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BANK CRISIS IN ARGENTINA: THE CONSTITUTIONALITY OF BANK DEPOSITS PESIFICATION, THE *MASSA* CASE

*Ignacio Hirigoyen**

I. INTRODUCTION

ARGENTINA experienced its biggest bank crisis in history from 2000 to 2002. The financial crisis was so severe that it is regarded as one of the most severe to ever occur during a peacetime period. At one point during such economic turmoil, Argentina went through five presidents in eight days. The fifth President, Eduardo Duhalde,¹ declared a state of economic emergency² and made executive decisions, taking economic measures that were the source of much controversy and litigation. This paper will address the *Massa* case,³ which arose out of a challenge to the constitutionality of such executive decisions and went all the way through to Argentina's Corte Suprema de Justicia de la Nación (Supreme Court). It will also analyze the merits of the decision through a comparison to decisions of the U.S. Supreme Court on constitutional issues and will explain why this comparison is appropriate. In order to understand the details of the *Massa* case, it is important to understand the background set forth in part II of this essay. Part II focuses on how the convertibility regime, the privatizations, corruption, and the International Monetary Fund (IMF) amongst other factors played a part in the crisis and will briefly present some other alternatives that could have been implemented. Part III will present the *Massa* Supreme

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1. Duhalde was appointed interim President of Argentina by the Legislative Assembly on January 2, 2002, during an unclear series of events that some people deemed as a conspiracy. Initially, he was to serve for a few months, until the chaotic situation of the country could be controlled. But Duhalde stayed in office for more than one year. During this time, he confirmed the default of most of the Argentine public debt and ended the unsustainable peg of the Argentine peso to the U.S. dollar, which triggered inflation and massive discontent. Duhalde managed to stabilize the turmoil and under some political pressure called for elections.
2. Public Emergency and Currency Exchange Reform Act, Law No. 25561, June 1, 2002, [29810] B.O. 1-2 (Arg.).
3. Corte Suprema de Justicia [CSJN], 27/12/2006, "*Massa, Juan Agustín v. Poder Ejecutivo Nacional*—dto. 1570/01 y otro s/ amparo ley 16.986," Fallos (M.2771.XLI) (Arg.).

Court decision with contrasting U.S. Supreme Court decisions, address similarities and differences in their reasoning, and explain why the Court seems to be arriving at more equitable decisions with the passing of time. Part IV of this essay analyzes U.S. Supreme Court decisions and draws parallels to *Massa*, evaluating Argentina's Supreme Court decision from another perspective. Part V concludes with the lessons learned from the *Massa* decision and Argentina's crisis.

II. BACKGROUND

The demise of Argentina's banking system was the result of a combination of many factors. These factors included (1) three years of increasing economic recession (which itself was largely a result of both an overvalued Argentine peso and negative effects of the Mexican, Brazilian, and Asian crises), and (2) a currency convertibility policy that fixed the exchange rate of each Argentine peso to one U.S. dollar during the 1990s.⁴ The convertibility plan helped achieve the short term goal of controlling inflation but masked vulnerabilities of Argentina's economy that resurfaced later and exacerbated the crisis.⁵ Moreover, a high level of corruption at almost every political level increased Argentines' lack of trust in their government and economy (which itself contributed to the deposit exodus).⁶ At the macroeconomic level, the failure of the economies of countries that used similar convertibility regimes (also known as hard peg policies) to revive their economies was a factor in Argentina's economy losing world wide credibility. This loss of credibility led to a halt in foreign investment and promoted a huge bank deposit exodus that resulted in economic recess.⁷

4. FINANCIAL CRISES IN THE 1990s 401 (Douglas Arner, Mamiko Yokoi-Arai, & Zhongfei Zhou, eds., British Inst. of Int'l & Comparative) (2002).

5. *See id.*

6. Daniel Kurtz Phelan, *Lost Savings*, LEGAL AFFAIRS, NOV.-DEC. 2002, http://www.legalaffairs.org/issues/November-December-2002/scene_phelan_novdec2002.msp (indicating the Argentines' perception of corruption.). The government of Argentina maintains that official corruption has decreased dramatically as a result of the privatization of most state enterprises over the past decade. Argentina is a party to the Organization of American States (O.A.S.) Anti-Corruption Convention and ratified the Organisation for Economic Co-operation and Development (O.E.C.D.) Anti-Corruption Convention in 2001. The government has regulations against bribery of government officials, but enforcement is uncertain. An anti-corruption office under the Ministry of Justice reviews the financial disclosure statements that are now required of all senior public officials. Press reports indicate, however, that some public officials have refused to provide the required disclosure statements on the grounds that compliance would expose them to kidnapping attempts. The anti-corruption office also carries out investigations into cases of alleged corruption involving executive branch officials. *Id.*

7. Joseph Stiglitz, *Lessons from Argentina's Debacle*, SAND IM GETRIEBE (Association for Taxation of Financial Transactions to Aid Citizens (ATTAC)/ Argentina), Jan. 9, 2002, <http://attac.org>. East Asia's crisis of 1997 became a global financial crisis, raising interest rates for all emerging markets, including Argentina. Argentina's exchange system survived, but at a heavy price—double digit unemployment. Soon, high interest rates strained the country's budget. With 20 percent interest rates, 9 percent of the country's gross domestic product (GDP) was spent annually on financing its debt. The U.S. dollar, to which Argentina's peso was

The high magnitude of Argentina's banking crisis negatively impacted the country not only economically but also socially and politically. Argentines revolted on December 21, 2001 brought down then President Fernando de La Rúa, and went through five presidents during a ten day period until Eduardo Duhalde was appointed by Congress to govern the country as interim President until there was time to hold constitutional presidential elections. During that period of time, President Duhalde made use of special powers granted by Congress according to section 96 CN.⁸ The use or abuse of said emergency powers during the crisis was and still is a source of much litigation.

In order to understand the magnitude of the crisis, it is necessary to understand the history of Argentina's privatization activities and currency convertibility policies, how they worked, what they ostensibly did, and their strengths and weaknesses.

A. ECONOMIC POLICY DURING THE 1990s, PRIVATIZATIONS AND CONVERTIBILITY

Privatization of state-owned companies and full peso-convertibility were economic tools used in Argentina during the 1990s to combat the severe hyperinflation experienced by Argentina in 1989 and 1990.⁹ Their objective was to stabilize a highly volatile economy that was resulting in social unrest.¹⁰ Under this economic regime, Argentina achieved its desired stabilization fairly quickly.¹¹ The goal of privatizations was to generate revenue by attracting foreign investment in order to finance public debt without resorting to inflationary financing.¹² Privatizations were intended to have a double effect: first, to increase the state reserves through the money obtained from the sale of large state-owned enterprises (between 1991 and 1994, the government privatized 90 percent of all state-owned enterprises for an amount equivalent to U.S. \$20 billion dollars); and second, to reduce the operating deficits that those large enterprises historically imposed on the state.¹³ According to Argentine Central Bank President Javier Gonzalez Fraga, "privatizations [were] Ar-

tied, increased sharply in value. Meanwhile, Argentina's Mercosur trading partner, Brazil, saw its currency depreciate. Wages and prices fell, but not enough to allow Argentina to compete effectively.

8. CONSTITUCIÓN ARGENTINA [CONST. ARG.] § 96. The second ballot, when appropriate, shall be held between the two voting formulas of the most voted candidates, within thirty days of the previous election. After twelve days and after agreeing to default on its foreign debt, Argentina declared Senator Eduardo Duhalde as interim President. Days after becoming President of Argentina and after being approved by a majority of the opposition, Duhalde decreed Law 25.561 (pesification of bank deposits). See Law No. 25561, [29810] B.O. 1-2.
9. *IMF Policy and the Argentine Crisis*, 34 U. MIAMI INTER-AM. L. REV. 155, 187 n.1.
10. *Id.*
11. Press Release, U.S. Dep't of the Treasury, Statement of John B. Taylor, Under Secretary of the Treasury for International Affairs before the Subcommittee on International Monetary Policy and Trade of the House Financial Services Committee (Feb. 6, 2002), available at <http://www.ustreas.gov/press/releases/po986.htm>.
12. *Id.*
13. *Id.*

gentina's major tool in the process of debt reduction."¹⁴ This does not suggest that economic performance, politics, or ideology have played no part in Argentina's privatizations, but merely that they have been secondary to debt concerns.¹⁵ Other goals of Latin American privatizations, including cutting corruption, restoring government credibility, attracting foreign investment, reducing public spending, and gaining access to credit markets were also in existence during early 1990 in Argentina.¹⁶

The convertibility system was established in 1991 by Law No. 23928¹⁷ and was sustained by three basic principles: (1) the convertible currency (or hard peg), (2) the prohibition of indexation¹⁸ (because of suspicion that indexation was the cause of inflation), and (3) the possibility of using foreign currency for domestic transactions.¹⁹ Basically, the Republic of Argentina's Central Bank (BCRA) had to provide full convertibility between pesos and U.S. dollars at a 1 peso/\$1 ratio while exchange controls were eliminated.²⁰ The strength of the system depended on the capacity of the BCRA to keep reserves in U.S. dollars supporting the value of the peso.²¹ According to Law No. 23928, the reserves in U.S. dollars and gold should be at least equal to 100 percent of the monetary flow.²²

But the program resulted in most people (including Argentines) believing that the peso was overvalued.²³ As a result, most citizens converted their deposits into U.S. currency as rapidly as possible.²⁴ In addition, Argentina became more dependent on imports from countries with free floating currencies and cheaper goods.²⁵ Problems arose when the high growth rate in Argentina's economy left it with increasing foreign indebtedness and trade deficits, both warning signs masked initially by the revenues from the privatizations.²⁶

Nevertheless, as a result of both privatization and convertibility plans, Argentina had ten prosperous years, from 1991 to 2001.²⁷ But President

14. Kunio Inoue, Argentina to Promote Privatization to Cut Debt, REUTERS, Aug. 9, 1990.

15. *Id.*

16. *Id.*

17. Law about Convertibility of the Austral, Law 23928, Mar. 28, 1991, [27104] B.O. 1, amended by Law about Convertibility, Law No. 25445, June 22, 1991, [29675] B.O. 1 (Arg.).

18. Indexation refers to the automatic adjustment of an economic variable, such as wages, taxes, or pension benefits, to a cost-of-living index, so that the variable rises or falls in accordance with the rate of inflation.

19. FINANCIAL CRISES IN THE 1990s, *supra* note 4.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Doug Casey, What's Next for Argentina?, WORLD NOTE DAILY, Aug. 1, 2002 (Doug Casey is the author of the best sellers *Strategic Investing*, *Crisis Investing* and *Crisis Investing for the Rest of the 90's*.)

Menem's²⁸ reforms were half-measures at best—the equivalent of giving vitamins and amphetamines to a cancer patient. They were completely inadequate to cure the rot; therefore, the latent crisis resurfaced at last.²⁹

B. THE ROLE OF THE INTERNATIONAL MONETARY FUND (IMF)

The IMF had a large role in shaping the 1990 Argentine economy³⁰. As one commentator stated:

Argentina followed the IMF model faithfully, more faithfully, than almost any other nation. Its economy was opened wide. Its peso was pegged to the dollar. For a few years it sparked an investment boom as foreigners bought most of the country's patrimony—its banks, phone companies, gas water, electricity, railroads, airlines, airports, postal service, even its subways. As long as this money came in, there were enough dollars to keep plenty of pesos in circulation. But the dollar-to-peso peg led to an overvalued currency which killed Argentine exports, and once there was little more to sell off, the dollars ceased coming in, which pulled money out of local circulation. As Argentina tanked, the IMF's austerity program pushed the economy further into collapse.³¹

The role of the IMF has been widely criticized for its actions in many countries around the world.³² Some are of the opinion that the IMF's policy pattern is as clear in Argentina as in previous collapses around the globe.³³ It gives countries bad economic advice, then lends heavily to them, allows them to waste the new funds, and watches as the government's popularity plummets.³⁴ When the economic crisis is deep, the IMF blames the government and pulls the plug, knowing that it always gets paid first and in full.³⁵ In Argentina, as elsewhere, the population and the private sector are left holding the bag.³⁶ The result is a country more deeply impoverished than it would have been without IMF's involvement.³⁷ In Argentina's crisis, the most often criticized point on the

28. Carlos Menem was President of Argentina for eight years, and was responsible for convertibility and the privatizations that took place in Argentina during the 1990s.

29. See generally, Casey, *supra* note 27.

30. *Argentina's Economic Meltdown: Causes and Remedies: Hearing Before the Subcomm. on International Monetary Policy and Trade, Comm. on Financial Servs.*, 107th Cong. 52 (2002), available at <http://financialservices.house.gov/archive/hearings.as@formmode=detail&hearing=88.html>.

31. *Id.* at 4 (statement of Dr. John Taylor, Under Secretary of the Treasury for International Affairs, quoting from Robert Kuttner in the *AMERICAN PROSPECT*). There is disagreement amongst economists regarding the fact that Argentina's peso was overvalued. See Steve H. Hanke, *Argentina: Caveat Lector 4*, at lesson 2 (Cato Inst., White Paper, Oct. 17, 2002) ('If you are "politically correct," being factually incorrect does not matter.'), available at <http://www.cato.org/pubs/whitepapers/hanke-021017.pdf>.

32. Hanke, *supra* note 31, at 26.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

IMF's role is that the IMF continued lending money to Argentina even though Argentina was not fully meeting IMF's demands.³⁸ The IMF and Argentina agreed to an austerity plan.³⁹ Although Argentina on more than one occasion failed to comply with the plan's guidelines, the IMF continued to loan funds.⁴⁰ This funding policy did nothing more than to push them headlong in to a depression as the increased debt to the IMF would be paid at the expense of the private sector.⁴¹

On the other hand, others are of the opinion that the IMF allowed Argentina to have a very relaxed way to comply with its demands, and Argentina is as much or more to blame than the IMF for mismanaging the funds.⁴² Irrespective of the role of the IMF, there should be no denying the fact that the chief wrongdoer in Argentina's collapse was the government and not the IMF. But, even assuming the IMF was attempting to be an understanding lender, it is difficult for the IMF to avoid scrutiny when its superior status allows it to be repaid irrespective of whether the government fails, and always at the expense of the private citizens of the country. At some point, the bartender has some responsibility for the activities of his drunken patron.

C. THE ROAD TO THE CRISIS

1. Macroeconomic Factors

Argentina could have recognized the symptoms of the crisis from the example of East Asia in 1997. East Asia's crisis was due in part to several of the same key factors: (1) strong economic growth but an overdependence on domestic demand without enough expansion in exports, (2) aggressive expansion of loans provided by banks, and (3) excessive and increased borrowing from the international interbank in the public and private sector leading to dangerous credit exposures.⁴³ In 1997, Argentina could have (after Mexico's and Asia's crises) started thinking about devaluing the currency, and if not then, certainly after Brazil devalued in 1998.⁴⁴ Brazil's devaluation also affected Argentina's dealings in the MERCOSUR.⁴⁵

In late 1998, Argentina entered an economic decline that was to last for many years.⁴⁶ The decline deepened after Brazil, Argentina's largest

38. *Id.*

39. *Id.*

40. *Id.*

41. *See generally id.*

42. *Id.* at 62; *International Monetary Fund and the National Interests of the United States: Hearing Before the Joint Economic Comm.*, 105th Cong. (1998) (Statement of Dr. C. Fred Bergsten, Director, Institute for International Economics, Argentina's Economic Meltdown: Causes and Remedies).

43. Hanke, *supra* note 31.

44. *See id.*

45. *See id.*; *see also* Inoue, *supra* note 14.

46. Kurt Schuler, *Ignorance and Influence: U.S. Economists on Argentina's Depression of 1998-2002*, 2 *ECON. JOURNAL WATCH* 234-278 (2005).

trading partner, devalued its currency substantially in January 1999.⁴⁷ Argentina could not devalue under the convertibility system it then had.⁴⁸ As time passed, what started as a recession turned into a depression.⁴⁹ Argentina's economy declined further, suffering its two worst quarters on record.⁵⁰ It finally hit bottom around August 2002.⁵¹ Commentators on Argentina's crisis have suggested a number of causes for it. A nearly exhaustive list includes: (1) the effect of the convertibility system on the real exchange rate, competitiveness, and willingness to issue dollar-denominated debt (bearing in mind that most observers considered the convertibility system to be a currency board), (2) external shocks, such as the reduced inflow of foreign capital, (3) budget deficits and their effect on the sustainability of the government debt, (4) inflexible labor markets, (5) three big tax increases the Argentine government imposed from January 2000 to August 2001, (6) mistakes by the IMF, and (7) political blunders by the Argentine government that reduced confidence in the economy, such as by upsetting established property rights.⁵²

Almost all commentators agreed that the convertibility system lacked credibility over the last several months of its existence.⁵³ Recommendations for replacing the system fell into two major groups.⁵⁴ A majority favored a floating exchange rate, heavily managed if necessary and possibly supported by extensive exchange controls and forced conversion of dollar assets into pesos.⁵⁵ A significant minority favored official dollarization at one peso per dollar (at least before the government devalued the peso in early 2002).⁵⁶ A few remaining commentators held intermediate positions, such as favoring dollarization combined with a one-shot devaluation.⁵⁷

2. *Economic Crisis Led to Social Crisis that Led to a Political Crisis and its Aftermath Enhanced the Social Crisis*

Imports in Argentina grew dramatically by 600 percent from 1990 to 2000, wiping out 1500 textile factories, 1200 shoe factories, 360 auto part makers and 150 toy factories.⁵⁸ The economic crisis developed into a political crisis that started by bringing down from office President De la Rúa. Thereafter, Argentina went through five presidents in ten days. The fifth and last President during the crisis (Duhalde) made use of special powers to devalue the Argentine peso and end the convertibility

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

plan, which helped to exacerbate the already existing banking crisis. After ten years of convertibility (at 1 peso/1 dollar ratio), Argentine's would use U.S. dollars and Argentine pesos indistinctively for any kind of transaction. The majority would keep bank deposits in U.S. dollars as a hedging measure as most Argentines expected that such parity was not going to exist forever and the peso would devalue eventually.

This added yet another layer to the crisis since the President, who enjoyed special powers granted by Congress, decreed that all bank deposits, in any currency, be converted to Argentine pesos. Decree 214/2002,⁵⁹ which *pesificated*⁶⁰ all bank deposits, combined with the devaluation of the peso, and resulted in citizens' bank deposits' values decreasing initially by 40 percent with respect to the U.S. dollar. Decree 214/2002 affected every debtor/creditor relation; the *Massa* decision focuses on the reality of bank deposit holders versus banks.

An interesting point that made the situation even worse is that on the month before the crisis reached its peak, in order to prevent bank insolvency, Argentina's Minister of Economy implemented the *El Corralito*

59. Financial System Restructuring, Decree No. 214, Feb. 3, 2002, [29830] B.O. 1-2 (Arg.).

Conversión a pesos de las obligaciones de dar sumas de dinero, de cualquier causa u origen, expresadas en [d]ólares [e]stadounidenses u otras monedas extranjeras, existentes a la sanción de la Ley 25561, y de [l]os depósitos en [dichas] monedas . . . en el sistema financiero . . . [R]elación de cambio. . . [C]oeficiente de Estabilización de Referencia. . . [E]misión de un Bono . . . [a] cargo del Tesoro Nacional para solventar el desequilibrio [resultante de la diferencia de cambio que se establece]. Suspensión [de] procesos judiciales y medidas cautelares y ejecutorias relacionadas con el Decreto 1570/2001 . . . , la Ley 25561, el Decreto 71/2002 . . . y el presente decreto. Modifica[se] la Ley 21526 de Entidades Financieras N 21.526. Global Legal Information Network, Summary Record of Decree 214, <http://www.glin.gov/search.action> (search for "125266," limit search by "Source Number (GLIN Number, etc.)").

Obligations to deliver money, for any reason or origin, expressed in United States Dollars or other foreign currency, existent by the enactment of Law 25561 (Public Emergency and Exchange Rate Reform) are converted to Pesos. Deposits in Dollars or other foreign currency existent in the financial system shall be converted to Pesos. Debts in Dollars or other foreign currency are converted to Pesos. A Reference Stabilization Coefficient is to be applied to Foreign currency deposits and foreign currency debts. Obligations of any nature or origin arising after the enactment of Law 25561 cannot include nor be subject to adjustment clauses. Stipulates the issue of Bonds to be debited from funds of the National Treasury intended to settle the financial imbalance, and the issue of Bonds in United States Dollars to be debited from funds of the National Treasury, which can be chosen by deposit-holders in the financial system to substitute the refund of deposits. Judicial claims, preliminary injunctions and the execution of judgements related to Decree 1570/2001 (Rules to which Financial Entities are to fit their operations), Law 25561, Decree 71/2002 (Standards regulating exchange rate provisions stipulated by Law 25561) and the present Decree, are suspended. Law 21526 about Financial Entities is modified. *Id.*

60. Pesification refers to the conversion of every U.S. dollar in the economy to Argentine pesos.

program⁶¹ (translated in English to little stockyard, which is of no particular meaning). El Corralito was implemented as a mandatory method of economic austerity to prevent bank insolvency. Fearing that people would rush to the bank to withdraw all their bank deposits, which would create a bank crisis, El Corralito only let deposit holders withdraw \$250 (pesos/dollars) per week per bank account.⁶² This is the reason why when the pesification took place, people still had money trapped in the banks. Moreover, on top of El Corralito, the government proclaimed Law 25466 (*Intangibilidad de los Depósitos*)⁶³ stating that bank deposits were not to be touched by the government. Such a decree seemed to serve no purpose since the Argentine constitution grants a right to property that includes bank deposits as property and by no means can the state deprive citizens of their personal property.⁶⁴

This set of events economically hurt Argentines very deeply; hence it was the source of much litigation by the people dealing with the constitutionality of the emergency decrees and issues with property rights.

III. CONSEQUENCES OF THE CRISIS: THE MASSA CASE

Argentina uses code law, and thus relies on statutory interpretation and not judicial precedent for resolving disputes.⁶⁵ There existed no such legislation on the civil code to resolve issues surrounding the appropriateness of the emergency decrees.⁶⁶ Moreover, civil code courts treat case precedent as mere persuasive arguments and not mandatory.⁶⁷ The Argentina Supreme Court thus acted as a court of equity and took the high burden of institutional, political, and social repercussions that its decisions would impart. Such fact makes relevant the comparison to U.S. Supreme Court decisions (which often consider equitable principles) dealing with constitutional issues during emergency times. Social peace is the highest goal of the Supreme Court as stated in the preamble of Argentina's Constitution.⁶⁸

A. FACTS AND HOLDING

Mr. Massa was the holder of deposits in Bank Boston NA (in Argentina), which on December 31, 2001 had a balance of U.S. \$184,475.75. He was affected by the emergency laws promulgated during the crisis by President Duhalde. Massa's deposits were pesificated and therefore devaluated, so he commenced an action against the government seeking an injunction *accion de amparo*⁶⁹ (a summary proceeding that serves to

61. Intangibility of deposits, Law No. 25466, art. 6, Sept. 24, 2001, [29739] B.O. 2.

62. *Id.*

63. *Id.*

64. *Id.* art. 2.

65. CIVIL LAW (Ralf Rogowski ed., New York Press 1995).

66. *Id.*

67. *Id.*

68. CONST. ARG. Preamble.

69. CONST. ARG. § 43, Accion de Amparo.

guarantee constitutional rights) against the bank claiming that such emergency laws (Law 25561 and decrees 1570/01, 71/02, 141/02, and 214/02⁷⁰ and others) were unconstitutional. After the lower court (*primera instancia*)⁷¹ granted a preliminary injunction favorable to Massa and made the bank restitute U.S. \$44,803 as a preliminary judgment, the Court granted a *recurso extraordinario* to analyze the constitutionality of the emergency laws and their encroachment into Massa's personal property rights. Argentina's Supreme Court held that Bank Boston had to return to the deposit holder the amount on the account in pesos at a rate of 1.4 pesos per dollar on the account plus the referential stabilization coefficient (CER), which is the result of many economic variables fixed at four percent annually.⁷² Therefore, Bank Boston had to return to an amount, according to the formula determined by the Court that would allow Mr. Massa to purchase the same amount of U.S. dollars in the free market (equivalent to U.S. \$139,672.75).⁷³ The formula worked as follows: Bank Boston was to reintegrate Mr. Massa 1.4 pesos per U.S. dollar in the account plus a 4 percent interest per year based on price inflation and increased interest rates, which in essence was to reintegrate to Massa the whole sum that he had deposited.⁷⁴ In short, the Court validated a "court modified pesification," which allowed the Court to avoid answering on its constitutionality.

Argentina's Supreme Court found the pesification decree 214/2002 dictated by the President to not be repugnant to the Argentine Constitution.⁷⁵ The Court found that even though the executive power overstepped its boundaries by acting in a legislative manner, it did not injure a citizen's private property because it did not alter the intrinsic value of their bank deposits. Argentina's Constitution grants Congress and the executive, by express delegation, the power to fix exchange rates

70. Law 25561, [29810] B.O. 1-2; Financial Entities, Decree 1570, Dec. 1, 2001, [29787] B.O. 1-2, (Arg.); Decree 71, Sept. 1, 2002, [29813] B.O. 6; Decree 141, Jan. 17, 2002, [29819] B.O. 2; Decree 214, [29830] B.O. 1-2.

71. Primera instancia is equivalent to a trial court in the United States, but only one judge intervenes on this process as there is no trial by jury in Argentina.

72. Economic Terms, Posting of Robert Wright to Line of Sight blog, <http://www.wrighton.com.ar/?p=396> (Jul. 5, 2006).

Coefficiente de [r]estabilización de [r]eferencia or [r]eferenced [c]oefficient for [r]eal[v]alue [s]tabilization . . . was a number based on the [c]onsumer [p]rice [i]ndex from the previous two months plus the first [six] days of the current month and took into account the effect of inflation on all prices. The CER varied daily, and the Central Bank published tables for public reference. The CER was used during the first half of 2002 to calculate rents, loans, and mortgages after devaluation. Later, all contracts were renegotiated and resigned. You can imagine the mess. For example, my previous rent was set at \$340 pesos/pegged dollars by contract, but after multiplying by the CER of March 8, 2002 (the day I paid), it became \$348 [\$340 x 1.0244 = \$348.30]. I signed my lease in Caballito at 340 dollars which became 348 devalued pesos or approximately 172 dollars. *Id.* (emphasis omitted).

73. *Massa*, Fallos (M.2771.XLI) (holding).

74. *Id.* at 1 (holding).

75. *Id.* ¶¶ 20 & 21.

between the Argentine peso and foreign currencies with the ultimate objective of safeguarding public economic order.⁷⁶

B. ARGUMENTS BROUGHT FORWARD SUPPORTING
THE GOVERNMENT'S MEASURES

The *Massa* decision was decided mainly upon two issues (1) constitutionality issues arising out of the injury to personal property and (2) the constitutionality of the presidential decrees. It was argued that by expropriating the citizens' personal property, the government violated section 17 of Argentina's Constitution that guarantees the right to private property, and that the President abused the power granted by the emergency powers when he encroached the powers of Congress by sanctioning emergency decrees. This usurpation of power would be considered unconstitutional because according to the constitutional division of powers it was up to congress and not the President to decide the fate of Argentina's economy.⁷⁷

The constitutionality of the pesification decree 214/2002 was questioned because banks infringed on citizens' personal property rights by not repaying their money at the rate deposited, constituting a confiscation of property and thus violating section 17 of Argentina's Constitution.⁷⁸ The Court making reference to precedent (e.g. *Bustos*) held that there was no property injury claim because Congress and the President have the power to fix exchange rates between the peso and foreign currencies, and thus they had the power to pesificate the economy. Furthermore, the Court in *Massa* reasoned that since the money was ordered to be returned there was no injury to personal property and thus the government's actions were not repugnant to the constitution.⁷⁹

Section 17 of the Argentine Constitution establishes that:

Property may not be violated and no inhabitant of the Nation can be deprived of it except by virtue of a sentence based on law. Expropriation for reasons of public interest must be authorized by law and previously compensated. Only Congress levies the taxes mentioned in Section 4. No personal service can be requested except by virtue of law or sentence based on law. Every author or inventor is the exclusive owner of his work, invention, or discovery for the term granted by law. The confiscation of property is hereby abolished forever from the Argentine Criminal Code. No armed body may make requisitions nor demand assistance of any kind.⁸⁰

The Court referenced to section 17 of the Constitution and noted that under contract law, deposit holders have the duty as creditors and the bank has the duty of the debtor, which is to return the bank deposits in

76. CONST. ARG. §§ 75-76.

77. *Massa*, Fallos (M.2771.XLI), Argibay, J., op., ¶ 3.

78. *Id.* ¶ 4.

79. *Id.* ¶ 5.

80. CONST. ARG. § 17.

the same currency denomination that they were made and entrusted to them. People have the property right over bank deposits, and such a right is protected against any kind of authority that purports to attack that personal property right.⁸¹ The Argentine Constitution in section 17 provides a protection similar to the one given by the Fifth Amendment of the U.S. Constitution, "the due process clause," which states that no person shall be deprived of life, liberty, or property without due process of law.⁸² The phrase reflects the idea that a person's life, liberty, and property are not subject to the complete discretion of government officials.⁸³

But, the Court in *Massa* referred to historic and recent precedent that supports that based on monetary sovereignty, governmental interference (like pesification here) was not repugnant to the constitution.⁸⁴ In *Bustos*, the Court explained that Congress and the executive power are empowered by precedent and express legislative delegation, to fix the exchange rates between the peso and foreign currencies with the objective of keeping public and economic order.⁸⁵ Following the Court's precedent of keeping public and economic order, the emergency laws promulgated by the legislation were resolved to be unconstitutional.⁸⁶ The *Massa* Court, citing *Bustos*, then focused on the potential harm that not following the Court's historic precedent would impart: "A ruling contrary to funcionamiento economico [the fundamental rule of precedent effected years after established, would bring grave institutional problems contrary to following the decision of the Court]."⁸⁷

81. *Id.*

82. U.S. CONST. amend. V.

83. An interesting fact is that Congress on September 24, 2001, before El Corralito and pesification promulgated Law 25466, Law de Intangibility of Deposits, which stated that the government would not reach into agreements between deposit holders and banks, specifically in sections 2 and 3 of said law. Why then the double shield? Why did the government feel the need to dictate a law that gave citizens a right that they already had? Section 17 of the Constitution and Law 25466 both protect personal property, in this case bank deposits. At this point it is important to consider section 28 of Constitution, which says that other national laws should not modify the principles of the constitution. Argentina's Supreme Court has a long history of following decisions in favor of the government disposing of private property in order to remediate social and/or economic crises. Perhaps, given this history, the government determined it was important to give Argentines an indication that there would be no taking of bank deposits.

84. CSJN, 26/10/2004, "Bustos, Alberto Roque y otros c/ E.N. y otros s/ amparo," Fallos (B.139.XXXIX) (Arg.). Causa "Bustos" [fallo en extenso elDial - AA 2520]).

85. CONST. ARG. § 75(11) ("Congress is empowered: . . . To coin money, to regulate the value thereof and that of foreign currency; and to adopt a uniform standard of weights and measures for the whole Nation"). "The legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress." *Id.* § 76. See also CSJN, 28/8.2001, "Perez Hector Antonio c/ Anses reajustes por movilidad," Fallos (P.520.XXXVI), "Avico Teresa c/ Anses," Fallos (A.749.XXXVI). In re "Avico c/ de la Pesa" (Fallos: 172:21).

86. See "Avico Teresa c/ Anses," Fallos (A.749.XXXVI). See also *Bustos*, Fallos (B.139.XXXIX).

87. *Massa*, Fallos (M.2771.XLI), Argibay, J. op. ¶ 6 (quote translated by the author).

It is worth noting that the Court's reasoning was not unanimous regarding the outcome in *Massa*. One of the Supreme Court justices, Justice Argibay, made compelling arguments as to why Argentina's savers had in fact suffered an infringement of their property rights. She also argued that the way the pesification Decree 214/02 was sanctioned was unconstitutional.⁸⁸

In her opinion, Argibay states that El Corralito and the taking of bank deposits by the government without the creditor's consent, and the fact that the government would not return the money for another ten years, made it hard to support the opinion that creditors did not suffer any alteration of their personal and property rights due to the government's actions.⁸⁹ Furthermore, she argued that if it is found that an emergency measure injures property rights in a "substantial and definite" manner, such a measure could be regarded as unconstitutional.⁹⁰ Therefore, if 214/2002 had gone further than the limit established for governmental intervention an inquiry into its constitutionality was not only adequate but necessary.⁹¹ Argibay also inquires about the constitutionality of Decree 214 through the division of powers and the executive's power to dictate laws because as opposed to the legislative.⁹² Section 99 of the National Constitution, establishes that "[t]he Executive Power shall in no event issue provisions of the legislative nature, in which case they shall be absolutely and irreparably null and void."⁹³ Therefore, any disposition of a legislative nature decreed by the executive power is found to be unconstitutional unless it can be shown that specified prerequisites dictated in the constitution are met. Section 99(3) also outlines the requisites required for the exception to take place:

Only when due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed, and when rules are not referred to criminal issues, taxation, electoral matters, or the system of political parties, he shall issue decrees on grounds of necessity and urgency, which shall be decided by a general agreement of ministers who shall countersign them together with the Chief of the Ministerial Cabinet.⁹⁴

Section 99(3) outlines as well, the procedure the executive power must follow for the exception above to apply.⁹⁵

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. CONST. ARG § 99(3), para. 2, available at <http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf>.

94. *Id.* § 99(3), para. 2.

95. *Id.* § 99(3), para. 4.

Within the term of ten days, the Chief of the Ministerial Cabinet shall personally submit the decision to the consideration of the Joint Standing Committee of Congress, which shall be composed according to the proportion of the political representation of the parties in each House.

The fact that the President invoked the privilege granted by section 99(3) of the constitution, and dictated decree 214/02 by acting as a legislator, was not contested at any point in any case; it was a known fact that he acted as a legislator.⁹⁶ Moreover, it was also undisputed that while sanctioning decree 214/02, the proper legislative procedure set forth in section 99(3) was not followed, and thus the decree was not proclaimed according to the constitution.⁹⁷ Congress set the guidelines accordingly to section 99(3), but the President chose not to follow them.⁹⁸ According to legal precedent, even in emergency situations, the President must abide by the constitution.⁹⁹ Therefore, there was no argument that decree 214/02 was pronounced in transgression of section 99(3) of the constitution and was thus, by definition, unconstitutional.¹⁰⁰

Notwithstanding Argibay's argument attacking the constitutionality of the emergency measures, she sided with the majority, by doing so she undermined the validity of her arguments. The Court unanimously ruled that the emergency measures were not unconstitutional. She joined the majority's decision by accepting that grave institutional consequences would follow if the Court ruled otherwise.

In short, Argentina's Supreme Court decided in *Massa* that the emergency decrees were, in general, not repugnant to the constitution. The Court did not declare that the pesification was constitutional. The majority agreed that pesification (as seen in *Massa*) was constitutionally acceptable. Justice Fayt was of the opinion that it was not necessary to pronounce it constitutional or unconstitutional,¹⁰¹ and Justice Argibay, after voicing her disagreement, agreed with the outcome because it was the most equitable decision.

In order to reach their decision, the Court faced several compelling challenges on the constitutionality of the emergency measures. The Court responded by arguing that (1) dictating law 25561 was the only resource, (2) the constitution reserved the power to promulgate such laws for the President, and (3) reference to U.S. precedent was very relevant. While the general idea of resolving *Massa* equitably finds its basis on promoting social welfare as stated in the constitution, Argentina's Supreme Court seemed to force the outcome.

Within the term of ten days, this committee shall submit its report to the plenary meeting of each House for its specific consideration, and it shall be immediately discussed by both Houses. A special law enacted with the absolute majority of all the members of each House shall regulate the procedure and scope of Congress participation. *Id.*

96. *Massa*, Fallos [M.2771.XLI], Argibay, J., op., ¶ 7.b.

97. *Id.*

98. *Id.*

99. "Avico Teresa c/ Anses," Fallos (A.749.XXXVI).

100. *Id.*

101. *Massa*, Fayt, J., ¶ 20.

1. Decree 214/2002 was the Only Resource

The first argument was that since the crisis was of such a high magnitude, as section 1 of Law 25561 stated, proclaiming that Decree 214/02 was the only resource that the government had.¹⁰² In order to back this position, the argument pointed to section 64 of Law 25967 sanctioned in December 2004, which ratified the emergency measures.¹⁰³ Law 25967, a budget law, was promulgated two years after the pesification had taken place, but in one of its sections the law ratified the power of the executive to take measures during emergencies, which was at issue in *Massa*.¹⁰⁴

This argument was highly criticized since nowhere in the constitution does it allow such methods of validating any “necessity and urgency” decree.¹⁰⁵ The interesting fact is that by proclaiming a state of emergency (Law 25561) made the promulgation of Decree 214/02 inevitable, hence it was constitutional.¹⁰⁶ But before Decree 214/02 was issued, Congress established guidelines according to section 99(3) of the Constitution that the President had to follow in dealing with the crisis.¹⁰⁷ Among the measures authorized by these guidelines, pesification of bank deposits was not one of them.¹⁰⁸ In fact, Congress resolved to do just the opposite by keeping the peso pegged to the U.S. dollar.¹⁰⁹ Section 6 of Law 25561, Emergency and Reform of Currency Exchange Regime, (now Law 25820¹¹⁰) emphasizes that the executive would restructure the debt with the banks (at 1 peso/1 dollar ratio) only in cases where the amount did not exceed U.S. \$100,000 and where the debt consisted of either (1) hypoteques or mortgage loans for home purchases, (2) home improvement loans, (3) personal loans, (4) car loans, (5) individuals of corporations that qualify as small or medium size businesses, or (6) up to said amount in cases such as (1) if the loan is for a family home, and (5) above.¹¹¹ Shifting the emphasis to the last paragraph of Law 25561, it was argued that the word “restructuring” only granted the government the power to modify the time of repayment and the interest rates regarding bank deposits.¹¹² Therefore, implied in the above mentioned law was Congress’ will to return bank deposits in the same denomination in which they were made and that the time of repayment and the interest rate could be modified.¹¹³ Thus, the executive would be able to take compensatory mea-

102. *Massa*, Fallos [M.2771.XLI], Argibay, J., op., ¶ 7.a.

103. *Id*; See also General Budget of the Federal Government, Law No. 25967, Nov. 24, 2004, [30549] B.O. 1-8 (Arg.); Presupuesto General de la Administración Nacional, Decree No. 1852, Dec. 16, 2004, B.O., art. 47 (Arg.).

104. See generally *Massa*, Fallos [M.2771.XLI], Argibay, J., op., ¶ 7.b.

105. *Id*. See also CONST. ARG. § 99(3).

106. *Massa*, Fallos [M.2771.XLI], Argibay, J., op., ¶ 7.a.

107. Law No. 25561, [29810] B.O. 1-2; see also CONST. ARG. § 99(3).

108. *Massa*, Fallos [M.2771.XLI], Argibay, J., op., ¶ 7.a.

109. *Id*.

110. Public Emergency and Reform of the Exchange Rate Regime, Law No. 25820, Dec. 2, 2003, [30291] B.O. 1 (Arg.).

111. Law No. 25561, [29810] B.O. 1-2.

112. *Id*. art. 6.

113. *Id*.

asures to counteract the imbalance affected by the measures proclaimed above, such as guaranteed government bonds in foreign currency denominations as consistent with the takings clause of the Argentine Constitution.¹¹⁴ In other words, Congress decided that the executive could take the necessary measures to ensure preservation of the capital belonging to savers that deposited money in banks on the date stated in the El Corralito decree 1570/2001, restructuring it accordingly to the solvency situation at the moment. This protection encompassed bank deposits in foreign currency denominations.¹¹⁵ The objective of section 6 of Law 25561 was to ratify Congress' intent to reintegrate bank deposits equivalent in value to the amount in which they were made irrespective of its denomination.¹¹⁶ According to the requirements set forth in section 99(3) of the Constitution, Law 25561 was ready and would have been operative. It provided the guidelines that the executive would follow. In section 6, it outlined the emergency program that granted the President the power to interfere with personal property but only by extending the time of repayment and putting a ceiling on interest rates. The President disregarded the guidelines set in the Law 25561 and thus the pesification decree should have been declared unconstitutional.

The stringent standard required when dealing with purging the unconstitutionality of facts that are presumed constitutional by delegation, requires a convincing and irrefutable showing that the measure being evaluated be "irreplaceable and just" and to serve to an imminent necessity that can not wait.¹¹⁷ Thus, it could have been argued that Law 25561 was not sophisticated enough to deal with the crisis by itself and that the decision to "step beyond congress' guidelines was therefore necessary."¹¹⁸ The argument could have pointed to the fact that it would have not been sufficient to just extend the time of repayment and limit the interest rates of the bank deposits, as Congress originally thought possible.¹¹⁹ Therefore, in order to deal with an imminent crisis of such a magnitude, the emergency measures dictated by the President were in fact necessary and could not wait.¹²⁰ But this was never argued although it would have helped support the Court's ruling.

Congress delayed addressing a solution for almost three years, and when it finally got around to coming up with a solution, it did so only by a

114. *See id.*

115. *Massa*, Fallos [M.2771.XLI], Argibay, J., op., ¶ 7.a.

116. DIARIO DE SESIONES DE LA CÁMARA DE DIPUTADOS DE LA NACIÓN, 5 de Enero del 2002. . (copy at <http://www.diputados.gov.ar/> (solicited via email). Article 6 makes a distinction between debts between the private sector and banks, greater and smaller than U.S. \$100,000. Amounts greater than U.S. \$100,000 would be returned in the same denomination they were made, amounts less that U.S. \$100,000 at a ratio of 1peso/1dollar. (*Massa*, Fallos (M.2771.XLI), Argibay, J., op., ¶ 7.a.

117. *Id.*

118. *Massa*, Fallos [M.2771.XLI].

119. *Id.*

120. *Id.*

section of a later-promulgated law (Ley de Presupuesto¹²¹) without allowing for much of any debate. Such a set of events is by all means unacceptable since it not only violated constitutional due process, but also frustrated section 99(3)'s purpose, which was to (1) assure a "seasonable and public"¹²² resolution, since three years could not be considered to be a seasonable decision, and (2) during a congressional session, in order to decide either the ratification or rejection of such necessity and urgency decrees, which might have been complied in part but considering that the issue at hand would render such an important decision, it should have been addressed by itself.

2. *The Constitution Reserved the Power for President to Promulgate Decree 214/2002*

Decree 214/02 was also evaluated not as a disposition legislative in character (even though it was sanctioned as an urgency and necessity decree meeting legislative criterion), but as one reserved for the President by the Constitution. The idea behind the argument was that since it was a reserved power, there was no constitutional or property rights violation.¹²³ Under this view, the deposit holders would have been compensated in pesos according to the money they had in the bank, thus their acquisitive power would not have changed.¹²⁴ This, the argument states, would have been constitutional because Decree 214/02 would have not overstepped the limits set by the emergency plan approved by Law 25561, since it was a reserved power.¹²⁵

This reasoning was incomplete, since it infers that deposit holders did not suffer any economical injury based only on their expectation to preserve their wealth respective to Argentina's economy. Comparing only domestic wealth, however, the scenario would not have been altered by Decree 214, since the devaluation of Argentina's economy kept the buying power of the peso proportional by reducing goods and services' prices in the economy.¹²⁶ The government also made reference to section 2 of Decree 214/02, which fixed the exchange rate at 40 percent higher than other obligations affected by the pesification, therefore implying that Argentines were better off by a forty percent increase in their wealth.¹²⁷ The flaw in the reasoning was that it considered that the capital deposited in the banks was destined only for consuming or investing in the local market and not in foreign ones.¹²⁸ It also takes for granted that the consumption or investing would have been done locally in goods or services

121. Law. No. 25967, [30549] B.O. 1-8 (the Budget Law).

122. *Massa*, Argibay, J., ¶ 7(b).

123. *Massa*, Fallos [M.2771.XLI].

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

that did not follow the dollar's evolution.¹²⁹

3. *U.S. Jurisprudence is on Point Because the Issue is One of Power, Not Purely Economic*

The last argument addressed by the Court was based on comparing *Massa* and the pesification crisis to U.S. Supreme Court decisions during the Gold Repeal Joint Resolution.¹³⁰

During the 1930s, the U.S. Supreme Court invalidated a law seeking to rescind a clause whereby creditors could demand payment in gold coin.¹³¹ In all of these cases, the U.S. Supreme Court upheld the constitutionality of the Gold Repeal Joint Resolution as a valid exercise of the power of Congress over the monetary system expressly delegated to it by the U.S. Constitution.¹³² The government argued that it had the power, granted by the Constitution, to fix exchange rates. Argentina's Supreme Court reached the same outcome as the U.S. Supreme Court in its decisions.¹³³ But Argentina's Supreme Court in *Massa* stated that it ruled in such a way because not following such an ancient precedent would have brought institutional chaos.¹³⁴ The *Massa* Court can find ample support in U.S. precedent. The only difference between the two jurisprudences is that in the U.S. cases, Congress came up with the guidelines on how to implement the use of the U.S. dollar over gold, and the President abided by those guidelines. In Argentina's case, the President did not. Argentina's Congress, in 2002, did not produce any resolution that supported presidential interference affecting bank contracts. In fact, it promulgated Law 25561, which ordered banks to preserve the value of people's bank deposits and not to pesificate. But the comparison is still very relevant. Argentina was experiencing a political social and economic crisis and the question of emergency decisions was one of power. Argentina's Constitution, in cases of emergency, broadens presidential powers in a much broader manner than the U.S. Constitution.¹³⁵ Thus, it would be more appropriate to analyze whether in an emergency situation, like the one

129. *Id.*

130. See generally *Perry v. U. S.*, 294 U.S. 330 (1935); *U.S. v. Bankers Trust Co.*, 294 U.S. 240 (1935). The *Perry* and the *Bankers Trust Company* cases are known as the Gold Clause Cases and were decided on February 18, 1935. The constitutionality of the Gold Repeal Joint Resolution was challenged in the U.S. Supreme Court in these Gold Clause Cases. See also *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240 (1935) (a suit involving a railroad-coupon of issued on February 1, 1930, with 4.5 times its value due on February 1, 1960); *U. S. Reconstruction Fin. Corp. v. Bankers Trust Co.*, (involving the gold clauses in bonds issued by the St. Louis, Iron Mountain & Southern Railway Co. on May 1, 1903, and due May 1, 1933). These latter cases were also decided together.

131. *Nortz v. U. S.*, 294 U.S. 317 (1935) (concerning the gold clause in gold certificates, series of 1928); *Perry*, 294 U.S. at 330 (involving the gold clause in liberty bonds issued under the Act of September 24, 1917).

132. See generally *Perry*, 294 U.S. at 330; 2 *ENCYCLOPEDIA OF BANKING & FINANCE* (Glenn G. Munn, F.L. Garcia, & Charles J. Woelfel, 9th ed., Salem Press 1993).

133. See generally *Massa*, Fallos [M.2771.XLI], holding.

134. *Id.*

135. *Avico*, Fallos (A.749.XXXVI), holding, at 1.

experienced in Argentina during 2001, and according to Argentina's Supreme Court precedent, the government would have had the power to promulgate the emergency decrees over the legislative branch. This issue is further addressed in section C below.

4. *Other Issues Considered by the Massa Court in Reaching Their Decision*

These are some of the other factors playing a lesser role in the *Massa* decision. The Court considered the following factors:

1. The laws promulgated during the 2001-2002 crisis came from precedents from the same Court and it would negatively impact the judicial system to have applied this decision retrospectively (Argentina has no rule against ex post facto laws, their application backwards is determined by the Court)
2. After five years, there were many factors affecting judicial decisions
3. It was necessary to analyze the macroeconomic repercussions of the decisions made by Congress.
4. The decisions over constitutional protection of contracts and personal property would have had a very important effect over institutional evolution in Argentina.
5. Declaring a law unconstitutional would be unnecessary when there were other tools to resolve the issue granted by the law.
6. Judges have ruled in many different ways on this issue showing the disparity in criterion of our society.
7. It was necessary to arrive to a definite solution to these kinds of problems in order to promote social peace, especially when concerning savers rights.
8. And, the Argentina Supreme Court had to abide by law to the Constitution, which ruled the Court.¹³⁶

In *Massa*, the Court arrived at what seems like the most equitable decision possible. While Justice Argibay made very compelling arguments regarding the unconstitutionality of the emergency decrees, she recognized in the end that the plurality was seeking to put an end to these kinds of disputes. Thus, Justice Argibay agreed in general with the result arrived at by the majority and joined.

C. PREVIOUS ARGENTINA SUPREME COURT DECISIONS ON GOVERNMENT TAKINGS

The Supreme Court decisions during the crisis shifted years of case precedent, which had always sided with expanding presidential powers regarding these kinds of cases.¹³⁷ Thus, *Massa* was not the first case

136. *Massa*, Fallos [M.2771.XLI], Lorenzetti, J., concurring op., ¶ 24.

137. Jonathan M. Miller, *Evaluating the Argentine Supreme Court Under Presidents Alfonsín and Menem (1983-1999)*, 7 Sw. J. L. & TRADE AM. 369, 395 (2000) ("On several occasions the President and his allies publicly admitted that they sought an expanded Court to avoid the risk of opposition to government policies."). See also

decided by Argentina's Supreme Court regarding taking issues.¹³⁸ When litigation arose after the 2001 crisis, Argentina's Supreme Court status regarding some of the issues was unclear, which made the rulings very unpredictable. *Massa* seemed to have reconciled most of the troublesome issues the Court faced and was thought to be a common ground decision that the Court and Argentina's citizens could adjust to and live with. The following two Argentina Supreme Court decisions will highlight some of the controversies on the way to reaching the *Massa* decision.

1. *Supreme Court Decision: "Smith v. Poder Ejecutivo Nacional"*
1/2/2002¹³⁹

One of the first cases in which Argentina's Supreme Court decided the pesification and El Corralito issues was *Smith*. This was a very controversial decision because it went against the Supreme Court's set precedent of expanding presidential powers in times of emergency.¹⁴⁰

The Court in *Smith* declared the emergency laws unconstitutional because they affected property rights granted by section 17 of the Constitution. The Court reasoned that the acquired rights doctrine in Argentina's Constitution grants rights that are not rescindable, and thus the savers suffered property injury. Argentina's Supreme Court declared El Corralito unconstitutional on February 1, 2002 in its *Smith* decision.¹⁴¹ Even though the Supreme Court ruled against El Corralito, President Duhalde made use of his emergency powers granted to him by Congress and banned further legal challenges to El Corralito.¹⁴² The Court independently continued granting injunctions that ordered the return of deposits to tens of thousands of savers. El Corralito's restrictions were eased in October and November 2002, and abolished by December 2, 2002.

2. *The Bustos Case—the Implementation of the Shared Effort Doctrine*¹⁴³

In *Bustos*, contrary to *Smith*, the Court applied the shared efforts doctrine and declared that the pesification decrees were not unconstitutional because there had been no injury to personal property.¹⁴⁴ The Court based its decision on the following considerations:

CSJN, 27/12/1990, "Peralta c/ Estado Nacional," Fallos (1990-313-1513) ¶ 40-44, & 52.

138. Millar, *supra* note 136, at 399-407.

139. CSJN, 1/2/2002, Banco de Galicia y Buenos Aires s/ solicita intervención urgente en autos: "Smith, Carlos Antonio c/ Poder Ejecutivo Nacional o Estado Nacional s/ sumarísimo," Fallos (B.32.XXXVIII).

140. *Id.*

141. *Smith v. Estado Nacional*, 1/2/2002, J.A. (2002-I-237); see also *La Corte Puso Fin al Corralito*, DIARIO JUDICIAL, Feb. 1, 2002, <http://www.diariojudicial.com/nota.asp?IDNoticia=3689>.

142. *Devaluation's Downbeat Start*, ECONOMIST, Jan. 12, 2002, at 34.

143. *Bustos*, Fallos (B.139.XXXIX), holding, at 1.

144. *Id.*

1. During an economic emergency the legislative and executive powers enjoy broader powers
2. The Constitution does not recognize absolute rights during economic and social turmoil because those rights are subordinated to the Nation's welfare.
3. The savers did not suffer because of pesification as long as they could get back an amount that would have the same intrinsic value as the original deposit (in the domestic arena).
4. And, the shared effort doctrine was a more equitable way of dealing with pesification issues.¹⁴⁵

The shared effort doctrine was manufactured by the Court in order to recognize that both debtor and creditors were victims of the crisis in one way or the other.¹⁴⁶ The doctrine sought to avoid recognizing individual rights by hurting Argentina's social welfare.¹⁴⁷ In other words, the Court reasoned that returning deposits in their original denomination would amount to a complete disregard of Argentina's then present reality, thus greatly privileging a sector of the country, while injuring the rest.¹⁴⁸ The way that money was distributed in a shared efforts decision was at the rate of 1.8 pesos per dollar. While coming up with the shared efforts doctrine, the Court put some of the blame on the savers because of their constant mistrust of the peso.¹⁴⁹ The Court criticized the deposit holders wanting to insure a constant acquisitive power regardless of how their country's economy did and the expense placed on the economy.¹⁵⁰ The Court mentioned that it was obvious that the deposits were made in U.S. dollars because savers had doubts that the acquisitive power of the peso would be maintained, and thus attempted to maintain the intrinsic value of their capital by keeping the stronger currency.¹⁵¹ By saving in U.S. dollars, the savers were depleting the support of Argentina's economy (the dollar), and thus the Court reasoned, they should share the blame of Argentina's economic failure.¹⁵²

It is worth noting that while *Smith* and *Bustos* come out on different ends, the reality in Argentina had changed during the time period between when the decisions were rendered. Two years had passed since *Smith*, and Argentina had a healthier economy. Also during *Smith*, some of the justices were undergoing impeachment by the government, which sheds doubt as to the judges' motives while deciding the case because of threats of losing their jobs. Two years later, in *Bustos*, the Court faced

145. *Id.* See also Maria Jenkis, *Fallo Bustos: Convalidación de la Pesificación*, LATIN COUNSEL.COM, Nov. 10, 2004, <http://www.latincounsel.com/esp/noticiaampliada.php?nid=4696>.

146. *Id.*

147. *Id.* See also XIX Jornadas Nacionales de Derecho Civil, Rosario, Septiembre del 2003, http://jornadascivil.eurofull.com/img/XXI-JNDC-19_JornNac_DerCivil.htm.

148. *Id.*

149. *Bustos*, Fallos (B.139.XXXIX), Fayt, J., op. ¶ 7.

150. See *id.* ¶ 7.

151. *Id.* ¶ 7.

152. *Id.* ¶ 7.

demand by the deposit holders, for reimbursement of their deposits in U.S. dollars with the added claim that it was imperative for them to get back dollars and not pesos. The Court highlighted the fact that the savers had the initial chance of getting dollars when the government offered, at the beginning of the crisis, an option for ten-year bonds payable in dollars for those savers that would choose not to seek legal action. The Court reasoned that if the savers declined that option, maybe keeping the dollar value was not as imperative as they claimed.¹⁵³ "All citizens must surrender their individual interests in favor of social welfare."¹⁵⁴ One of the arguments advanced by the government in *Bustos* was that there existed no injury to property, since it was upon the government to decide how to repay the deposits, and therefore, the Court should have no voice in the matter. It was up to the government to care for the country's welfare.¹⁵⁵ In 2006, while deciding *Massa*, two more years had gone by and the economy was in even better shape than when *Bustos* was decided. It seemed that the Court had finally landed a sound decision which could reconcile the issues equitably. The emergency laws were declared to not be repugnant to the constitution, and in recognizing the harshness of the crisis, the Court came up with a formula that required the banks to repay the money at a rate of 1 U.S. dollar /1.4 pesos plus CER. This decision seemed fair and looked to be the final answer to disputes of this kind.

But the highest Court went backwards and in March of 2007 overruled certain aspects of *Massa*.¹⁵⁶ In the *Rinaldi* case, even though the issue did not involve bank deposits (it involved non-bank hypoteques), the Court brought back the shared efforts doctrine and ordered the debtors to pay 1.8 pesos per dollar owed. The *Rinaldi* Court also recognized that there was no injury to private property because the government was not taking away any property but was just limiting the use of such property. The Court in *Rinaldi* delivered an opinion more along the lines of U.S. jurisprudence. Citing to U.S. Supreme Court precedent (*Blaisdell*),¹⁵⁷ Argentina's Supreme Court recognized that that during an emergency the government has the power to determine the intrinsic value of its currency, but it is up to the Court to determine whether there existed any abuse in the application of the emergency laws.¹⁵⁸

153. *Id.* ¶ 7.

154. *Id.* at 2, holding. (translated by author)

155. *Id.*

156. CSJN, 15/3/2007, "Rinaldi, Francisco Augusto y otro c/ Guzmán Toledo, Ronal constante y otra s/ ejecución hipotecaria," Fallos [R.320.XLII] (Arg.).

157. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

158. *Id.* at 234 n. 3. This Court has the power, in the case at bar, to review the legislative declarations: (a) as to the existence of emergency in which the government had the duty to act as to the existence and extent of the 'public interest'; b) to ascertain whether the object comes within the legitimate scope of the police power; c) to ascertain whether the rules and standards provided, if any, are reasonably definite and certain; and (d) to ascertain whether the extent and effect of the legislation are such as reasonably and properly to accomplish a legitimate object within the police power. *Id.* (internal citations omitted). *Id.*

IV. ARGENTINA'S PESIFICATION DECISIONS COMPARED TO U.S. GOLD CLAUSE DECISIONS

Argentina's Constitution is based on the U.S. Constitution, so Argentina's system and the United State's system include a similar separation of the branches of government, which tends to guarantee judicial independence.¹⁵⁹ But Argentina's system departs radically from the U.S. model by expressly granting the federal government broad general powers to promote the economic prosperity of the nation and the conduct of human development.¹⁶⁰ But in reviewing constitutional problems addressed by the Supreme Courts of both countries regarding takings issues, the Courts share many similarities.

A. BOTH COUNTRIES USED TWO CURRENCIES AT THE SAME TIME

In the Gold Clause cases, the U.S. Supreme Court upheld the unification of the country's economy from one using gold and dollars to one of using just dollars. For many years gold worked as a support of the U.S. dollar. Gold grew stronger and so did its demand, thus threatening the gold/dollar balance. President Roosevelt prohibited people to withdraw or utilize gold as currency. Everybody that had gold was required to exchange it for paper currency. During that process, too many people lost money since the dollar had devaluated against gold. The U.S. Congress did not allow people to lose money (they got the same amount they spent on gold back in dollars), but it also did not allow them to become better off (Gold bonds had appreciated sixty percent with respect to the dollar but repayment was still done based on the purchase price). In making such a harsh decision, similar issues to the ones in *Massa* were litigated. The U.S. Supreme Court explained that a gold bondholder was not entitled to redeem a bond that was payable in gold coin of the standard of value at the time of purchase for an amount in legal tender that was in excess of the face value of the bond based upon a decrease in the weight of U.S. gold dollars.¹⁶¹ In another decision, the Court reasoned that Congress was empowered with the authority to regulate the value of money, and to make all laws necessary and proper for carrying out that enumerated power.¹⁶² Furthermore, the Court stated that "[c]ontracts may create rights of property, but when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of domi-

159. Hon. Elena Highton-Nolasco, Vice President, Supreme Court of Argentina, Transnational Judicial Dialogue: Strengthening Networks & Mechanisms for Judicial Consultation & Cooperation at Harvard Law School, Cambridge, Massachusetts, *Judicial Ethics and the Role of Judges in a Democratic Society* (Dec. 2, 2006) available at <http://www.asil.org/judicial/transnational/documents/TJD-Ethics-Highton-070122.pdf>.

160. *Id.* See also CONST. ARG. § 75(18) (Clausula del Progreso).

161. *Perry*, 294 U.S. at 330.

162. *Norman*, 294 U.S. at 240.

nant constitutional power by making contracts about them.”¹⁶³ The Court uses an example in which if someone contracts for a fixed shipping rate and then Congress prescribes different rates, the latter will control and override those rates in contracts previously made.¹⁶⁴

Argentina had two alternate currencies during the 1990s, the peso and the dollar. The dollar served as support for the peso. Thus, if we use the reasoning of the U.S. Supreme Court above, Congress would have the power to alter the value of the currency even amongst private parties since Congress would retain control over the subject-matter of those contracts (value of money). Therefore, changing the intrinsic value of money should not be considered as an expropriation by the government. The pesification of the economy in Argentina would be analogous to the dollarization of the U.S. economy during the 1930s. In Argentina, the convertibility was an artificial parity and congress had, by constitutional delegation, the power to establish the value of such parity. The Argentine Congress decided against pesification, and the executive disregarded Congress' advice and decreed the pesification; this is where the comparison differs. In the United States, Congress dictated what to do and the executive upheld and obeyed Congress's guidelines. But in Argentina, Congress dictated what to do, and the executive overruled and did not abide. But this by itself should not be grounds for declaring the decree unconstitutional. "The Constitution is not a suicide pact" is a rhetorical phrase in American political and legal discourse.¹⁶⁵ The phrase expresses the belief that constitutional restrictions on governmental power must give way to urgent practical needs.¹⁶⁶ Argentina was experiencing social unrest and economic and political crises. Under a state of emergency, the executive power is relaxed and must to do what it deems necessary for the good of the country. Argentina's constitution establishes that the government retains adequate authority to secure the peace and good order of society.¹⁶⁷ This same phrasing was used by the U.S. Supreme Court: "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, -a government which retains adequate authority to secure the peace and good order of society."¹⁶⁸ Furthermore, Argentina's Supreme Court rejected U.S. precedent on the ground that they addressed the issue of power and not economic issues.¹⁶⁹ The fact is that the issues of pesification and El Corralito are issues of whether the gov-

163. *Id.* at 307-308.

164. *See id.*

165. Abraham Lincoln used this phrase as a response to charges that he was violating the United States Constitution by suspending habeas corpus during the American Civil War. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Robert H. Jackson, J., dissenting op.).

166. *Id.*

167. *See* CONST. ARG., Preamble.

168. *See* *Blaisdell*, 290 U.S. at 435.

169. *See* *Massa*, Fallos [M.2771.XLI], Argibay, J., op., ¶ 9.

ernment has the power to alter the intrinsic value of its currency. Thus, some believe that the Constitution grants such power.

B. SIMILAR ISSUES, DIFFERENT RESULTS

One of the main reasons for the different results in the U.S. Supreme Court's decisions compared to the Argentina's Supreme Court decisions is Argentina's Supreme Court's unstable track record that seems to result in contradicting decisions time and again.¹⁷⁰ Some commentators point out that because Argentina uses civil law, the Court does not pay too much attention to precedent as being mandatory authority, but merely persuasive.¹⁷¹ Another set of arguments points to the fact that the Court is highly politicized, and thus it lacks independence from the government.¹⁷² Therefore, the judges make decisions according to who is ruling the executive in order to safeguard their jobs.¹⁷³ Moreover, the Court's delay in ruling on these constitutionality issues backs this latter hypothesis that the government pressured the Court to delay its ruling until the country's financial picture had improved to the point that it could manage the format and the timing of a return of dollar deposits.¹⁷⁴ This is not uncommon in the history of Argentina's Supreme Court.¹⁷⁵ One can not help but be a little skeptical about the Court's decisions as allegations arise. It took the Court too long to resolve an issue that required immediate action by them in order to protect Argentina's citizens, and it still seems not to have a final answer. The U.S. 1930s gold crises were much more severe in terms of the government taking a harsher measure. But the Supreme Court made a definite ruling in evaluating that it was for the good of the country and stuck by it. People learned to live with it.

V. CONCLUSION

Governmental intervention during times of emergency seems to be a very normal occurrence, as was the case in Argentina and many other countries (United States, Russia, etc.). Governmental intervention can be very appropriate when duly justified. A country's economy can not survive without a strong government, but also its citizens can not survive without a strong government to protect them. Aside from some of the

170. Becky L. Jacobs, *Pesification and Economic Crisis in Argentina: the Moral Hazard Posed by a Politicized Supreme Court*, 34 U. MIAMI INTER-AM. L. REV. 391, 394 (2003).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Argentine High Court Postpones Ruling Until February*, DOW JONES INT'L NEWS, Dec. 27, 2002.

175. Decree 2196, Dec. 2, 1986, A.D.L.A. 4180. Decree 2196 of 11/28/86 declares in state of economic emergency the national social security system established by Laws 18037 and 18038. This law stops as of the promulgation date and until 12/31/88 all the lawsuits, including the execution of judgments and administrative claims, brought against the Caja Nacional de Prevision. See Caja Nacional de Prevision, <http://www.glin.gov/view.action?glinID=22806>; see also Jacobs, *supra* note 170.

controversial blame that could arguably be attributed to the IMF and its policies, it is up to Argentina to face and accept all the responsibilities of the crisis. The problem in Argentina seems to be that neither its government nor its Supreme Court enjoy the full trust of the Argentine people. Both the Court and the government carry the heavy burden of a turbulent past.

The pesification crisis exposed Argentina's economic and judicial weaknesses to its maximum; *Massa* is a great example where we can observe both. Many Argentines lost everything they owned because of the pesification; on the other hand many came out ahead. The poverty line increased from thirty percent before the crisis to more than fifty percent after the crisis, which indicates that the lower and middle classes suffered the highest impact. Argentina was left economically devastated by the crisis, internally and externally. Argentina also lost worldwide credibility because of the crisis, and its economy, although regaining strength, is still suffering the consequences.

In terms of justice, Argentina's Supreme Court does not have the most credible track record. As history shows, since the government has exerted some influence on the Court's decisions, future decisions become plagued with doubt. Argentina's Supreme Court has to establish a more consistent rule of law, one that not only Argentines will respect but one that the whole world could grow to respect.

In *Massa*, there was no majority holding (four votes is majority) with respect to the issue of the constitutionality of the pesification. It would be incorrect to say that the Court declared the pesification of bank deposits to be constitutional. What the Court did was not to declare pesification of bank deposits unconstitutional, and that way avoided ruling on the most important issue. The Court, without deciding the constitutionality of the pesification decree, decided how much money the savers would get back from the banks. Therefore, the Court pesificated the deposits in the way it thought most appropriate. The irony is that the Court had to decide on the constitutionality of the pesification; instead, it ruled that it was not unconstitutional and then came up with its own pesification method.

The *Massa* victory, as the solution to one of the biggest bank crises of all time, was short lived. The Court's solutions in *Massa* were only made possible by the time that elapsed between the facts and the Court's decision, which allowed Argentina's economy to recover to a point where such a ruling could be afforded. Still, there was a sense that justice had not been served. The struggle of the Court in arriving at a concrete solution is prolonging Argentina's agony in fully recovering from the effects of the crisis. Decisions have to be made seasonably because if not, future circumstances (or others) will decide for us.