarded as a matter of prime concern, prioritising it even over poverty reduction measures and other social policies that might help to improve the economic and social situation of Argentina's poor. The President of the World Bank, James Wolfensohn, explained this quite graphically when saying in reply to the question of whether Argentina should increase its budgetary surplus in order to be able to dedicate more money to debt repayment: 'And at some point, as an individual, you can't just go on not paying your credit cards, and not paying your bank, and not paying your mortgage and saying well, what I really want to do is to educate my kids. ... Well, of course you want to educate your kids, but at a certain moment the rules are that if you want to keep playing the game you do have some other obligations and that is the issue with countries.'³ Beyond insisting on debt repayment, the IMF makes debt renegotiations and restructuring subject to conditions, such as a reduction of public spending;⁴ or the adoption of policies that favour foreign investors in Argentina, for example the owners of privatised public service providers.⁵ Accordingly, the problem of debt repayment is one of the most crucial issues for consideration when reflecting on the relationship between capitalism and human rights within the Argentinean context.

However, as is to be expected, the link between debt repayment, capitalism and human rights is not uncontroversial. In the context of Argentina, the only undisputed

¹ I would like to thank Dr. Carlos Juliá for helping me with my research into Argentinean law, and Prof. Sheldon Leader for discussions of the international dimensions of some of the issues addressed in this chapter.

² Clarín, 9 March 2004.

³ 23 April 2004, www.businessday.co.za.

⁴ Clarín, 12 January 2005.

⁵ For example when insisting on legislation allowing for an increase of the charges for their services, see Eduardo Amadeo, *La Salida del Abismo*, Planeta Buenos Aires 2003, at p.151.

fact rather seems to be that Argentina suffered an extreme economic crisis, as the consequence of which the protection of social rights has deteriorated, unemployment figures have rocketed,⁶ savings and pensions have been devalued, poverty rates have reached an unprecedented level, and the social protection of large sectors of the Argentinean society has dropped worryingly.⁷ The reasons for this, on the other hand, are debatable and debated. Many voices can be heard contending that Argentina's crisis and the resulting deterioration of the social situation of large parts of the population were mainly caused by internal factors, such as corruption, ungovernability, the lack of will to implement fully the adjustment programmes suggested by the IMF, etc.⁸ It would then not be the logic of capitalism that adversely affects the human and social rights situation of the people. To the contrary, given that the IMF is presented as the mother of sound capitalist policies, the suggestion rather seems to be that Argentina would not face its economic problems, and the population would not have to put up with the erosion of its social rights, if only capitalist policies had been, or would now be, implemented properly.⁹ However, it is submitted that the capitalist policies that were pursued in Argentina did, in fact, have an adverse impact on the dire social rights situation the country finds itself in.¹⁰ While there can be no doubt that factors inherent in the political culture of Argentina have significantly contributed to the desolate situation of the country,¹¹ it is equally clear that the current crisis in Argentina cannot be isolated from the phenomena of neoliberalist capitalism and financial globalisation.¹² Indeed, many of the acute problems that led to the breakdown of the Argentinean economy are the results of Argentina's neoliberal

⁶ See Augusto M. Morello, 'Suspensión del pago de la deuda pública. Fundamentos jurídicos', *El Derecho* 196 (2002), 839-46, at pp 839-40.

⁷ The public health system, for example, has almost collapsed, see *Estado de los hospitales públicos del país* (Situation of the public hospitals in the country), an Annexe to the Report on Health in Argentina, presented by the NGO Centre of Legal and Social Studies (CELS) to the Interamerican Commission on Human Rights, which gives an impressive overview of the disastrous situation of many hospitals in which even the most basic equipment, such as needles, anaesthetics etc., are missing, at www.cels.org.ar. For statistics on health; social security; unemployment; poverty rates etc. see the web page of the National Institute of Statistics and Censuses, www.indec.gov.ar.

⁸ See, for example, David Asp, 'Argentina's mystery of capital: why the International Monetary Fund needs Hernando de Soto', (2003) 12 *Minn J Global Trade* 383, at p.384. The IMF's Independent Evaluation Office's Report, while admitting some faults committed by the IMF, nevertheless mainly blames Argentina's policy choices, eg on p.31.

⁹ See Michael Mussa, *Argentina y el FMI: del triunfo a la tragedia* (Buenos Aires, Grupo Editorial Planeta, 2002), at pp.112-113.

¹⁰ The UN Committee on Economic, Social and Cultural Rights remarked in its Report on Argentina that 'the implementation of the structural adjustment programs has hampered the enjoyment of economic, social and cultural rights, in particular by the disadvantaged groups in society', at para.258, and recommended that 'the State party, when negotiating with international financial institutions, take into account its Covenant obligations to respect, protect and fulfil all the rights enshrined in the Covenant', at para.276, E/C.12/1999/11. Bernard Mudho, Report on 'Effects of structural adjustment policies and foreign debt on the full enjoyment of human rights, particularly economic, social and cultural rights, E/CN.4/2003/10.

¹¹ See, eg, Aldo Ferrer, *La Argentina y el Orden Mundial* (Buenos Aires, Fondo de Cultura Económica, 2003), at pp 141-47; and Michael Mussa, *Argentina y el FMI: del triunfo a la tragedia* (Buenos Aires, Grupo Editorial Planeta, 2002), at pp 13-26.

¹² See, eg, Stiglitz, n 1 above, at p 69; and Rapaport, n 1 above; Ann Pettifor, Liana Cisneros, Alejandro Olmos Gaona, 'It takes two to tango', Jubilee Plus Report, September 2001, at p.6, www.jubilee2000uk.org/analysis/reports/tangolowres.pdf.

policies, backed and partly required by the IMF, the World Bank and the G7 Governments.¹³

The problem of debt repayment touches on many fundamental issues such as concepts of justice; the tension between human rights protection and financial interests; and the relationship between the Third World and the industrialised North. It is therefore hardly surprising that debt repayment has sparked a highly emotive political and moral debate.¹⁴ From a moral perspective, it could be asked whether it can be justified that a country dedicates resources to the repayment of foreign debts while large parts of the population live below the poverty line and have even the fulfilment of their basic needs, such as food, shelter, health care etc. frustrated. The moral arguments against debt repayment become even more compelling when taking into account the claim that the international creditors are partly responsible for the debt crisis. In recent years, a moral claim for debt relief or even debt forgiveness because of the dramatic adverse impact of debt repayment on the social and economic situation in poor countries has become more and more popular.¹⁵ From a more political perspective, it is often argued that the debt is unfair, odious, that but for the usurious interest rates it would already have been repaid several times, and that, instead of the third world being indebted to the North, it is the other way round, as the North owes the third world an ecological debt.¹⁶

Reference to legal principles and concepts is often made in order to support these moral and political claims. From a legal perspective, the Third World debt is challenged based on principles of international law, as well as on principles of the domestic law of debtor nations. In this respect, it has been argued that many of the loan agreements are not valid, as they were often entered into by undemocratic regimes and were not used for the benefit of the people of the debtor nations; that the interest rates charged are usurious; and that the creditors are at least partly responsible for the debt crisis. With regard to the debt owed to IFIs, it is further suggested that conditionalities imposed on debtor nations as a prerequisite of receiving loans that are

¹³ See, eg, Ricardo Sidicaro, *La crisis del Estado* (Buenos Aires, Libros del Roja, 2002); and John V Paddock, 'IMF policy and the Argentine Crisis,' (2002) University of Miami Inter-American Law Review, 155-187; Miguel G. Peirano – Pagina 12, 19 September 2004. See also, very forcefully, Fantu Cheru, in his independent expert report to the Economic and Social Council 'Effects of structural adjustment policies on the full enjoyment of human rights', E/CN.4/1999/50, who demonstrates the connection between neo-liberal policies and the social rights situation more globally. Also Patricia Adams, *Odious Debts: Loose Lending, Corruption and the Third World's Environmental Legacy*, Earthscan 1991, at p.90.

¹⁴ Javier Iguíñiz Echeverría, 'La deuda social de los acreedores: aproximaciones a su responsabilidad social', in: Chris Jochnik, Patricio Pazmiño Freire (eds.), *Otras caras de la deuda*, (Nueva Sociedad Caracas 2001), at pp.191-215.

¹⁵ See, for example, Susanna Mitchell, 'The Charade of unaffordable debt cancellation', www.jubilee2000uk.org, (last accessed on 2 December 2004). This is, however, often rejected, either because it is argued that the third world does not owe any debt, see, for example, Adams at p.194, and/or because the current debt relief plans shift the burden away from the lenders themselves onto the tax payers in the creditor countries; see Adams, at p.193; Eric Toussaint, 'Impagable, incobrable, injusta: quebrar el círculo infernal de la deuda', in: Jochnik, 217-225, at pp.220-224. See also UN-ESC Human Rights Commission, Report of Special Rapporteur Ronaldo Figueredo, E/CN.4/2000/51.

¹⁶ Juliá, at pp. 215 and 236. See also Heinz-Dietrich Steffan, 'Perspectivas de desendeudamiento externo desde el derecho internacional', in: Chris Jochnik, Patricio Pazmiño Freire (eds.), *Otras caras de la deuda*, (Nueva Sociedad Caracas 2001), 117-130, at pp.125-128; and Joan Martínez-Alier, 'Deuda ecológica vs deuda externa: una perspectiva latinoamericana', in Jochnik, 163-180.

needed to avoid defaulting on debt repayment, in particular structural adjustment programmes (SAPs), have worsened the debt crisis and the protection of social rights in those countries, and also undermine state sovereignty. However, this reference to the law is frequently no more than an expression of moral and political convictions of what the law should be, without providing the analysis that would be necessary in order to justify the claim that legal principles do, in fact, support the conclusion that the foreign debt does not need to be repaid, either partially or in full. Indeed, it often seems as if the law is primarily regarded as a tool that might help achieve, and give more credence to, political and moral claims. The international creditors, on the other hand, present the problem primarily from a formalistic legal perspective, when arguing, based on traditional legal concepts such as the fulfilment of contractual obligations, that debts need to be repaid. Indeed, Argentina's creditors, without having any regard to the reasons for Argentina's grave economic and social crisis, and the question of whether solely Argentina is to blame for this, or whether they share some of the responsibility for this situation, adopt a seemingly objective legalistic attitude when demanding that these debts are contractual obligations that need to be honoured, no matter what the country's social situation. In the words of James Wolfensohn: 'everyone wants to put money into social purposes and no one more than the (World) Bank, but there needs to be a balance in terms of some responsibilities and obligations which have been undertaken'.¹⁷

It thus seems as if the legal debate of the problem of debt repayment in Argentina is characterised, on the one hand, by the allegedly value neutral legalistic approach adopted by Argentina's creditors, and on the other hand, by a moralistic and political approach to the interpretation and application of legal principles. It is submitted that both approaches are problematic. The political/moralistic approach, because while a debate of what the law should be in the context of the restructuring and repayment of sovereign debt is useful and necessary, this is a political and moral discussion and not a legal analysis. If, however, the law is to be used in order to add another dimension to the debate, and to rebut the legal claims of the creditors on legal grounds, a consistent legal argumentation that favours the arguments against debt repayment over those advanced by the creditors of sovereign debts needs to be developed. Only this way can the creditors' reference to clear-cut legal rights be reassessed in the light of the legal objections raised by the opponents of debt repayment. And only this way can a conclusion be drawn as to whether the law really supports the creditors' claims as unconditionally as they want to make believe,¹⁸ or whether the legal validity of their claims can rather successfully be challenged from the perspective of domestic Argentinean law, mainly constitutional law, and from the point of view of international law. Thus, it is submitted that it is essential to pay due respect to the legal issues surrounding debt repayment.¹⁹ However, the significance of political and moral considerations in the context of debt repayment should not be downplayed, and it is not suggested that the legal issues can be examined from a politically neutral perspective. Indeed, Noam Chomsky, rightly claims that while it is clear that the third

¹⁷ 23 April 2004, www.businessday.co.za.

¹⁸ This is also the approach suggested by Günter Frankenberg, Rolf Knieper, 'Legal problems of the overindebtedness of developing countries: the current relevance of the doctrine of odious debt', (1984) 12 *International Journal of the Sociology of Law*, 415-438, at pp.418-419.

¹⁹ See also Chris Jochnik, 'Nuevos caminos legales para enfrentar la deuda: una petición a la Corte Mundial', in: Jochnik, 95-116, at p.95.

world debt exists, it is an ideological question who is responsible for this debt and who owes it.²⁰

This paper will analyse some of the problems that arise when assessing the legal objections to debt repayment and evaluating whether and to what extent a debtor nation is in fact legally obliged to pay its foreign debt. Argentina will be used as example, as it is not only a country in which debt repayment is at the forefront of the political and economic agenda, but it is more importantly the only country in which the courts have been involved in questions surrounding the validity and constitutionality of a country's foreign debt.

1. Argentina's debt in its historical and political context

In the context of a short piece which mainly aims at providing an analysis of some legal issues around debt repayment, a full historical and political account of the development of Argentina's public foreign debt cannot even be attempted.²¹ Instead, an introduction to some of the features of Argentina's debt that are of particular importance for the subsequent discussion must suffice. Although the history of Argentina's foreign debt goes back to the 19th century, the most important period for the purposes of a legal analysis of debt repayment starts with the beginning of the latest military regime in 1976 and continues into present times. The process of excessive lending and borrowing that took place between 1976 and 1979 needs to be seen in the context of the world financial situation.²² Between 1974 and 1980, the oil crisis led to an extreme liquidity of Western banks where the OPEC countries deposited the dollars they gained from petrol exports, a financial situation in which loans to Third World governments seemed attractive.²³ Argentina's military regime was happy to accept loans which international banks were as happy to offer, even though large parts of the loans were not used for the purposes of investment into infrastructural, industrial or other developmental projects, the carrying out and success of which could have guaranteed the repayment of said loans.²⁴ Instead, the incoming money was widely used for the purpose of increasing the federal reserves of the country,²⁵ by depositing the money with the very banks that made the loans, obtaining lower interest rates than those paid for the loans!²⁶ The multiplication of Argentina's foreign debt by four and a half during the latest dictatorship was

²⁰ La Nación, 24 April 2000.

²¹ For a fuller account see, for example, Norberto Galasso, *De la Banca Baring al FMI. Historia de la Deuda Externa Argentina*, (Editorial Colihue 2003).

²² For a more general and concise description of the problems created by lending policies in that era see Günter Frankenberg, Rolf Knieper, 'Legal problems of the overindebtedness of developing countries: the current relevance of the doctrine of odious debt', (1984) 12 *International Journal of the Sociology of Law*, 415-438, at p.416.

²³ For a description of loan policies during that period see, for example, Adams, at pp.60-64, and 95-99; see also Jorge Schvarzer, *Argentina 1976-81: El endeudamiento externo como pivote de la especulación financiera*, Cuadernos del Bimestre, Buenos Aires 1983, pp.7-10; Tom Congdon, *The Debt Threat*, Basil Blackwell Oxford 1988, at p.112; Eric Toussaint, 'Impagable, incobrable, injusta: quebrar el círculo infernal de la deuda', in: Jochnik, 217-225, at p.218.

²⁴ Hans-Rimbert Hemmer, 'The international debt crisis, its causes and possible solutions', in Manfred Brochert, Rolf Schinke (eds.) *International Indebtedness*, Routledge London 1990, 76-85, at pp.79-80.

²⁵ Sue Bradford, Bernardo Kucinski, *The Debt Squads*, Zed Books London 1988, at pp.89-90.

²⁶ See Alejandro Olmos, *Todo Lo Que Usted Quiso Saber Sobre La Deuda Externa Y Siempre Se Lo Ocultaron*, Ediciones Continente, 4th ed. Buenos Aires 2004, at pp. 203-204; Eric Toussaint, *Your Money or Your life! The tyranny of global finance*, Pluto Press London 1999, at p.201.

accompanied by, and some argue intended to facilitate,²⁷ the opening of the capital market and the financial system to foreign capital; a capital flight; the indebting of prosperous nationalised enterprises;²⁸ and the country's dependence on IFI's. As Justice Ballesterro concluded in the case of *Olmos*, a criminal case brought against Martínez de Hoz, Secretary of the Economy under the latest military regime, and others, for their involvement in indebting the country between 1976 and 1983, a decision that provides a very detailed analysis of the ways in which Argentina's foreign debt developed under the military regime, based on the reports of numerous expert witnesses: prosperous public companies had been obliged to take up loans they did not need to enable the country to obtain foreign currency that stayed with the Central Bank and with the help of which the financial and economic policies of the military regime, that is the opening of the capital market, could be achieved.²⁹ Private Argentinean companies also accrued foreign debt of substantial proportion, for which the State issued guarantees. This debt of the private sector was turned into public debt in 1982, as the military government, when the private companies did not repay their debts, assumed this debt by issuing new state bonds.³⁰ This further increased the already large public foreign debt of the Argentinean State.³¹

Having liberally received loans, with the change of the world financial situation and US fiscal policies in 1979, Argentina, like many other countries, found itself in the situation described forcefully by Fantu Cheru, who submitted that: 'what turned the debt into a crisis was not the absolute level of the debt, but the changing terms of the debt. When the second oil price rise of 1979 occurred, the US Federal Reserve Bank adopted a tight monetary policy which pushed up real interest rates to historically high levels. For debtor countries, this not only made new borrowing more expensive, but also unexpectedly increased the amount of interest they had to pay on their old loans, since much of this commercial borrowing was originally contracted with floating interest rates.'³²

With the return to democracy under the Government of Alfonsín at the end of 1983, the new government at first took the view that the debt it inherited from the military regime would not be repaid without a thorough investigation into how it had come about in order to establish to what extent the debt was, in fact, legitimate. To that effect, Congress enacted statute 23.062, stating that all administrative acts and provisions of the de facto regime lacked legal validity, and, more importantly in the present context, rejected the investment accounts referring to the years 1976 to 1983 in statute 23.854.³³ In June 1984, the then Secretary of the Economy, Bernardo Grinspun, submitted a Letter of Intent to the IMF, stating that the debt Argentina was asked to repay had been contracted by the means of arbitrary and authoritarian policies in which the creditors had actively participated and which did not bring any

²⁷ See, for example, Marcelo Diamond and Daniel Naszewski, 'Argentina's foreign debt: its origin and consequences', in: *Politics and Economics of External Debt Crisis. The Latin American Experience*, Miguel Wionczek (ed.), Westview Press Boulder and London 1985, 231-276, at p.249.

²⁸ Schvarzer, at pp.24-30; Aldo Ferrer, *¿Puede Argentina pagar su deuda externa?* El Cid Editor Buenos Aires 1982, at pp.54-60.

²⁹ See also Toussaint (1999), at p.200-201.

³⁰ See also Martín Kanenguiser, *La Maldita Herencia*, Editorial Sudamericana Buenos Aires 2003, at p. 42.

³¹ See Schvarzer, at pp. 51-55.

³² Report to the Economic and Social Council 'Effects of structural adjustment policies on the full enjoyment of human rights', E/CN.4/1999/50.

³³ A power given to Congress by Art.75(8) of the Constitution.

benefits to the Argentinean people. However, giving in to the enormous pressures from Argentina's creditors,³⁴ he added that Argentina would honour its tradition of meeting all its obligations.³⁵ The same line was taken by all Argentinean governments ever since, and instead of deciding whether or not all or part of the debt was, for various reasons, illegitimately contracted and therefore did not have to be repaid by the Argentinean people, new loans were constantly taken up in order to repay and restructure the debt that originated from the military regime of 1976 to 1983. Furthermore, those state owned companies that had formerly been profitable, but forced under the military regime to take up foreign debt, were privatised and sold rather cheaply to foreign companies.³⁶

In December 2001 Argentina defaulted on all debt servicing other than with regard to debts with IFIs, and for a short period, even defaulted on its foreign debt with the World Bank. Given the financial impossibility of repaying all of its foreign debt, in September 2003 the Argentinean Government submitted to the Annual Meeting of the IMF and the World Bank in Dubai a proposal that consists of reducing the foreign public debt with other than IFI's by 75%, a proposal which was at the time accepted by the IMF on the basis that the IMF itself, as well as the other IFI's, received preferential creditor status, meaning that the Argentinean debt with the IFI's will be repaid in full, including interests. However, since then, the IMF as well as the G7 Governments and the creditors concerned put a lot of pressure on the Argentinean Government to improve this offer.³⁷ These negotiations between the Argentinean Government and Argentina's private creditors are on-going. Parallel to the Government's offer of new bonds to replace the bonds that are in default, many bondholders, particularly those who are not happy with the offers the Argentinean Government has made so far, pursue their claims in the courts, mainly in New York.³⁸

While, unfortunately, this very brief overview can only give a very sketchy introduction to the issue, it should not be left unmentioned that apart from the economic and social consequences of the foreign debt, Argentina's status as a debtor state means, in practice, that the IMF, and the G7 Governments, through the IMF, as well as in their own voice, exercise a lot of pressure on Argentina regarding its economic and fiscal policies. In fact, one often gets the impression that in Argentina, political decisions, as well as laws implementing them, are often made in negotiations with, if not according to the dictate of, the IMF and the most powerful states in the world.

³⁴ See Kanenguiser, pp.49-62; Susan Goerge, *A Fate Worse than Debt*, Penguin London 1988, at p. 68; Olmos at p.59; Jason Morgan-Foster, 'The relationship of IMF structural adjustment programs to economic, social and cultural rights, the Argentine case revisited', (2003) 24 Mich J Int'l Law 577-646, at p.621.

³⁵ Olmos pp.58-59. See also R.T. Naylor, *Hot Money and the Politics of Debt*, Black Rose Books Montreal, London, New York 1994, pp.345-346, who argues that the Alfonsín government had its own interests in striking a deal with the IMF and its other creditors.

³⁶ Toussaint (1999), at pp. 203-204.

³⁷ See, for example, Clarín, 22 April 2004.

³⁸ The so far latest attempt by Argentina's creditors to use New York courts in their fight for debt repayment failed in November 2004 when Justice Griesa refused to declare Argentina's latest offer to its creditors to be unlawful, which would have had the effect of stopping the process of exchanging the old bonds for new ones that is currently being under way, see Clarín, 19 November 2004.

2. Foreign debt and the Argentinean Constitution

In Argentina, the main legal objections against debt repayment are based on constitutional arguments, and the most popular of the arguments advanced in this context is that of the unconstitutionality of the foreign debt on the ground that it has not been incurred, restructured and accepted by the constitutionally competent state organ, which would be Congress. The constitutionality of debt and debt repayment can also be challenged from a different angle, as according to the Argentinean Constitution, all acts, legislative or executive, that violate constitutional rights and principles, including social and other human rights, are unconstitutional. Thus, an argument could be made that every act facilitating debt repayment is unconstitutional, if a link between debt repayment and social rights violations can be shown.

2.1. Unconstitutionality because the debt was not contracted or settled by Congress

The Argentinean Constitution regulates the distribution of powers between the different state organs. Article 75, which establishes the areas in which Congress has exclusive competence, contains two different sections dealing with questions of public debt. First of all, in s.4, Article 75 empowers Congress to borrow money on the credit of the Nation, thus clarifying that it is Congress, not the Executive, that has the power to indebt the country by taking out loans. S.7 of Article 75 empowers Congress to settle the payment of the domestic and foreign debt of the Nation. This section found its way into the Constitution of 1853 in order to ensure that in the case of debt that was incurred, prior to the coming into force of the Constitution, by an organ other than Congress, Congress would at least retrospectively be involved in settling the payment of such debt. The importance of Congress' involvement in the issue of public debt can be explained by the consideration that the people can only be expected to pay debt taken up in the name of the country if Congress, as the representative of the people, at least retrospectively accepts it as binding.³⁹ If this is the underlying idea, and given that s.7 survived the constitutional reform of 1994, even though it is not very likely that there are any more payments of public debts in need of settlement that refer to the pre-constitutional period, it seems convincing to apply s.7 also to cases in which a public debt was not incurred in accordance with s. 4 of Article 75 by the constitutionally determined regime, ie Congress, but instead, for example, by an undemocratic regime that governed the country and indebted it without constitutional authority.⁴⁰ This is of great importance in the Argentinean context, given that since the coming into force of the Constitution, the country suffered years of de facto regimes.

Thus, only Congress can validly indebt the country, and if public debt was taken up in the name of the country by another organ, only Congress has the power to settle the payment of such debt. In the context of Argentina's foreign debt, these constitutional provisions raise some important issues. The first question that needs to be asked is that of whether or not the country's public foreign debt has been contracted in the constitutionally foreseen way, and what legal consequences attach if it can be established that that was not, in fact, the case. In order to answer the factual question,

³⁹ Salvador María Lozada, *La Deuda Externa y el Desguace del Estado Nacional*, Ediciones Jurídicas Cuyo, Mendoza 2002, at pp.249-252.

⁴⁰ Juliá, at p.165; Lozada, p.252; Carlos Mastrorilli, 'Atribuciones del Congreso en material de deuda externa', *La Ley* 1984-C, 831-836, at p.833.

it needs to be determined when the debt was contracted, for what amount, and, most importantly, for which purposes, by whom, and by the means of which acts.⁴¹ None of these facts are, however, easy to establish, as the history of Argentina's foreign debt is long and complicated. Even if the analysis is limited to the period starting with the beginning of the latest military regime in 1976, when the country's foreign debt reached quantitatively new proportions, to determine with any degree of exactitude any of the aforementioned factors is extremely difficult, not the least because the Central Bank of Argentina, the main institution involved in all matters surrounding foreign debt, did not keep a record of the transactions related to the country's foreign debt!⁴² Some knowledge can, however, be gained from the factual findings in the case of *Olmos*,⁴³ where it was determined that during the government of the latest military regime, Argentina's foreign debt was not contracted through Parliamentary legislation, ie the procedure envisaged in Article 75(4) of the Constitution, but instead by the means of governmental decrees and decisions of Central Bank executives.⁴⁴ This raises the question of the constitutional validity of acts by de facto regimes that do not respect formal constitutional requirements, or change them. In this respect, in Argentinean constitutional law it is a well-established principle that once a de facto regime has come to an end, measures taken in violation of constitutional principles need to be confirmed by a subsequent democratic government in order to be constitutional and thus valid.⁴⁵

Thus, the debt was originally contracted in an unconstitutional way, and in 1984, Congress adopted Act 23.854 which rejected all investment accounts referring to the period of the military regime, that is 1976 to 1983. Various arguments might nevertheless be brought forward in favour of the view that Congress later settled the debt pursuant to Article 75(7), thereby healing the original unconstitutionality. The main controversy in this context focuses on the interpretation of the word 'settle'.⁴⁶ Many seem to be of the opinion that either by approving the annual Budget Act which determines the budget of the Argentinean State, and which routinely includes a provision assigning a certain amount of money to the payment of the country's foreign debt,⁴⁷ or through the approval of measures restructuring the original debt, Congress settled the payment of the public debt.⁴⁸ This view seems to find some support in the Supreme Court's decision in *Brunicardi*.⁴⁹ In that case, a bondholder challenged the constitutionality of regulation 772/86 and of ministerial resolutions and communications of the Central Bank based on regulation 772/86, which modified, in 1986, the conditions of the bonds he was holding. The last military regime had issued these bonds through regulation 1334/82, thereby assuming the debt of private

⁴¹ Lozada, p. 243

⁴² See R.T. Naylor, *Hot Money and the Politics of Debt*, Black Rose Books Montreal, London, New York 1994, at pp. 144-148.

⁴³ "Olmos, Alejandro S/dcia", causa N°14.467, www.seprin.com/DEUDA_EXTERNA/Sentencia.htm.

⁴⁴ See also Alberto García Lema, 'Bases constitucionales y legales del proceso de reestructuración de la deuda pública', La Ley 2004-A 956-971, at p.959.

⁴⁵ Germán Bidart Campos, *Tratado Elemental de Derecho Constitucional Argentino*, Tomo II, Ediar Buenos Aires 1992, at pp.510-512, 519 and 522.

⁴⁶ The Spanish original uses the word 'arreglar'.

⁴⁷ García Lema, at p.961; With regard to the comparable situation of contracting debt pursuant to Article 75(4), see Marcelo Villegas, Eugenio Bruno, Lucas Piaggio, 'Los derechos de los inversores argentinos frente a la propuesta de reestructuración', La Ley 2004-A, 1025-1046, at p.1025

⁴⁸ García Lema, at p.961

⁴⁹ "Brunicardi, Adriano Caredio c/ Estado Nacional (BCRA) s/ cobro S.C. B.592.XXIV.", Corte Suprema de Justicia de la Nación, Decision of 24/02/1997.

Argentinean companies. At the same time, the conditions of the original loan were altered. The Supreme Court first of all made it clear that the rejection of the investment accounts through statute 23.854 did not, in itself, affect the validity of any legal acts or relationships that date back to the military regime. According to the Court, the modification of the terms of the obligations assumed in 1982 through regulation 772/86 must be regarded as an implicit ratification and a recognition of the validity of the original obligations that were thereby altered.⁵⁰ Given that the Parliamentary debate of the budget made it possible to know Congress' opinion with regard to the servicing of the country's debt, it did not trouble the Court that these alterations had been made in the form of executive regulations. From the fact that Congress did not adopt the suggestion of a minority in Parliament which wanted to include into the text of the Budget Acts explicit references to a direct involvement of Congress in the context of settling the public debt, the Court rather concluded that Congress accepted the practice whereby the executive exercised all faculties concerning the foreign debt and Congress' involvement was reduced to the annual debate of the budget dedicated to the payment of the foreign debt.⁵¹

The Court's analysis which led to the conclusion that the discrepancy between the constitutional text and the practice adopted with regard to all acts concerning the country's foreign debt is not problematic, is surprisingly superficial, given that within the system of a written constitution that expressly allocates different tasks to different constitutional organs, the question of whether or not constitutional requirements have been complied with cannot depend on the attitude of the different organs, but instead depends on whether or not the constitution regards such practices as acceptable. Thus, Congress and the Executive cannot, even by mutual agreement, circumvent the constitutionally determined distribution of powers and vest powers in the Executive that the Constitution assigned to Congress, unless the Constitution itself allows for such a delegation of powers. It then seems as if two constitutional questions need to be addressed in this context: whether Congress' enactment of the annual Budget Act can constitute the settling of old, or the contracting of new debt, acts for which Congress has the exclusive competence pursuant to Articles 75(7) and 75(4), respectively; and whether or not the practice according to which Congress' involvement is reduced to approving the Budget Act constitutes a delegation of power that is in accordance with the Constitution.

With regard to the question of whether the mere approval of the budget constitutes a settling of the public debt by Congress as required by Article 75(7) of the Constitution, one of Argentina's most highly regarded constitutional law professors, Germán Bidart Campos, suggested that this cannot be the case, given that Article 75 of the Constitution makes a clear distinction between Congress' power to approve the budget, a power conferred by s.8 of Article 75, and the power to settle the public debt pursuant to s.7 of Article 75. According to his opinion, s.7 of Article 75 would be superfluous if it could be exercised simply by approving the budget, that is by the very same act with which Congress fulfils its task of fixing the budget under Article 75(8). Thus, settling the debt needs to be something qualitatively different from the mere approval of a budgetary item. Neither can Congress' involvement in the contracting or settling of public debt be reduced to approving the relevant international treaty in which the terms of the debt were agreed between the Argentinean Government and the creditor, as here again, two distinct constitutional

⁵⁰ Ibid., at para.9.

⁵¹ Ibid., at para 10.

faculties of Congress would otherwise merge into one.⁵² He therefore concludes that the practice according to which it is the Executive that contracts the foreign debt and regulates the terms and conditions of its payment, whereas Congress does no more than approve the relevant treaties and allocate the funds necessary for this purposes within the budget, is a mutation of the Constitution.⁵³

This leaves the question of what, in addition to making available the relevant budget, is required in order for Congress to ‘settle’ the payment of the debt. It has been suggested that to settle the payment of the debt refers to putting it in order, and that the difference between such an activity and the mere approval of budgetary positions is that the latter only refers to setting aside a certain amount of money for a specific purpose, but does not include, as should the former, a thorough and detailed analysis of the origins of such loans, their destination, conditions and any other point that is important in order to perform the task of effectively auditing the foreign debt that was contracted by an organ other than Congress.⁵⁴ To settle the payment of the debt would then refer to all decisions about transactions in this context, including cuts, guarantees, securities, renewals, (re)financing of the debt, the period of payment, and interest rates.⁵⁵ Given that Article 75(7) of the Constitution is aimed at involving Congress retroactively in scrutinising those foreign debts that were not contracted by Congress itself in order to decide whether it is justified that the country assume the payment of such debt, Congress cannot fulfil this task by approving something as part of the budget the exact circumstances of which it ignores and never debated.⁵⁶

A settling of the debt in this sense, has, however, never taken place. In 1984, the Alfonsín Government convened an Investigative Committee of Senate whose task was to investigate the economic illegalities and irregularities that occurred between 1976 and 1983. This could have been a first step towards enabling Congress to perform its task of settling the payment of the country’s foreign debt based on the findings of this Committee. However, the Committee’s mandate was terminated in 1985 before it could fulfil its mission.⁵⁷ When Justice Ballestero decided in 2000 to send his findings in *Olmos*, including all expert witnesses’ reports, to Senate and Congress to make available to both Houses of Parliament the outcome of the most thorough investigation into the development of the country’s foreign debt under the last military regime,⁵⁸ a Parliamentary debate of the issue did not take place. From all this follows that the payment of the debt has not been settled by Congress in the constitutionally required way.

Does this mean that all activities of the Executive that aim at paying, renegotiating or refinancing the unsettled debt are then necessarily unconstitutional? As these activities are based on empowering statutes in which Congress grants the Executive far-reaching powers in the context of the foreign debt, executive acts based on those statutes can then only be unconstitutional if the empowering statutes on which such

⁵² Bidart Campos, *Tratado*, at p.126; see also Mastrorilli, at p.833; and Marcelo Bazán Lazcano, ‘¿Es constitucional la gestión de la deuda pública externa?’, *El Derecho* 117, 963-976, at 970-971.

⁵³ *Ibid*, at p.127.

⁵⁴ Juliá, at p.166; see also Lozada, at p. 260-261; Bazán Lazcano, at p971.

⁵⁵ Mastrorilli, at p.832; see also Juliá, at p.165.

⁵⁶ Lozada, at p.261-262.

⁵⁷ Juliá, at pp.174-180. Juliá questions whether the Investigative Committee was rightly one of Senate, rather than Congress, given that it is Congress who is responsible for the settling of the debt.

⁵⁸ “*Olmos*, Alejandro S/dcia”, causa N°14.467.

activities are based are themselves unconstitutional, or if the Executive's acts go beyond the powers awarded by those statutes. It then needs to be analysed whether this delegation of powers from the legislative to the executive is constitutional. In Article 76(1), the Argentinean Constitution prohibits that Congress delegate powers to the Executive 'save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress.' According to Argentinean constitutional doctrine, it is unconstitutional that Congress authorises another organ to perform the functions the Constitution has vested in Congress.⁵⁹ What is, on the other hand, constitutional is that Congress exercises its constitutional powers in an area of its competence, but does so in a form that leaves room for the executive to become active in the same area, within the framework set by Congress.⁶⁰

Thus, Congress cannot validly delegate to the Executive its powers to settle the country's foreign debt. On the other hand, Congress could, in principle, delegate the competence to negotiate the terms of repaying, refinancing or renegotiating the old debt, as these seem to be administrative tasks that normally belong to the executive's responsibilities, as long as Congress sets the policy framework within which these activities are to take place. However, it is doubtful that such delegations can be constitutionally valid before Congress has exercised its task of settling the debt. This is because before Congress has audited and accepted as binding a debt that was incurred in an unconstitutional fashion, this debt itself, and then necessarily also its repayment, has not been legitimised. To delegate powers with regard to the payment of this debt would then mean that Congress gives the Executive the power to dedicate the Nation's money to the fulfilment of an obligation the Nation has not as yet assumed in the constitutionally prescribed way, and this can hardly be regarded as a legitimate and constitutionally valid expense. It follows that all activities that take place in the context of debt repayment and renegotiation before the debt has been settled are unconstitutional. These considerations not only apply to the renegotiation of the terms and to the repayment of the foreign debt, but also to the taking up of new loans in order to repay the old debt. Debt can only be contracted constitutionally for the purposes mentioned in Article 4 of the Argentinean Constitution, and that article limits Congress' power to authorise loans and credit transactions to cases of national emergencies or enterprises of national interest. Debt repayment does not fall under either of these categories, so that the taking up of new loans in order to repay or refinance the old debt cannot be justified this way and must instead be regarded as an activity in the context of settling the payment of the old debt. The claim frequently made in the political discussion of Argentina's foreign debt that every payment, renegotiation or refinancing of the debt, as well as the taking up of new debts in order to repay the old debt, is unconstitutional until a settling of the payment of the debt by Congress has taken place, thus has its backing in the country's Constitution. However, judicial proceedings intended to prevent Government, by the means of a temporary injunction, from performing any such acts aimed at paying or renegotiating the country's foreign debt, or contracting new debt for this purpose, until Congress establishes the real amount of the debt and settles its payment with regard to the findings in *Olmos*,⁶¹ were thrown out for procedural reasons.⁶² However, given that in

⁵⁹ Bidart Campos, *Tratado*, at p.28.

⁶⁰ *Ibid.*, at p.31.

⁶¹ For an extract of the petition made to the court see www.lanuevahuella.com.ar/temasnacionales/Acerbi_10.htm, last accessed on 17 November 2004

Argentina the acts of all organs of the state are subject to constitutional review by the courts,⁶³ the courts have the role and the power to control the compatibility of all decisions of the executive and the legislative with constitutional principles.⁶⁴ This means that if proceedings for unconstitutionality were initiated, the courts could, and should, declare all acts aimed the debt repayment or renegotiation before the debt has been settled by Congress as unconstitutional. This includes that the current practice of assigning funds to debt repayment in the annual Budget Acts⁶⁵ could be struck down as unconstitutional by the courts.

In the light of the current practice with regard to debt renegotiations and payment, it seems nevertheless important to add that even if the debt had been settled, as many seem to think, so that its repayment in itself would then not be unconstitutional, the breadth of the legislative delegations gives rise to constitutional concerns. The Supreme Court argued in *Brunicardi* that the general authorisation of the executive to intervene in all matters regarding the foreign debt that can be found in the Ministries Act and which was relevant for the specific question before the Court, amounted to a delegation of powers that was compatible with the Constitution.⁶⁶ However, it has been suggested that if the delegations of power to the Secretary of the Economy by the means of this statute were to be interpreted as conferring such wide ranging powers as those to issue new bonds and to determine their terms and conditions, this would go beyond the powers envisaged by Article 76, as this means that instead of executing parliamentary policies, the Executive determines these policies, thereby assuming powers that are vested in Congress.⁶⁷ What would, instead, be necessary in the context of a constitutional delegation of powers is an intervention of Congress, prior to any executive activities with regard to the foreign debt, which sets the policy framework in which such activities are to take place,⁶⁸ Thus, Congress must be involved not just in setting aside the money needed for fulfilling obligations entered into by the Executive, but must rather provide, through the empowering provisions, a clear framework for the negotiating position of the Argentinean State.⁶⁹ If the empowering statute does not contain such clear guidelines, and the results of the negotiations between Government and Argentina's creditors are not debated and approved by Congress, either the delegation itself, or its exercise by the Executive, would be unconstitutional.

However, this is not how the delegation of powers works in practice. In Act 11.672, called Act Permanently Complementing the Budget, as amended by Act 16.432, Congress gave the Executive the power to contract public debt with IFIs. In the context of the restructuring of Argentina's public debt under the Menem Government, Act 24.156 (Act of the Financial Administration and the Control Systems of the

⁶² Julia at p.203.

⁶³ Helio Juan Zarini, *Derecho Constitucional* (Buenos Aires, Editorial Astrea, 2nd ed. 1999), at pp 87-93.

⁶⁴ Eg the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights; see Art 75 (22) of the Constitution.

⁶⁵ For a general discussion of the reviewability of the Budget Acts see Horacio Guillermo Corti, 'La ley de presupuesto ante la Constitución', in: Facultad de Derecho Universidad de Buenos Aires, *Lecciones y Ensayos 2002-77*, 35-84, at pp.58 and 80.

⁶⁶ *Brunicardi*, Adriano Caredio c/ Estado Nacional (BCRA) s/ cobro S.C. B.592.XXIV.", at para.13.

⁶⁷ *Mastrorilli*, at p.833-834.

⁶⁸ *Mastrorilli*, at p.835-836; see also García Lema, at p.960.

⁶⁹ *Mastrorilli*, at p.835-836.

National Public Sector), which came into force in 1993, authorises the Executive in its Article 65 to perform operations to restructure the public debt, as long as this constitutes an improvement of the original amount, payment period and/or interest rates. While the executive cannot make any operations with regard to the public debt unless they have been contemplated and specified in the Budget Act (s.60 of Act 24.156), operations with IFIs are expressly excluded from this requirement. Thus, Congress' role is largely reduced to rubberstamping whatever the results of Government's negotiations by making available the necessary funds in the Budget Act, and with regard to the debt with IFI, the empowering statute does not even require that.⁷⁰ Furthermore, in the light of latest financial crisis, Congress gave the Executive so-called super powers, allowing the executive to change the assignment of the budget contained in the Budget Act from one item to another without any congressional involvement.⁷¹ It is obvious that the delegation of powers, as well as the common practice adopted in Argentina in the context of debt negotiations, are not in line with constitutional principles. It has, indeed, been argued that the contracting of foreign debt by the Executive not only violates the constitutional provisions expressly regulating the distribution of powers and the competences of the respective constitutional organs, but also the spirit of the Constitution as set out in Articles 22 (the people deliberate and govern only through their representatives and authorities that were created by the Constitution) and 29 (Congress may not vest on the National Executive Power ... extraordinary powers or the total public authority; it may not grant acts of submission or supremacy whereby the life, honour, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever. Acts of this nature shall be utterly void) of the Constitution.⁷²

2.2. Can the unconstitutionality be healed?

If the main legal problem with regard to Argentina's foreign debt were the lack of constitutional legitimacy because the payment of the debt has never been settled by Congress in the constitutionally correct way, the possibility contained in Article 75(7) that Congress retrospectively accept the debt suggests that this procedural unconstitutionality can be healed. Thus, it seems as if Congress could redress the situation, if it so wished, and retrospectively legitimise the debt. However, it has been established above that settling the debt involves a qualitative aspect, as the origins, the amount and the purpose of the loans need to be thoroughly audited. While this does not mean that at the end of this auditing procedure the debt cannot be approved and accepted as binding the Nation, it is important to analyse whether Congress is entirely free in deciding whether or not to accept the debt and how to settle its payment, or whether the Constitution imposes restrictions in this respect. It is submitted that the latter is the case, as the Argentinean Constitution not only requires procedural constitutionality of all state acts, that is compliance with the procedure and competencies set out in the Constitution, but in addition demands substantive constitutionality, which means that the content of the decisions made by constitutional organs must be in accordance with constitutional principles. The Constitution prescribes in Article 4 that debt can only be taken up in cases of national emergencies

⁷⁰ It is then impossible to understand the opinion that this provides a constitutional delegation of powers, but see García Lema at p.962.

⁷¹ Clarín 24 November 2004.

⁷² Juliá, at pp.189-190.

or for the purposes of financing enterprises of national interest. It is submitted that the powers of Congress retrospectively to settle the payment of debt cannot go beyond its powers of contracting it to begin with. Thus, when settling the payment of the debt according to Article 75(7), Congress can only accept a debt as valid and binding if, but for the fact that it was not agreed by the competent state organ, it was contracted in accordance with constitutional standards.

In the context of the Argentinean Constitution it also needs to be borne in mind that all state acts must be compatible with constitutional human rights guarantees, including compliance with those international treaties which the Constitution has granted constitutional status,⁷³ such as the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights. Human rights considerations can thus not be ignored when Government enters into international agreements, when Parliament enacts legislation implementing the measures agreed therein, or when Government formulates its economic and financial policy. This raises an interesting legal question, as it is then doubtful that the government could validly conclude the agreements that its creditors demand, at least if a negative impact of debt rescheduling and debt repayment on the protection of social and economic rights could be shown.⁷⁴ In that case, Congress could for the same reasons not validly settle the payment of the debt.⁷⁵ Thus, even if the auditing showed that parts of the debt taken up by the military regime was contracted for constitutionally valid objectives, the rescheduling and repayment of this debt would need to give due regard to human rights considerations, including social rights. In this context, it needs to be taken into account that the UN Commission on Human Rights affirmed that ‘the exercise of the basic rights of the people of debtor countries to food, housing, clothing, employment, education, health services and a healthy environment cannot be subordinated to the implementation of structural adjustment policies, growth programmes and economic reforms arising from the debt.’⁷⁶ Furthermore, countries are under the obligation to assert and defend these rights in their negotiations with IFIs.⁷⁷ Given the constitutional status of these treaty obligations, social rights compatibility of debt repayment can be controlled by Argentinean courts in the context of constitutional review of state acts.

2.3. Consequences of unconstitutionality

If, then, Argentina’s foreign debt has never been settled in the constitutionally prescribed way, and this affects the constitutionality of any delegation to renegotiate this debt and the contracting of new debt in order to repay it, the crucial and unfortunately in the context of the Argentinean debate largely neglected question arising is that of the consequences of this unconstitutionality. Several approaches are possible in this respect from an internal Argentinean perspective. First of all, it could

⁷³ See Art 75 (22) of the Constitution.

⁷⁴ In the case of Argentina, this adverse impact was, for example, expressly mentioned by Bernard Mudho, Report on ‘Effects of structural adjustment policies and foreign debt on the full enjoyment of human rights, particularly economic, social and cultural rights, E/CN.4/2003/10.

⁷⁵ For a discussion of the relevance of economic and social rights in this context see Rolando E Gialdino, ‘Derechos humanos y deuda externa’, LL 2003-E, 1468-1481.

⁷⁶ Resolution 2002/29, ‘Effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights, at para.9.

⁷⁷ See the observations made by Sadi in the 33rd meeting of the Committee for Economic, Social and Cultural Rights on 25 November 1999, E/C.12/1999/SR.33, at para.13.

be argued that the internal unconstitutionality has no effect on Argentina's relationship with its creditors, as no one can rely on the lack of internal competency in order to escape his/her obligations.⁷⁸ Alternatively, it could be said that the procedural unconstitutionality in itself affects the existence of the obligation towards the creditors, a result that seems to be in line with the approach taken by s.66 of Act 24.156 which provides that 'Operations with regard to public loans that are executed in contravention of the provisions of this statute are void and without effect, which does not affect the personal responsibility of those who executed them. The obligations following from these operations are not enforceable against the central administration or any other contracting entity of the federal public sector.'⁷⁹ Another possibility would be to make the effect of the unconstitutionality, or the unlawfulness, of the contracting of the debt, dependent on the bad faith of the creditor.⁸⁰

At this point, an international dimension needs to be brought into the discussion, given that the country's foreign debt involves foreign creditors. Thus, it needs to be examined what effect, if any, the domestic unconstitutionality of the debt and of debt repayment has on the claim of the country's foreign creditors. In this context, it needs to be noted that Argentina has accepted foreign jurisdiction in these matters,⁸¹ although the constitutionality of this has been questioned.⁸² Looking at litigation which is currently taking place in New York before Justice Griesa, it seems as if the constitutionality of the Argentinean debt is not at all an issue before the court, which might be explained by the fact that the Argentinean Government is not raising the issue, so that there is then no need for the court to analyse it. While it is not likely that this situation is going to change, in the context of analysing how objections to debt repayment might influence the legal position it is nevertheless interesting to examine what effect, if any, the unconstitutionality argument could have in the context of such litigation.

The argument that the fact that debt was not incurred in the constitutionally prescribed way should void the loan agreements finds support in some international arbitration cases discussing the validity of obligations that were incurred by state organs acting *ultra vires*.⁸³ In one case, for example, the President of Venezuela had authorised the Venezuelan consul in New York to enter into certain contracts. The consul exceeded his authority, but the authorisation issued by the President contained an 'anticipatory all powers clause', approving all future acts of the consul with regard to those contracts. It was held that the validity of the contracts depended on whether the President himself had the power to enter into such contracts. Given that under the Venezuelan Constitution the legislature had the exclusive competence to conclude contracts in the particular subject matter, the contract was found to be *ultra vires* and the claim against Venezuela was rejected.⁸⁴ Similarly, in the so-called *Tinoco* case,⁸⁵ a cabinet member of the Tinoco Government of Costa Rica had entered into a concessionary contract with a foreign corporation. The contract was then authorised

⁷⁸ Bazán Lazcano at p.971.

⁷⁹ For a critique of this waiver of state responsibility see Oscar Aguilar Valdez, 'Responsabilidad del estado por su actividad financiera', La Ley 2004-A 972-992, at pp.988-990.

⁸⁰ Valdez, at p.990.

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⁸³ For a discussion of these cases see Theodor Meron, 'Repudiation of *ultra vires* state contracts and the international responsibility of states', (1957) 6 ICLQ 273-289, at pp.274-275.

⁸⁴ *Beales, Nobles and Garrison (US v Venezuela)*, summarised in Meron, at pp.279-280.

⁸⁵ *Great Britain v Costa Rica* (1923), Reports of International Arbitral Awards, Vol. 1, 371.

by the President and approved by the Chamber of Deputies. Taft, the US Chief Justice who was the arbitrator in that case, argued that the validity of the contract had to be determined according to the law of Costa Rica in existence at the time of its making. The contract contained provisions concerning taxes, so that, according to the Costa Rican Constitution, the approval of both Houses of Congress, not just that of the Lower Chamber, was required. As Senate had not approved (or disapproved) the contract, it was invalid, and Taft took it for granted that the nullity of the contract based on domestic constitutional law had the effect of invalidating the contractual claim of the international concessionary.⁸⁶ If these principles were to be applied to the case of Argentina's foreign debt, it seems as if Argentina could be justified in repudiating debt repayment on the basis of the preceding analysis of Argentinean domestic constitutional law, that is on the grounds that Congress did not settle the payment of the debt and that therefore all acts with respect to the negotiation and repayment of the foreign debt were and still are unconstitutional, thereby voiding any obligations the Argentinean state might otherwise have incurred towards its creditors.

However, other cases make the prospect of successfully invoking the unconstitutionality of the obligations in international judicial or arbitration proceedings extremely unlikely. In some cases, international tribunals have, for example, held that the conduct of a State subsequent to the conclusion of the contract must be taken into account when deciding whether or not contracts are valid even though they were entered into *ultra vires*. In a case involving Mexico,⁸⁷ a contract for legal services was concluded between a US lawyer and an official acting for the Provisional Mexican Government. After having made several payments under the contract, the incoming Mexican Government refused to pay the remaining sum on the basis that the contract was *ultra vires* and thus void under Mexican law. The Commission held that it was unwarranted pronounce the nullity of the contract in the light of the fact that the new Mexican Government had recognised the validity of the contract by making several payments under it.⁸⁸ In a comparable case in which a US Consul in India had appointed a lawyer to render legal services to the US, and in which the US Government refused to pay the fees on the grounds that the Consul had not been authorised to employ the lawyer on behalf of the Government, the tribunal decided that:

‘Whatever at the outset was the authority of the United States Consul to employ an attorney at the expense of the United States Government, it is plain from the correspondence referred to above that that Government was perfectly aware ... of Hemming's employment in a prosecution initiated solely for its benefit, that it did not object in any way whatever during the progress of the case to the steps taken by its Consul but appeared implicitly at all events to approve of those steps and of Hemming's employment. This Tribunal is, therefore, of the opinion that the United States is bound by the contract entered into, rightly or wrongly, by its Consul for its benefit and ratified by it.’⁸⁹

⁸⁶ *Ibid.*, at 397-398.

⁸⁷ *Davies (USA) v Mexico* (1927), Reports of International Arbitral Awards, Vol. 4, 139.

⁸⁸ *Ibid.*, at 141. For a related argument, though in a case that was based on a different factual situation, see *Z v ABC* (1983) 8 YCA 94, at 104.

⁸⁹ *Hemming (GB) v US* (1920), Reports of International Arbitral Awards, Vol. 6, 51, at 53. See also *Shufeldt (US v Guatemala)*, Annual Digest and Reports of Public International Law Cases, 1929-1930, Case No.110, p.180.

In the case of Argentina, it could then easily be argued that the consistent acts of all subsequent democratic governments to repay and restructure the country's foreign debt constitute a subsequent ratification of the originally void loan agreements concluded by the military regime. It is submitted that whether and how originally unconstitutional contracts can be ratified is, just as the issue of the original unconstitutionality of such contracts, a matter to be decided according to domestic constitutional law. Only if the organ that ratifies the situation has the authority to do so, and if the ratification complies with constitutional principles, will this ratification be any more valid than the act thereby ratified.⁹⁰ However, the foregoing analysis demonstrated that in the Argentinean context the acts that might be regarded as a ratification are not constitutional, so that they cannot have the effect of ratifying the originally unconstitutional contracts. If there is then no valid ratification, it is only possible to base an estoppel on a pure good faith argument,⁹¹ on the grounds that the partial fulfilment of the obligation by the debtor state creates the appearance of the validity of the obligation on which the creditor can rely, or a legitimate expectation that the country will not turn round and repudiate the contract at some later point.

In another case in which the Venezuelan Government declared a contract void on the grounds that it had not been submitted by the Executive for legislative approval as required by the country's Constitution, it was held that this omission should not be ascribed to the other party to the contract, but rather to the Venezuelan Executive to whom the compliance with said formality corresponded.⁹² In *Aboilard*,⁹³ again a case in which a concessionary contract entered into between a French company and several Haitian Secretaries of State in the name of the Haitian Government, was later repudiated by the Haitian government on the grounds that it had not been submitted to the legislature and was therefore void under domestic law, the tribunal accepted the invalidity of the contract under domestic Haitian law. However, it was held that while the contract could therefore not produce the effects of a valid contract, Haiti was internationally liable for the repudiation of the contract, because the Government was responsible for the legitimate expectations created by Government officials in the validity of the contract. The Government was accordingly liable for the damage suffered by the concessionary. These decisions equally seem to be based on the concept of good faith with regard to the fact that the state organ that originally entered into the obligation acted within its authorities. Thus based on cases such as *Aboilard*, it could be argued that the reasons for the invalidity of the obligations lie with the Argentinean Government, not with the foreign creditors, and that the Argentinean State through its acts has created legitimate expectations in its creditors and can accordingly not escape liability, even if the loan agreements were to be found invalid.

In both types of cases, in order to be able to rely on good faith, the other party must have relied either on the appearance of original authority or on the appearance of ratification, and must have applied reasonable care in order to ascertain the authority of the state official, the amount of care required varying depending on the expertise of the creditor and the importance and the subject matter of the contract.⁹⁴ The outcome

⁹⁰ In the UK, a comparable point was made by Lord Templeman in *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL), at 39, though in a rather different context.

⁹¹ Meron, at p.286.

⁹² *Rudloff (US v Venezuela)* (1903), as summarised by Meron, p. 285.

⁹³ *Aboilard (France v Haiti)*, (1905) 1 *Revue de Droit International Privé et de Droit Pénal International*, 893.

⁹⁴ Meron, at pp.288-289.

of Argentinean challenges regarding the validity of the loan agreements based on unconstitutionality would then depend on the good faith of the creditors. While with regard to the original debt contracted by the military regime, an argument can be made that the unconstitutionality should have been obvious to foreign lenders,⁹⁵ it is more difficult to sustain a similar argument with regard to the acts of subsequent democratic governments. Even if these acts are unconstitutional under the Argentinean Constitution, it could be argued that the Argentinean State has, though not validly at the domestic level, nevertheless through the continuous practice of debt repayment, renegotiation and restructuring, created a legitimate expectation in the honouring of its obligations at the international level and is therefore barred from relying on the domestic invalidity of the contract.

This approach at first sight seems to strike a fair balance between the interests of international creditors and those of debtor nations.⁹⁶ However, several considerations shed doubt on the appropriateness of such an approach in this particular context. First of all, it needs to be taken into account that, known to the other party, one of the parties to the contract is a state, and that states are bound by their constitutional and international law obligations, and furthermore have to take public interests into account when entering into contracts or later deciding whether or not to honour them. Indeed, states might be in violation of constitutional requirements or international norms if they were to give their contractual obligations precedence over other principles, for example their social rights obligations.⁹⁷ If the approach favouring the interests of creditors in the validity of contracts that are invalid under the domestic constitutional law of the debtor country is really derived from generally accepted principles of international law, it nevertheless needs to be borne in mind that at least with regard to agreements that might violate a state's obligations under international treaties, such as the ICESCR, the conflict can then not be reduced to one between domestic law and international law, but turns into a conflict between conflicting principles of international law.

The context of debt repayment in Argentina demonstrates clearly the problems of an approach that separates the domestic constitutionality of a contract from its international validity.⁹⁸ If acts related to debt repayment either by the Argentinean Executive, or by Congress before settling the payment of the debt, were to be regarded as valid with regard to the country's creditors without any regard to procedural or substantive domestic constitutional principles, this would have extremely far-reaching consequences. Indeed, it would mean no less than that the repayment of a debt taken up by a military regime and accepted de facto by democratic governments under pressure, develops its own dynamics and that this cycle can never be broken, no matter what the audit required by the Argentinean Constitution were to find with regard to the legitimacy of this debt and the compatibility of its servicing with human rights protection. If constitutional principles could thus be disregarded in the context of the contractual relationship between Argentina and its creditors, the Argentinean Government would be more accountable

⁹⁵ See also the arguments advanced by Taft in the *Tinoco* case, *Great Britain v Costa Rica* (1923), Reports of International Arbitral Awards, Vol. 1, 371, at 394.

⁹⁶ Theodor Meron, 'Repudiation of ultra vires state contracts and the international responsibility of states', (1957) 6 ICLQ 273-289, at pp.274-275.

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⁹⁸ For a detailed argument against the internationalisation of such contracts see, for example, M Sornarajah, *The Settlement of Foreign Investment Disputes*, Kluwer Law International The Hague 2000, at pp.85-104 and 223-278.

its 'external creditors (the IMF and the World Bank in particular) than to [its] own citizens.'⁹⁹

As the example of Argentina shows, the existence of a detailed constitution and of constitutional review of all state acts, to the contrary, seems to be the only legal tool a country that is dependent on its creditors has in order to keep at least some sovereignty and retain some independent decision-making power.¹⁰⁰ If domestic constitutionality can be disregarded in the international context, this means that a country's constitution, which is supposed to be the supreme expression of a nation's governing principles, as well as superior to the acts of the government of the day, loses this very characteristic, as government's or government officials can bind nations even if their acts violate constitutional principles, so that the constitution becomes largely worthless. If representative democracy is still a valid principle, it is difficult to sustain that the people can be held responsible for ultra vires acts of state organs that did not have the authority to represent the people. Indeed, if constitutional principles had been complied with, large parts of Argentina's debt could not have been incurred, and the debt crisis would accordingly have been avoided.¹⁰¹

Conclusion

It is obvious that in an article, it is not possible to do justice to the complexities of the issues surrounding debt repayment, even when concentrating only on the example of one country. Many important issues therefore had to be neglected, even though they are important in themselves and could to some extent be related to the issues analysed above, such as the debate surrounding international bankruptcy procedures following the example of US domestic law.¹⁰² In the context of the legal debate taking place in Argentina, it is submitted that the analysis of the procedural unconstitutionality of the country's foreign debt, while important in order to make clear the importance of Congress' involvement in resolving the problem, can be no more than a first step on the way of questioning the legitimacy of debt repayment. As was demonstrated, procedural unconstitutionality can be healed, unless this is prevented by substantive reasons, such as social rights considerations. A deeper analysis of these issues needs to take place in order to assess how these arguments could most effectively be used in the context of debt renegotiation and in the context of international judicial and arbitration proceedings for defaulting on debt repayment.

Furthermore, even if an audit of the Argentinean debt were to take place and were to show that much of the debt was, in fact, contracted in an unconstitutional way,¹⁰³ or

⁹⁹ Fantu Cheru, 'Effects of structural adjustment policies on the full enjoyment of human rights', E/CN.4/1999/50.

¹⁰⁰ The need for strong national constitutionalism in order to improve a debtor country's position towards its creditors see also Joseph Oloka-Onyango, 'Beyond the rhetoric: reinvigorating the struggle for economic and social rights in Africa', (1995) 26 Cal W Int'l LJ 1, at pp.64-65.

¹⁰¹ Eduardo Conesa, 'Argentina: como convivir con el default', La Ley 2004-A 993-1012, at p.1007.

¹⁰² See, for example, Kunibert Raffer, 'Solving Sovereign Debt Overhang by Internationalising Chapter 9 Procedures', (2002) 36 Studien von Zeitfragen (Internet Ausgabe), www.jahrbuch2002.studien-von-zeitfragen.net/Weltfinanz/RAFFER_1/raffer_1.HTM.

¹⁰³ Or that the interest rates are usurious and that the debt has been repaid if normal interest rates were applied, an interesting argument which can unfortunately not be developed in the context of this paper, but see Miguel Angel Espeche Gil, 'Ilicitud del alza unilateral de los intereses de la deuda externa', presentation to the XV Congress of IHLADI in April 1989, comunidad.derecho.org/deudaexterna/espechee.htm.

that social rights considerations make a different approach to debt repayment necessary, this would open up new questions. An important problem that needs to be resolved in this context is that of the consequences of the invalidity of any loan agreements. In the context of swap interest transactions contracted *ultra vires* by local authorities, the House of Lords hinted, for example, that ‘It may not follow that, as between the council and the banks, payments made by the council before or after the period of interim strategy can be recovered by the council. Nor does it follow that payments received by the council before or after that period cannot be recovered by the banks. The consequences of any *ultra vires* transaction may depend on the facts of each case.’¹⁰⁴ Thus, more work needs to be done to examine what the consequences of an *ultra vires* transaction should be, to what extent the principles of unjust enrichment might be relied on, and how social rights arguments fit into the restitution and compensation debate.

The preceding analysis has shown that while a legal analysis of Argentina’s foreign debt points clearly towards the conclusion that in the context of the settling of the country’s foreign debt, formal and substantive requirements of the Argentinean Constitution have been, and still are, widely disregarded. While the Constitution demands that the debt is settled by Congress as the democratically legitimate representative of the people, one look at the ongoing debt negotiations between the Argentinean Government and the country’s creditors shows a substantial gap between constitutional demands and reality. The terms of debt repayment with regard to debts with IFIs are worked out between the Argentinean Government and the IMF, and with regard to the restructuring of the debt with other than IFIs, they depend in addition on the approval of the US Security and Exchange Commission, or its equivalent in other countries in which the new bonds are to be put on the market.

Several explanations come to mind when reflecting on the discrepancy between constitutional mandates and reality. First of all, it could be possible that the requirements of the Constitution are simply impractical, and that in the context of debt repayment which requires constant negotiations with a wide variety of creditors, a concentration of powers in the Executive is inevitable. The Argentinean Constitution provides a framework, based on what was perceived to be in the interests of the Argentinean Nation, which, if strictly adhered to, could stand in the way of capitalist interests and policies. Indeed, in the globalised world of neo-liberalist capitalism, it seems as if national sovereignty, but also the idea of a strong role of Congress, and of an independent judiciary that can control the constitutionality of all state acts, are no longer popular. Statements of foreign government officials and executives of IFIs make it clear that they regard the Argentinean constitutional system as threatening their vision of the rule of law and of legal security, which is a vision entirely focused on international and transnational business and financial interests.¹⁰⁵ More importantly, constitutional values such as the protection of economic and social rights do not come into the equation at all.

In the domestic arena, based on the realities of the negotiations with its creditors, a distribution of powers away from the in many cases constitutionally empowered and

¹⁰⁴ See *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL), post 36D-E, per curiam.

¹⁰⁵ For a description of how the IMF demanded ‘legal certainty’, by which was meant that the courts could not interfere with governmental policies(!), see Eduardo Amadeo, *La Salida del Abismo*, Planeta Buenos Aires 2003, at pp.107-109.

democratically legitimated organ, Congress, to the Executive, can be observed, and has equally been justified on grounds of the realities, necessities and exigencies of debt negotiations. This shows that it is essential to bear in mind that the debt is used as a political tool, that gives IFI's, and in fact the whole international financial world, the possibility to exercise political pressure on debtor countries, but furthermore as a means to achieve internal obedience.¹⁰⁶ Indeed, it can be observed in Argentina that governments use debt repayment as an argument to justify unpopular measures,¹⁰⁷ and, even more importantly, in order to silence any debate of national policies.¹⁰⁸

As a final point, it should be noted that the debate in Argentina, apart from that taking place in militant political circles, is largely characterised by resignation, if not fear, in that while there seems to be a large consensus that the debt is unconstitutional and, more importantly, unpayable and unsustainable and that debt repayment is detrimental to the interests of the country, the reality of the international power structure needs to be accepted and the debt to be repaid in order to avoid the consequences of international isolation, the loss of international investments etc. From a legal perspective, this raises interesting issues of sovereignty and undue pressure which need to be resolved at the international level if the law is not to degenerate into the law of the strongest.

¹⁰⁶ Juliá at p.99.

¹⁰⁷ Juliá at p.162.

¹⁰⁸ Lozada, at p.25.