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The Argentine Monetary and Financial Framework

Marcelo Rafael Tavarone*

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I. Introduction.

This article aims to describe the Argentine finance and banking systems and how they work in an international context. Although the securities market is an important part of the Argentine financial system, this study focuses on monetary and banking activity. Part II of this article deals with the Monetary Institutions and the framework of the Convertibility System. Part III deals with the structure of the financial system analyzing the regulatory framework and describing the different institutions foreseen by the Financial Institutions Law. Part IV analyzes the insertion of the Argentine Finance and Banking System in the MERCOSUR, taking into account the lessons provided by the European Union and other international efforts. Finally, Part V contains the conclusions of this study.

II. The Monetary Role of the Central Bank.

The Banco Central de la República Argentina (BCRA) performs its role as both a monetary and banking authority. Its powers and attributions are mainly ruled by the Banco Central de la República Argentina Law (BCRAL) No. 24.144, and some rules contained in the Financial Institutions Law (FIL) No. 21.526. This part describes its specific powers and attributions regarding its monetary functions.

The Argentine monetary system must be analyzed in accordance with two main principles of Argentine monetary law: the Convertibility System (CS) and the BCRA independence. Both principles establish the framework of monetary policies in Argentina.

A. The Convertibility System.

The CS was established April 1, 1991, through the Convertibility Law (CL) No. 23.928. It is an important tool used by the government to reduce inflation and restore the value of the Argentine currency. The CL comprises three basic issues: the convertible currency; the prohibition of indexation; and the possibility of using foreign currency for domestic transactions.

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1. Public offer of securities is ruled by Law No. 17.811 and its regulation and supervision is performed by a public agency called “Comisión Nacional de Valores.”
2. Central Bank of the Argentine Republic.
1. The Convertible Currency.

According to articles 1 and 2 of the CL, one peso shall be freely convertible into one U.S. dollar at the same time that the state—through the BCRA—assumes the compromise of freely selling and buying pesos and U.S. dollars. In other words, the CL provides for full convertibility between pesos and U.S. dollars. The BCRA’s reserves shall be, at least, equal to 100 percent of the money flow, i.e., the quantity of pesos shall not be greater, but can be less than the quantity of U.S. dollars and other reserves kept by the BCRA. This disposition is deemed to be a limit for the BCRA attribution of money supply and can be defined as a minimum relationship of solvency between the money supply and the BCRA’s reserves.

The BCRA performs the role of Currency Board by providing the above-mentioned convertibility between pesos and U.S. dollars while simultaneously performing the role of lender of last resort (LOLR). This can be a difficult task in the case of a “bank run” during which the BCRA should provide financial assistance to illiquid banks compromising its reserves. But some legal dispositions are aimed to protect BCRA’s reserves when it performs the role of LOLR: article 17 (b), (c) and (e) of the BCRA imposes limitations on the assistance to troubled banks and clearly states that reserves for free disposition (convertibility), which support the monetary flow, shall not, in any case, be compromised.

The successful implementation of the CS has involved a strengthening of the banking system and a constraint in fiscal policy in order to reduce government deficit, facilitated by an extensive program of privatizations that included some provincial state-owned banks.

The 1994 Mexican peso devaluation triggered a crisis in the Argentine banking system threatening the CS. BCRA authorities had to manage the crisis with rather limited resources since, according to the CL, the monetary base shall be limited to the level of foreign exchange reserves, restricting BCRA authority from using these reserves to assist troubled banking institutions.

Restructuring and consolidation of the banking system was achieved through a trust fund financed by $2 billion government of Argentina bonds and a $500 million loan from the World Bank. At the same time, the Argentine Government encouraged mergers,

6. The CL refers to “australes”, the Argentine currency until 1991. However, it was replaced by the “peso” a few months after the implementation of the CL. Moreover, the CL itself states that the “austral” would be considered as a new currency after the implementation of this law. For this reason, many authors referred to “austral convertible” instead of “austral.” The change of the name of the currency ended with this confusion.


9. See GERSCOVICH, supra note 7, at 6.


11. See Peter Montagnon, THE PRICE OF THE PRIZE, FIN. TIMES, Feb. 12, 1998, at 13; Stephen Fidler, BOARD GAME WINNER, FIN. TIMES, February 12, 1998, at 13. The strengthening of fiscal policies and the banking sector are two primary challenges for a convertibility system. The lack of these requirements has been a key reason for the reluctance of the IMF to help in the implementation of a convertibility system in the case of Indonesia.


13. See id.
acquisitions and restructuring of smaller banks, as well as privatization of provincial state-owned banks\(^\text{14}\) aided by another special trust created to assist troubled provincial banks subject to privatization processes. This trust is funded by 70,559,999 shares of YPF S.A. proceeds obtained from loans provided by the Inter-American Bank of Reconstruction and Development and other multilateral agencies.\(^\text{15}\)

2. **Prohibition of Indexation.**

The CS was also accompanied by a prohibition against applying indexation to any monetary debt after March 31, 1991.\(^\text{16}\) This prohibition was enacted because indexation of monetary debts was considered to be one of the causes of increasing inflation rates. At the same time, after the stabilization of the Argentine currency, indexation clauses were expected to become superfluous since they had continuously been used to protect monetary credits from continuing devaluations.\(^\text{17}\) However, there were many doubts about the success of this new anti-inflation policy and therefore, prohibition of indexation was not welcome by many authors.\(^\text{18}\) Nevertheless, today the CL has gathered wide consensus because of its successful implementation. Moreover, during the 1995 presidential election, the three major political parties (which kept 96.2 percent of the popular vote) agreed to support the CL.\(^\text{19}\)

Prohibition of indexation was reinforced by CL No. 24.283 by which all indexation or application of interest to the value of any asset or credit shall not exceed the actual value of the asset or credit at the moment of the payment. This law was aimed to prevent situations in which mechanisms for indexation, formerly addressed to keep the real value of the asset, had actually produced a final amount that exceeded the real value of the asset. But this law also received considerable criticism from authors who feared that creditors would suffer distortions in their expectations of reimbursement.\(^\text{20}\)

3. **The Use of Foreign Currency in Domestic Transactions.**

Article 11 of the CL contained a reform of article 619 of the Argentine Civil Code. According to article 11, parties in a domestic transaction may agree to pay their debts with foreign currency that can be freely used for particular transactions. Under the previous version of article 619 of the Civil Code where parties agreed to pay their obligations in amounts of foreign currency, they were able to extinguish debts by paying the amount of Argentine currency necessary to acquire the amount of foreign currency originally agreed.

\(^{14}\) See id. at 23, 27. See infra Part III.B.4.c.iii.


This rule incorporated a wide usage in savings and domestic transactions, which were often agreed in amounts of foreign exchange to avoid the effects of Argentine currency devaluation. At the same time, foreign exchange controls were abolished as a coherent means to achieve financial and economic liberalization.

4. The Convertibility System After the East Asian Crisis.

When the East Asian crisis began, it was expected to produce serious recessional effects on the Argentine economy due to a decrease in the economic activity in Argentina's most important partner, Brazil. However, growth only seemed to decrease during the first months after the crisis. After that, activity started to increase considerably, and during the month of March 1998, industrial activity experienced a growth of eight percent.

Because an alarming increase in trade deficit and foreign indebtedness has accompanied the explosive expansion of the economy, the International Monetary Fund (IMF) has carefully analyzed the growth of the Argentine economy.

High growth rates, an increase in the trade deficit, and foreign indebtedness could be a warning of a new crisis similar to the East Asian crisis. Moreover, many share the opinion that the East Asian crisis was due to several key factors: (a) strong economic growth, but only depending on domestic demand without enough expansion in exports; (b) aggressive expansion of loans provided by banks; and (c) excessive increase in borrowing from the international interbank and, in hard currency, in the public and private sector leading to dangerous exposures.

Some of these same factors are currently being observed in the Argentine economy. Due to the possible lack of hard foreign currency, these factors represent a serious risk for the CS that excessive foreign indebtedness combined with a trade deficit could produce. In order to stop a potential financial crisis similar to that suffered by East Asian countries, the IMF has already recommended an increase in interest rates and capital reserves requirements.

Although an increase of interest rates and capital reserves requirements would help to stop these effects, doubts could arise about the effect of these measures on financial activity. In a CS like Argentina's, governments face a choice to stimulate exports and decrease the trade deficit: it may use a devaluation; or it may raise interest rates to hold the CS.

In the case of using the first choice (devaluation), its effects may become disastrous for those firms with foreign currency indebtedness. Furthermore, external confidence may

21. See Casiello, supra note 17, at 1041.
27. See Suttle, supra note 25, at 11.
28. See id.
be seriously damaged like in the case of the Mexican peso devaluation in 1994. The second choice, however, leads to higher interest rates, less funds for the banks to lend to firms, and may ultimately lead to a recession. At the same time, an interest rate increase may lead bank borrowers to default on their obligations with a consequent deterioration of bank portfolios. This deterioration, added to higher capital reserve requirements, may lead some banks to suffer illiquidity problems, and the risk of a banking crisis would again appear with all its risks for the system.

B. CENTRAL BANK INDEPENDENCE.

For many years, the Argentine monetary policies were used for short-term aims, and the BCRA was merely a tool for financing public deficit with consequent inflation increases ending in a hyperinflation crisis in 1989.

In 1994, following the experience of many other countries, the BCRAL established the BCRA independence, albeit most of the authors prefer to call it "Central Bank Autonomy." The expression "independence" will be used in this study.

Article 3 of the BCRAL states that preserving the money value shall be the BCRA's primary and fundamental aim, which shall not be subject to orders, indications, or instructions from the National Executive Power (NEP) when elaborating and executing monetary policies. This independence, however, needs certain safeguards to provide a binding institutional and legal framework. This need is related to three aspects: organic safeguards of independence; functional safeguards of independence; and central bank accountability.

1. Organic Safeguards.

Organic safeguards of Central Bank Independence (CBI) are related to the appointment, term of office, dismissal, and other conditions for central banks officials.

a. Appointment.

BCRA government is in charge of a Board of Directors (BD) formed by a president, a vice president, and eight directors. According to article 7 of the BCRAL, all members of this BD are appointed by the NEP with the necessary agreement of the Senate Chamber. The agreement of the Senate Chamber fulfills the requirement of plurality of the appointment.

b. Terms of Office.

According to article 7 of the BCRAL, members of the BD shall be appointed for a period of six years and can be reappointed after this period. Although BCRAL does not state whether they can be reappointed more than once, some authors argue that they can only be reappointed once. This long term of office is aimed at avoiding politicization, short-term perspectives, and vulnerability to electoral and political cycles.
c. Dismissal.

The grounds for dismissal of members of the BD are addressed by article 9 of the BCRAL. Members can only be dismissed because of nonperformance of the BCRAL or because of the existence of any incompatibility to perform their role as directors or inabilities addressed in the FIL for authorities of financial institutions.

Members of the BD can also be dismissed because of misconduct or nonperformance of public officer duties. The dismissal will operate through an NEP Decree that requires the previous council of a Congress Commission presided by the President of the Senators Chamber (who is normally the Vice-President of the country) and composed of the presidents of the Commissions of National Budget and Economy of the Senators Chamber as well as the presidents of National Budget and Economy Commissions of the Deputies Chamber. The system chosen by the BCRAL adopts a procedure of dismissal similar to the procedure of "Political Trial" (impeachment), instead of a judicial procedure. Problems could arise in cases where the Congress and the NEP are controlled by the same political party.

d. Suitability and Salary.

According to article 6 of the BCRAL, all members shall be competent in the areas of monetary, banking, and finance law and must also be recognized as morally sound. Article 7 states that the salaries of BD members will be fixed by the BCRA's budget. According to article 15(e), this budget shall be prepared and remitted by the same BD for its approval by the NEP, albeit this rule has been deemed to be an undue subordination to the NEP.

e. Prohibitions Applicable to BCRA Officials While in Office.

In order to keep their independence, members of the BD are prohibited from engaging in outside employment during the term of their office. According to article 8 of the BCRAL, the following persons shall not be members of the BD: employees or officials of the national, provincial, or municipal governments including both legislative and judicial powers, although teaching activity is not prohibited by the same rule; shareholders or directors, administrators, trustees, and all those who perform services for financial institutions; persons who are prohibited from serving as directors, managers, trustees and other roles in financial institutions by the FIL (bankrupt, nonperforming debtors, etc.).

f. Restrictions Applicable to BCRA Officials After They Leave Office.

Limitations on central bank officials' ability to pursue employment in private financial institutions or to become government officials for a reasonable period after they leave their office have been deemed to be a safeguard for undue private incentives and to avoid political influence during their term in office. The BCRAL, however, does not contain any restrictions related to these inabilities.

35. However, the procedure is not the same as the impeachment established by the Argentine National Constitution since the latter requires the participation of both Congress Chambers members instead of only a "council" of the mentioned commissions. Therefore, it has been said that the BCRAL should have foreseen the same impeachment procedure. See BENELVAZ & COLL, supra note 8, at 72.
36. Id. at 70. See also infra Parts II.B.2.d., II.B.3.a.
37. LASTRA, supra note 32, at 35.
g. Liaisons with Treasury/Ministry of Economy.

There is a necessity for consistency between the conduct of general economic policy and the conduct of monetary policy. This consistency requires the existence of clear rules for coordination between the Central Bank and the Ministry of Economy. A possible solution adopted by some legislators has been the right to attend meetings, but not to vote by the Minister.\textsuperscript{38} In principle, this has been the case of the Argentine BCRAL. Accordingly, article 12 of the BCRAL allows the Minister of Economy or his representative to participate in BD meetings, although he cannot vote in the decisions adopted by the board.

In order to allow coordination between BCRA and the Argentine Government, article 26 states that the BCRA shall inform the Ministry of Economy about the situation of the monetary, finance, and exchange policies,\textsuperscript{39} and according to article 27, the Ministry of Economy shall also provide information to the BCRA about public incomes, expenditures, and debts.

Despite these rules contained in the BCRAL, some authors consider that the BCRA has been isolated from the general economic policies of the BCRAL.\textsuperscript{40} Several powers given by the previous legislation have been removed in the new BCRAL, and the BCRA will no longer perform the following roles: (a) economic, financing, monetary, and exchange councillor of the government; (b) participant in meetings summoned by the NEP for the discussion of monetary, exchange, and financing policy; (c) monetary, exchange, and financing policies advisor to the Ministry of Economy; and (d) participant in negotiations for the external debt of the country.\textsuperscript{41}

The withdrawal of these attributions of the BCRA, however, is consistent with the new structure of the BCRA.

2. Functional Safeguards.

Functional safeguards comprise rules on the attributions of central banks. They also avoid its manipulation by governments and have been addressed by the BCRAL.

a. Limitations on Lending to the Public Sector.

The prohibition or limitation on financing the public sector is related to direct credit to the government and purchases of government securities directly from the issuer, although purchases of public sector debt in the secondary markets are generally not prohibited.\textsuperscript{42}

Article 19(a) of the BCRAL contains a general prohibition for lending to the National Government as well as the provinces, banks, and municipalities. The BCRA shall not act as a guarantor for the same public sector either. But article 20 of the BCRAL contains an exception for lending to the public sector: the purchases of government bonds issued by the General National Treasurership. These purchases shall be done at market prices. The quantity of government securities shall not be increased by more than ten percent per year, and according to article 33, they shall not be over the third part of the BCRA reserves.

\textsuperscript{38} This is the case of Spain and France Central Bank laws. See id. at 36.
\textsuperscript{39} See infra Part II.B.3.a.
\textsuperscript{40} See Gerscovich, ¿Autonomía, supra note 31.
\textsuperscript{41} Id. at 1104.
\textsuperscript{42} LASTRA, supra note 32, at 38-39.
b. Conduct of Monetary Policy.

According to article 75(11) of the Argentine National Constitution, the conduct of money supply is an attribution of the Congress. At the same time, article 75(6) of this constitution foresees the possibility of creating "a federal bank with faculty to issue money."

According to this last rule, the Congress can delegate the attribution of conduct of the money supply to the BCRA. Furthermore, it did delegate it through article 30 of the BCRAL, which states that the BCRA is in charge of the money supply and no other national, provincial, or municipal authority will be able to print money. According to article 14, the BD will fix the monetary policy in accordance with article 3, i.e., preserving the value of the currency and without receiving indications or instructions from the NEP.

c. Regulatory Powers.

Central Banks perform a rule-making role as part of their monetary policy and banking supervisory functions. These regulatory attributions of the BCRA are more widely described in Part III, section 1.


Although the BD is in charge of preparing the BCRA budget, it shall be approved by the NEP. This approval has been considered an undue restriction to BCRA independence.

e. Decisional Autonomy.

Decisions of the BD on monetary policies are not subject to prior consultations with the government. This is a typical feature of independent central banks, while decisions of dependent central banks are typically subject to prior consultations with governments.

3. Central Bank Accountability.

Central banks must explain and justify their policies in order to ensure the legality of their actions and keep transparency in the operation of monetary policies. The institutional mechanisms for central bank accountability are referred to the accountability to the executive bodies, accountability to legislative bodies, and accountability to judicial bodies. Additionally, in the case of the BCRA, article 39 of the BCRAL addresses an external audit control.

a. Accountability to Executive Bodies.

According to article 26 of the BCRAL, the BCRA shall inform to the Ministry of Economy, which is a body depending on the NEP, about the situation of monetary, finance, and exchange policies, as well as about the funds flows and the payment balance.

Another case of accountability to the executive bodies is article 15(e), which states that the BD shall remit the budget of the BCRA to the Executive Power for its approval.

43. Id. at 43.
44. See supra Parts II.B.1.d., II.B.3.a.
45. See LASTRA, supra note 32, at 45.
46. Id. at 49-50.
47. See supra Parts II.B.1.d., II.B.2.d.
b. Accountability to Legislative Bodies.

According to article 10(i) of the BCRAL, the President of the BD is responsible for the presentation of an annual report on the operations of the BCRA to the Congress and shall appear before the Commissions of Budget, Finance, and Economy of both Deputies and Senators Chambers in order to inform them of monetary, exchange, and finance policies. Article 34 of the FIL imposes on the BCRA the duty to inform the Congress about programs for the restructuring of troubled financial institutions.

c. Accountability to Judicial Bodies.

Lawfulness of the BCRA's acts and decisions is controlled by the Judiciary in order to correct arbitrariness, e.g., article 42 of the FIL foresees an administrative and judicial review procedure of sanctions applied by the BCRA. The administrative and judicial review of BCRA's decisions is also ruled by the Administrative Procedures Law No. 19.549.

III. The Structure of the Financial System.

The FIL addresses the kind of financial institutions supervised by the BCRA allowed in the Argentine financial system. The rules of supervision are contained by the BCRAL, the FIL, and by some rules created by the BCRA in performing its regulation powers. The following sections first, analyze the BCRA attribution to issue general rules for the financial system, second, its powers as supervisor, and third, describe the different financial institutions foreseen by the FIL.

A. THE REGULATION FRAMEWORK.

Regulation of banking activity is justified because of the perceived public interest. Cranston explains some of the ways in which banking regulation can be faced. We might identify as possible reasons for banking regulation the following: prevention of systemic risk; prevention of fraud and money laundering; consumer protection and deposit insurance; and competition policy. In order to rule on the problems described, central banks are allowed to issue certain rules aimed to regulate the banking activity.

In the case of Argentina, the BCRA has the authority to issue these rules because of a delegation of power by the Congress. This delegation is given because the Congress is unable to perform by itself the role of banking regulator. Banking activity needs specialized analysis and fast decisions, which are impossible for the legislative bodies. But this delegation is limited to the monetary and banking activity and shall be performed in accordance with

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48. See LASTRA, supra note 32, at 76. The author explains that the question about if there is a public interest in banking activity "... is both tricky and controversial." In this work, when we say that banking activity involves a public interest it only means that the issues related to banking activity have strong effects on the individuals who participate in it. The insolvency of an industry is only the insolvency of an industry but the insolvency of a bank may produce the bankruptcy of many other activities because of the lack of credit. However, it must be said that banking activity is commercial and private in essence and the state shall regulate it without changing its nature. See also infra Part III.B.1.a.

49. ROSS CRANSTON, PRINCIPLES OF BANKING LAW 71-84 (1997).

the rules of the delegation itself and the National Constitution. Thus, article 4 of the FIL allows the BCRA to issue all the necessary rules for the implementation of the law, and articles 30 and 31 state that financial institutions shall be subject to rules issued by the BCRA regarding credit expansion, guarantees, terms of lending, interest rates, assets, and reserves.

Rules issued by the BCRA are called "communications" (comunicaciones) and "circular letters" (circulares), and some of them rule on very important matters, e.g., connected lending and spread of risk (Communication "A" 49 and Communication "A" 2140) or ranking of debtors (Communication "A" 2216), consolidated supervision (Communication "A" 2227) and minimum capital requirements (Communication "A" 2136).

B. Supervision.

Banks face a variety of risks that could produce negative consequences for the economy of a country: credit risk; market risk; liquidity risk; interest rate risk; foreign exchange risk; operations risk; fraud risk; and systemic risk.

In order to prevent these risks, the BCRA bears wide powers to supervise the system. As explained by Dr. Lastra, banking supervision is a process with four different stages: licensing; supervision stricto sensu; sanctioning; and crisis management.

1. Licensing.

Licensing or authorization prevents the existence of bad banks or dishonest people in banking activity, and it can be used as a very effective means for control. Accordingly, article 14(n) and (o) of the BCRAL states that it is a power of the BCRA's BD to authorize the existence of new financial institutions as well as the opening of new branches or subsidiaries and mergers between them. This provision is confirmed by article 7 of the FIL, which states that financial institutions shall not start their activities without the authorization of the BCRA. According to article 16 of the FIL, however, the provincial and municipal banks will be able to establish new branches inside their own jurisdictions by only giving notice to the BCRA.

Although the system is simple in appearance, two particular problems arise in the context of Argentine legislation. The first concerns the nature of banking activity, and the second concerns who should license banks. Regarding the nature of banking activity, it has been said that public authority must give an authorization to operate as financial institutions because it is a public service. Regarding who should give this authorization, some provinces have claimed they are also entitled to give or deny the licensing because of the federal organization of the Argentine Republic. Both problems are not only academically relevant, but they could have important practical consequences.

52. EDUARDO BARREIRA DELFINO, LEY DE ENTIDADES FINANCIERAS 29-31 (1993).
53. For further details, see LASTRA, supra note 32, at 98-107.
54. See CRANSTON, supra note 49, at 71-72.
56. Rosa Lastra, Lender of Last Resort, Bank Failures and Bank Insolvency Law in Economies in Transition, seminar (European Bank of Reconstruction & Development (1997)).
57. See CRANSTON, supra note 49, at 87; LASTRA, supra note 32, at 109-10.
a. Is the Banking Activity a “Public Service?”

The concept of public service in Argentina comes from the Administrative Law. Public services are those provided to individuals in the general interest of society, and they comprise basic services (infrastructure) like the provision of water, gas and electricity, maintenance, cleaning and lighting of public places, public transport, etc. In the past they were provided by big state-owned enterprises (proper public service) or by private companies (quasi-public service) that had an authorization given by the same state. The public service is equally provided to all its users, and its performance to individuals is compulsory.

The existence of an authorization or licensing in banking activity suggests that it could be considered another proper or quasi-public service, depending on the ownership of the bank. According to other sources, banking activity has a private nature, and the existence of public controls and licensing does not change this conclusion. Following the idea of banking activity as private in nature, the state should only participate in this realm by supervising private institutions in order to allow growth and avoid bureaucratization.

The consequences of considering banking activity as a public service are extremely serious, taking into account the compulsory performance by which any individual would be entitled to demand credit from a bank. The equality of the performance could also introduce serious problems in the classification of potential or actual debtors according to their possibilities of paying back credits.

This confusion has come from times in which banking activity was only performed by the state in Argentina. From 1946-1957 and from 1973-1977, banking deposits were nationalized. Private banks became merely agents of the BCRA when receiving deposits from the public, and interest rates were fixed by the BCRA. The current system, however, is private in nature, and banks receive deposits for their own account. Moreover, most state-owned enterprises that used to perform public services have been recently privatized, and the concept of public service has been reformulated according to the current state of affairs.

It has been said that the nature of banking activity will depend on political ideas more than on juridical concepts, i.e., it will be considered a public service when the state is deemed entitled to perform any activity, and it will not be considered a public service when a state is simply deemed to perform any activity in a subsidiary way to the private enterprises.

Current legislation in Argentina does not define whether banking activity is a public service, but the role played by private financial institutions, which take deposits and give credits by themselves and not as mere agents of the BCRA, makes it difficult to consider it a public service. Moreover, the BCRA participates in the system only performing its role of

58. When the public service is provided by a state-owned enterprise it is said to be a “proper public service” and when it is provided by a private enterprise duly authorized by the state it is called “quasi-public service.”
60. See Villegas, supra note 55, at 258; Jorge Labanca, Actividad bancaria como servicio publico y autorización para funcionar como banco, in JURISPRUDENCIA ARGENTINA, 1967 VI-811.
63. Id. at 31; see also BENELVAZ & COLL, supra note 8, at 305-08.
64. See RECIO & VILLER, supra note 59, at 87.
supervisor, and banks voluntarily contract with their customers fixing the interest rate according to market rules.65

b. Is the Licensing Attribution Shared by BCRA and the Provinces?

The Argentine state has a federal organization,66 and its provinces keep some of their powers that were not delegated to the federal government. It has been said that one of these powers is the one related to the financial activity performed in their own territories.67

All provinces have created their own provincial banks, which have been considered as "agents of the provinces," to promote provincial economic policies.68 Moreover, some provinces have passed their own provincial laws regulating the licensing of new banks inside their boundaries.69 In some cases, these regulations have been considered of doubtful validity70 since they overlap with the BCRA attributions for licensing.

However, the provinces' powers are considered jointly with BCRA attributions,71 and they can require the fulfillment of certain requirements for new financial institutions seeking to establish in their territories. But these requirements cannot be unreasonable since provincial authorities are not entitled to play a role of "local central banks," and they must be limited to the extent of administrative and local market requirements.72

2. Supervision Stricto Sensu.

Supervision stricto sensu is related to the monitoring of a bank performance and is aimed to control its asset quality, capital adequacy, liquidity, earnings, and management.73 It needs an efficient system to obtain information about the banks.

Article 4 of the FIL allows the BCRA to perform the supervision of financial institutions and article 43 of the BCRAL states that supervision will be performed by the BCRA through the Superintendencia de Entidades Financieras y Cambiarias (SEFC),74 which is a special department belonging to the BCRA. It must be said that the SEFC does not bear juridical personality independent from the BCRA,75 although it bears certain attributions for supervision of financial and exchange institutions.76

65. DELFINO, supra note 52, at 43.

66. CONST. ARG. art. 1.

67. See BENELVAZ & COLL, supra note 8, at 286.

68. Jesus Abad Hernando, El Banco Central y la potestad de regulación de la moneda y el crédito, LA LEY 954, 958 (1986).

69. See BENELVAZ & COLL, supra note 8, at 287. See also Hernando, supra note 68, at 957.

70. Eduardo Javier Romero, Régimen de Autorizaciones de Entidades Financieras. Facultades Federales y Provinciales, REVISTA DE DERECHO BANCARIO Y DE LA ACTIVIDAD FINANCIERA, Año 1, Jan.-Apr. 1991, No. 1-2. The author analyses the case of the Province of Entre Ríos, which passed the Provincial Law No. 7789 containing excessive requirements for new financial institutions seeking to establish new branches in this province.

71. See Hernando, supra note 68, at 957.

72. See Romero, supra note 70.

73. LASTRA, supra note 32, at 111.


76. Carlos Gustav Gerscovich, Garantía de los depósitos, supervisión y preservación del sistema financiero, JURISPRUDENCIA ARGENTINA, 1993-II, at 600, 602.
The SEFC is not only in charge of supervision of authorized institutions, but according to article 38 of the FIL, also for persons who unlawfully operate in the financial activity without the corresponding licensing.77

a. The SEFC Attributions.

Although it is dependent on the BCRA, the SEFC keeps a relative level of autonomy, and some of its powers are performed without previous authorization of the BD. Thus, according to article 48 of the BCRAL, the SEFC is administered by itself and can establish the rules for its administration as well as appoint or dismiss its personnel.78

Article 43 of the BCRAL states that the SEFC shall keep the necessary information about the qualification of financial institutions for the BD.79

Article 46 of the BCRAL allows the SEFC to: (a) qualify financial institutions; (b) withdraw the authorization to operate in the exchange market; (c) approve programs for restructuring troubled financial institutions;80 (d) apply regulatory rules established by the BD; and (e) establish requirements for external audit of financial and exchange institutions.81

All these powers shall be performed in accordance with the general policies established by the BD, but article 47 addresses powers that are performed by the SEFC by itself. This comprises: (a) issue rules about the information and accountability regime for financial and exchange institutions; (b) publish balance sheets of financial institutions as well as debtors, and other useful information for the analysis of the financial system; (c) order financial institutions to cease with lending programs that may risk their solvency; (d) issue rules about obtaining foreign currency by financial institutions; (e) with previous consultation to the BD president, apply the FIL to persons who are not included in it, when the importance or volume of their operations make it convenient because of monetary, exchange, or lending policies; (f) impose sanctions foreseen by the FIL; (g) any other attribution of the BCRA for the supervision of financial institutions that has not been expressly attributed by the BCRAL to the BD; and (h) apply legal rules about credit cards or electronic money.82

b. BCRA Powers for Investigation.

The BCRA bears wide powers for investigation over financial institutions,83 and according to article 37 of the FIL, financial institutions shall allow BCRA officials to have access to their accounts, correspondence, and documents, and in case of a verification or summary proceeding, debtors of financial institutions shall also allow BCRA officials to have access to their accounts and documents.84 Article 50 of the BCRAL strengthens this provision stating that SEFC will be able to require from enterprises and persons included in the FIL their accounts and documentation, being able to order the seizure of documen-

78. BCRAL art. 48.
79. Id. art. 43.
80. See infra Part III.B.4.
81. BCRAL art. 46.
82. Id. art. 47.
83. See Humberto Campagnale, La investigación administrativa en el régimen de las entidades financieras, JURISPRUDENCIA ARGENTINA, 1981-I, at 733.
tation and other elements related to the breach of rules. Article 51 of the BCRAL contains a similar rule for exchange houses.

According to article 54 of the BCRAL, the SEFC will be able to seek the assistance of public force in cases of “finding obstacles or resistance” to perform its role of inspection.

3. Sanctioning.

Banking legislation and regulation need effective enforcement. Penalties encourage banks to comply with laws and help to further regulatory aims.

Administrative powers of the BCRA to apply sanctions are ruled by the FIL and the BCRAL. This study focuses on the analysis of administrative sanctioning rather than criminal punishment since criminal punishment would exceed the scope of this essay.

a. The Sanctions.

An array of sanctions aimed to protect monetary policies and performance of the financial market has been addressed by article 41 of the FIL: call of attention; warning; fines; temporary or permanent disqualification to use banking current accounts; temporary or permanent disqualification as promoter, administrator, member of the vigilance council, trustee, liquidator or manager of financial institutions; and revocation of the authorization to operate as a financial institution.

Sanctions can be applied to institutions and persons involved in financial activity; hence directors, managers, officials, auditors, promoters, liquidators, and shareholders are subject to these sanctions. It has been said, however, that national state-owned institutions are not subject to sanctions since this would imply that the state applies a sanction to itself. Nevertheless, these privileges threaten market competition and monetary soundness since they constitute undue privileges for state-owned banks.

Without the prejudice of these sanctions, which can be applied by the BCRA itself, the BCRA shall promote the corresponding criminal actions upon discovery of criminal activity.

b. The Sanctionable Conducts.

Sanctionable conducts are those that imply a breach of the FIL, its regulatory rules, and resolutions issued by the BCRA. They are not specifically defined, but article 41 of the FIL uses a generic definition comprising any breach of regulations.
c. Who Applies Sanctions?

Identifying the authority that is entitled to apply sanctions in the Argentine banking system is not an easy issue. Article 41 of the FIL states that "sanctions shall be applied by the president of the BCRA, or the competent authority,"95 but article 14(h) of the BCRAL states that "[the BD will] revoke the authorization to operate as financial institutions by itself, or on request of the superintendent."96 At the same time, article 47(f) of the BCRAL states that "[the SEFC will] apply sanctions established by the FIL."97

A careful interpretation of article 41 of the FIL and articles 14(h) and 47(f) of the BCRAL leads to the following conclusions: the SEFC keeps the attribution of applying the sanctions of call of attention, warning, fines, and disqualification; the BD keeps the attribution of applying the sanction of revocation of the authorization to operate as a financial institution on request of the SEFC; and according to articles 11 of the BCRAL and 41 of the FIL, only in case of urgency and in very exceptional cases, the president of the BCRA will be able to apply the sanction of revocation of the authorization to operate as a financial institution.98

d. Administrative Summary Proceedings.

As explained above, the BCRA bears wide attributions for investigation of financial institutions. If investigation leads to the discovering of a breach of any regulation, the BCRA shall apply the corresponding sanctions. But according to article 41 of the FIL, the person or financial institution has a right to "due process,"99 being able to: (a) answer the charges; (b) offer proof for defense; and (c) insist that decisions of BCRA be duly founded.100

e. Administrative and Judicial Review.

Article 42 of the FIL foresees administrative and judicial review of sanctions applied by the BCRA in case of arbitrariness, and the Administrative Proceedings Law No. 19.549 will be applicable in a subsidiary way in case of administrative review.101


Sometimes banks fail despite the supervision of central banks, and the system must foresee a possibility of a crisis and be prepared to manage it using efficient means. Basically, crisis management will involve three steps: the lender of last resort role (LOLR); deposit insurance (if available); and bank insolvency proceedings.

a. The LOLR Role of Central Banks.

Central banks may act as LOLR to provide emergency lending for a single bank suffering a liquidity crisis or to the whole system in order to preserve its stability.102 The LOLR role

95. Id.
97. Id. art. 47(f).
98. DELFINO, supra note 52, at 183-84.
99. FIL art. 41.
100. DELFINO, supra note 52, at 187-88.
101. FIL art. 41.
102. See LASTRA, supra note 32, at 126; CRANSTON, supra note 49, at 117.
must be prudently performed in order to avoid distortions in competition because of the existence of an inherent subsidy to insolvent banks conferring an undue advantage for some banks against those that comply with legal rules. Thus, the doctrine of the LOLR role is based on the following operating principles: central banks should prevent temporary illiquid, but not insolvent, banks from failure; central banks should charge a penalty rate when acting as LOLR; central banks should require good collateral; central banks should show readiness to lend in advance; the LOLR role is discretionary, not mandatory; and central banks shall assess whether the situation may produce the failure of other institutions (systemic risk) and, if there is no risk of contagion, central banks may chose not to lend.

(i) The BCRA as LOLR.

It has been said that the BCRA performs an obligation when acting as LOLR, but the language of article 17 of the BCRAL makes it clear that the role is discretionary and not mandatory since it clearly states that "[the BCRA] will be able to." Article 17 does not state that "the BCRA shall" act as LOLR, which would have been the appropriate expression in the case of a mandatory role.

According to article 17(e) of the BCRAL, funds provided to financial institutions shall always have guarantees, and according to article 53 of the FIL, in case of bankruptcy of the aided institution, the BCRA will have a security interest that will rank in a better position than the other creditors of the bankrupted institution.

(ii) Limitations on the LOLR Role of the BCRA.

The BCRAL has imposed limitations on the LOLR role of the BCRA with two different aims: (1) to put an end to the practice of providing artificial aid to seriously troubled institutions, without solving problems, but notoriously increasing them since insolvent institutions—maintained by the BCRA assistance—used to keep receiving deposits from the public and, after their bankruptcy, these deposits had to be paid by the same BCRA because of the deposit insurance then existing; and (2) to protect BCRA reserves and support the value of the currency in accordance with the CS.

Thus, article 17(b), (c) and (e) limit the aid to cases of temporary illiquidity up to a maximum term of thirty days and a maximum amount equivalent to the value of the net worth of the aided financial institution. But in the case of it becoming necessary to provide liquidity to the financial system as a whole or because of extraordinary circumstances, these maximum terms and amounts may be exceeded with the previous approval of the absolute majority of the BD. Nonetheless, the reserves for convertibility shall not be risked, and without prejudice to other guarantees, shareholders shall pledge the necessary shares for the control of the financial institution and give their consent for proceedings estab-

103. Lastra, Lender of Last, supra note 56, at 8-9.
104. LAstra, supra note 32, at 127-28.
105. Delfino, supra note 52, at 242.
107. Id. art. 17(e).
108. Delfino, supra note 52, at 242-43.
110. BCRAL art. 17(b)-(c), (e).
lished by article 35 *bis* of the FIL. State-owned banks will be able to be excepted from this last requirement.¹¹¹

Despite these provisions, doubts may arise in cases of strong financial crisis in which the BCRA should provide full convertibility between pesos and U.S. dollars¹¹² and at the same time perform its role of LOLR. The main question seems to be whether the BCRA will be able to cope with its dual roles of currency board and LOLR. This question should focus the attention of Argentine banking supervisors to the adoption of liquidity policies and a strengthening of banking supervision.¹¹³

b. Deposit Insurance.

Law No. 24.144 abolished the deposit insurance created by previous legislation.¹¹⁴ Deposit insurance has been deemed to be a distortion to the system¹¹⁵ since in some cases it creates a moral hazard, i.e., depositors behave carelessly because of the existence of deposit insurance. Moreover, banks could also behave less carefully, taking excessive risks because of the knowledge of the insurance protection for depositors.¹¹⁶ On the other hand, public deposit insurance could be considered an improper burden for taxpayers who have to support the losses of the system.

All these reasons were taken into account by Law No. 24.144, but the Mexican peso crisis created trouble for the Argentine banking system and caused authorities to review their position on deposit insurance. Deposits fell sixteen percent between January and March 1995,¹¹⁷ and BCRA had to provide liquidity to many of the smaller banks that were in trouble because of the deposit withdrawals. Confidence was recovered with international help (IMF, IBRD),¹¹⁸ and with a new law passed by Congress (No. 24.485) by which a new deposit insurance system was created and deposits began to return.¹¹⁹

The deposit insurance system was implemented by Presidential Decrees No. 540/95 and 1292/96 and can be described as private, limited, mandatory, and financed by the institutions themselves through contributions and by the investors.¹²⁰

The system is private since it is managed by a corporation called SEDESA.¹²¹ SEDESA performs its role as trustee of a deposits guarantee fund, albeit the BCRA shall necessarily be one of the partners of SEDESA. The responsibility towards the depositors, however, will always be limited to the deposits guarantee fund.

Deposit insurance is limited; it will only cover deposits for less than ninety days up to the amount of $10,000 and deposits for more than ninety days up to the amount of $20,000. Deposit insurance is also mandatory and it is formed by contributions paid by the

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¹¹¹. See [*infra* Part III.B.5].
¹¹². See [*CAprio ET AL.*], [*supra* note 10].
¹¹³. Carrizosa et al., [*supra* note 12, at 6].
¹¹⁴. BCRAL, Law No. 24.144.
¹¹⁵. See Lasta, [*Lender of Last*, [*supra* note 56, at 8-9].
¹¹⁶. See [*LASTRA*], [*supra* note 32, at 130.
¹¹⁷. CAprio ET AL., [*supra* note 10, at 3].
¹¹⁸. [*Id.* at 3-4.
¹²⁰. See Duggan & Fernández, [*supra* note 15, at 8. See also Law No. 24.485 art. 1.
¹²¹. According to Presidential Decrees No. 540/95 and 1292/96, "SEDESA" is the abbreviation of "Seguro de Depósitos Sociedad Anónima" (Deposits Insurance Corporation).
financial institutions and the investors themselves. The funds cannot be provided by the state since Law 24.485 expressly states that BCRA and National Treasury resources shall not be risked by the deposit insurance.

c. Bank Insolvency Proceedings.

Banks are generally not subject to general bankruptcy procedures, but instead to special bank insolvency proceedings. In the case of Argentina, the BCRAL and the FIL contain provisions for financial institutions bankruptcy, albeit the Bankruptcy Law No. 24.522 is applied in a subsidiary way to those matters that have not been foreseen by both BCRAL and FIL.

(i) Injection of Capital.

Injection of capital provided by public funds has not been foreseen by the BCRAL or FIL. On the other hand, article 10 bis (b) of Presidential Decree No. 540/95, modified by Presidential Decree No. 1292/96, allows SEDESA to use the deposit guarantee fund for injection of capital. This solution has avoided the controversial use of public funds for injection of capital, which has been deemed to be a “de facto nationalization of the assisted banks” with possible distortions for monetary and fiscal policies.

(ii) Restructuring of Troubled Financial Institutions.

When solvency or illiquidity of financial institutions are deemed by the BCRA to be compromised, institutions shall present a plan of restructuring. According to article 34 of the FIL, the BCRA will also be able to appoint overseers with attribution of veto power over financial institution decisions, and the BCRA will be able to demand guarantees and to prohibit the distribution of profits as well as to except or postpone the payment of charges or fines.

The lack of presentation, rejection, or nonperformance of the plan of restructuring will allow the BCRA, given prior summoning and due hearing for the financial institution, to withdrawing the authorization to operate as a financial institution, without prejudice of other possible sanctions.

But according to article 35 bis of the FIL, before deciding to withdraw the authorization, the BCRA will have the exclusive power to decide whether to restructure the financial institution in order to protect the interest of depositors, applying any of the following means (or a combination of them): reduction of capital, with the possibility of acquisition by other financial institutions; transfer of certain assets and liabilities to other financial institutions, which will involve the exclusion of certain assets and deposits, but in this case, the transfer will be related to these assets and not to the institution itself; the BCRA will be able to request the appointment of a judicial supervisor by a Commercial Court in order to ensure the implementation of measures foreseen by article 35 bis of the FIL; and, during the process of restructuring, judicial proceedings related to excluded assets and debts shall be suspended.

122. LASTRA, supra note 32, at 134.
124. LASTRA, supra note 32, at 141.
126. Id. art. 34.
127. Id. art. 35 bis.
According to article 35 bis of the FIL, the BCRA will not be liable for decisions adopted during the process of restructuring, except in case of fraud.\textsuperscript{128}

The process of restructuring financial institutions is complemented by article 49 of the BCRAL, which allows the SEFC, previous authorization given by the BD, to temporarily suspend the operation of the troubled financial institution.\textsuperscript{129}

At the same time, Presidential Decree No. 286/95 has created a trust called \textit{Fondo Fiduciario para el Desarrollo Provincial} (Provincial Development Fiduciary Fund) aimed to help troubled provincial banks subject to privatization processes.\textsuperscript{130} Private banks can receive assistance from another trust called \textit{Fondo Fiduciario de Capitalización Bancaria} (Fiduciary Fund for Banking Capitalization) created by Presidential Decree No. 298/97.\textsuperscript{131}

Both trusts are aimed to assist banks with temporary liquidity problems through the purchase of loan portfolios and their resale, or increasing the share capital or any debt securities issued by the troubled institution, provided that the respective province or the institution provides sufficient guarantees.\textsuperscript{132}

\textbf{(iii) The Case of Provincial State-Owned Banks.}

All Argentine provinces have created their own provincial banks. They have claim their authority to create these banks and issue their own rules comes from the National Constitution.\textsuperscript{133}

In cases like the provincial banks of Catamarca, Tucumán, and Salta, they were submitted to overseers appointed by the BCRA\textsuperscript{134} in order to monitor their performance in situations of illiquidity, as established by article 34 of the FIL. It has been said, however, that the authority of the BCRA to establish an overseer with power of veto over decisions taken by provincial bank authorities is limited by the special nature of these banks since they are tools of the governments aimed to promote their own credit policies.\textsuperscript{135}

Nevertheless, this assumption has had negative effects on financial activity since provincial banks have often been used by provincial governments to obtain credit to finance their deficits and by borrowers who did not meet private bank creditworthiness criteria.\textsuperscript{136} Poor lending and collection policies made most provincial state owned banks technically bankrupt since many of them were artificially (and expensively) maintained by BCRA re-discounts or government deposits.\textsuperscript{137}

In 1995, following the effects of the 1994 Mexican peso devaluation, the deteriorating fiscal and financial situation of the provinces and their own banks led to a process of bank privatizations involving the provinces of Corrientes, Chaco, La Rioja, Entre Ríos, Misiones, and Formosa, followed by others in the process of being privatized.\textsuperscript{138} At the same time,

\begin{itemize}
  \item \textsuperscript{128} Id. art. 35 bis(V).
  \item \textsuperscript{130} Duggan & Fernández, supra note 15, at 7. See also supra Part II.A.1.
  \item \textsuperscript{131} Duggan & Fernández, supra note 15, at 7. See also supra Part II.A.1.
  \item \textsuperscript{132} See Duggan & Fernández, supra note 15, at 7.
  \item \textsuperscript{133} See Hernando, supra note 68, at 958-59.
  \item \textsuperscript{134} See BENEVAZ & COLL, supra note 8, at 294-301.
  \item \textsuperscript{135} See id. at 296.
  \item \textsuperscript{136} See Carrizosa et al., supra note 12, at 2.
  \item \textsuperscript{137} See id.
  \item \textsuperscript{138} See id. See also supra Part II.B.1.a.
\end{itemize}
the federal government recommended to all provinces the privatization of their state-owned banks in order to follow the general policies of financial liberalization issued by the federal government.139

(iv) Bankruptcy of Financial Institutions.

BCRAL and FIL contain some particular rules for bankruptcy procedure for financial institutions, albeit the Bankruptcy Law No. 24.522 is applicable in a subsidiary way. One important rule is contained in article 50 of the FIL. This rule states that only the BCRA will be able to make a bankruptcy declaration of financial institutions before their authorization to operate is revoked.

At the same time, the BCRA is no longer the liquidator or trustee of bankrupt financial institutions.140 The previous legislation stated that BCRA had to perform the role of liquidator (in case of liquidation) or trustee (in case of bankruptcy) and it was deemed a reason for many claims against the BCRA for damages produced during the performance of those roles.141 Now, according to article 48 of the FIL, the liquidator or the trustee shall be appointed by the court competent in the liquidation or bankruptcy procedure.

(v) Results Obtained with the Crisis Management Tools Provided by Current Legislation.

Crisis management tools provided by current legislation helped the Argentine banking system face both the Mexican peso devaluation and East Asian crises. However, opinions have arisen saying that the system (including the deposits insurance) is too expensive. Moreover, after the suspension of Banco Patricios in March 1998, it was said that delays by the BCRA in applying appropriate measures to exclude bad banks from the system increased costs for solvent banks, which are obligated to contribute to the deposits insurance system.142

These criticisms become more serious when taking into account the importance for Argentina to have an efficient banking system in order to protect BCRA's reserves aimed at providing full convertibility between pesos and U.S. dollars and which could be dangerously risked in case of a banking crisis.

Nevertheless, the transformation of the Argentine financial system during the last years can be deemed a positive one. Since the creation of SEDESA, nine financial institutions faced liquidity problems and just one of them (Caja de Crédito Pavón) underwent liquidation procedures. At the same time, seven other financial institutions were acquired by other banks (Banco Caseros, Banco Buci, Banco de Azul, Coopesur, Platense, and Banco Patricios); one of them has been reopened after having been acquired by new shareholders (Banco de Crédito Provincial, which reappeared in the market with the name

139. See BENÉLVAZ & COLL, supra note 8, at 337.
140. See Marcos E. Moiseeff, Perspectivas de una legislación nueva a propósito de la modificación de la ley de entidades financieras y su aplicación práctica, DERECHO ECONÓMICO REVISTA INTERDISCIPLINARIA DE LOS NEGOCIOS 111 (1996).
141. See id. at 112.
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“Mercobank”), and one institution is under a suspension applied by the BCRA (Banco Medefin, which actually seems to be near a liquidation procedure). 143

5. Compliance with International Standards—The Basle Committee Standards.

Banking activity has become increasingly international during the last years. Development of new technologies and financial innovation has played an important role in this process of internationalization. 144 Jointly with this expansion there has been a necessity of standardization of regulation and supervision in the different countries where cross-border activity takes place. Considerable changes in the international market during the last years have led to international expansion, diversification, and more intensive competition in banking activity, plus a deterioration of asset quality of individual financial institutions due to world economic conditions, leading to increases in loan-loss reserves and reductions in earnings. Further, bank crises beginning during the 1970s involved large institutions in different countries (Banco Ambrosiano in Italy, Herstatt Bankhaus in Germany, Continental Illinois in the United States, among others). The crises triggered by the Third World Debt were evidence of the increasing volatility of financial markets 145 and showed the necessity of standardization of prudential international supervision.

One of the most important efforts for this standardization has been the Basle Committee on Banking Supervision (BCBS), which comprises representatives of central banks and supervisory authorities of the Group of Ten Countries (France, Germany, Italy, Canada, Belgium, Japan, the United States, the Netherlands, the United Kingdom, and Sweden) plus Switzerland and Luxembourg. The BCBS was created in 1974 to encourage cooperation in supervision of international banking. 146 Its primary aim is the convergence of supervisory practices of its member institutions and the enhancement of effectiveness of supervision of international banking activity. This aim is achieved through studying and making recommendations on international banking supervision and helping the exchange of information among bank supervisors. 147 However, the BCBS bears no legal status as an international organization and has no legal authority to create legally binding rules since it is only an informal group of banking supervisors from a limited number of industrialized countries. 148 Nevertheless, the BCBS has become a de facto regulatory body since its powers, influence, competence, and prestige have influenced the incorporation of its decisions in national and international regulations. 149 Moreover, it has been said that BCBS has received a “tacit legitimacy” from its members 150 and has been used as a model of reform by many countries wishing to modernize their banking rules, e.g., Taiwan, South Korea, and South Africa. 151

144. See LASTRA, supra note 32, at 163.
146. See LASTRA, supra note 32, at 169.
147. See NORTON, supra note 145, at 177.
148. Id. at 256.
149. See LASTRA, supra note 32, at 169-70. See also NORTON, supra note 145, at 178.
150. NORTON, supra note 145, at 259.
151. Id. at 239, 260.
The BCBS has issued the "Core Principles for Effective Banking Supervision," which comprise twenty-five basic rules for the supervision of banking activity. These core principles involve certain preconditions, licensing and structure, methods of ongoing banking supervision, information requirements, formal powers of supervisors, and cross-border banking.

The Argentine system complies with most of these core principles. The system keeps clear objectives and responsibilities for banking supervision, provisions against connected lending, control of risk, rules for consolidated supervision, and risk management procedures.

Doubts arise, however, in three areas of the Argentine system: (1) licensing, where conflicts may arise between provincial authorities and BCRA attributions, requiring the issuance of clearer rules to avoid inconsistency between national and provincial policies; (2) crisis management in the case of provincial state-owned banks since, as described above, some provincial banks refuse the performance of certain measures issued by the BCRA; and (3) appendix I of the "Core Principles for Effective Banking Supervision" recommends that state-owned commercial banks operate at the same level of discipline as required for privately owned commercial banks in order to protect taxpayers and preserve strong credit and control in the banking system. But the Argentine banking system contains some unfair advantages for state-owned commercial banks, like article 17(c) of the BCRAL, which has an undue exception for state-owned banks in cases of restructuring, or article 16 of the FIL, which creates a privilege for the establishment of new branches by provincial or municipal banks. Other unfair privileges in favor of national state-owned institutions arise in the power of sanctioning of the BCRA.

A possible solution for these problems is the privatization of provincial and national state-owned banks as recently recommended by the federal government and started by some provinces. In the case of the federal government, this involved a large process of privatizations, which included important financial institutions like Caja Nacional de Ahorro y Seguro and Banco Hipotecario Nacional, and the recently announced privatization of the Banco de la Nación Argentina.

C. THE FINANCIAL INSTITUTIONS.

The FIL foresees an array of different types of institutions, and the most important difference among them is the kind of activities they are allowed to perform. It must be said, however, that the FIL is not only applicable to licensed financial institutions, but also to those persons and institutions whose volume of operations is so important that monetary and credit policies make it convenient to apply financial regulations.
1. Commercial Banks.

Commercial banks are allowed by article 21 of the FIL to perform any kind of active or passive operation that has not been forbidden by the law or by resolutions issued by the BCRA. Active operations are those where the bank keeps a position of creditor (asset side), e.g., lending. Passive operations are those where the bank keeps a position of debtor (liability side), e.g., deposit taking. Commercial banks are the only institutions allowed to keep current accounts with their clients as well as to make transfers from one market to another.

This generic authorization to perform any active or passive operation implies the enrollment of Argentine legislation in the idea of the multifunctional or universal banking, which came with full force during recent years by the internationalization and liberalization of financial markets, and it implies the possibility to perform both merchant and investment activities.

2. Investment Banks.

Investment banks are allowed by article 22 of the FIL to (a) take deposits; (b) issue bonds, obligations, and certificates of participation in their loans in local or international markets; (c) participate in medium- and long-term lending and, in some cases, short-term lending; (d) act as guarantors; (e) participate in transitory investments in bonds easily transferable; (f) perform underwriting contracts, trust contracts (as trustees), and leasing contracts; (g) obtain credits from other countries; (h) perform operations in foreign currency, with the previous authorization of the BCRA; and (i) act as agents and commissioners in operations related to their activities.


Mortgage banks are allowed by article 23 of the FIL to (a) take deposits when they represent a participation in mortgage loans and with special accounts; (b) issue mortgage obligations; (c) lend for construction, rebuilding or maintenance of buildings; (d) act as guarantors in operations related to their activities; (e) participate in transitory investments in bonds easily transferable; (f) obtain credits from other countries with the previous authorization of the BCRA; and (g) act as agents and commissioners in operations related to their activities.

4. Finance Companies.

Finance companies are allowed by article 24 of the FIL to (a) take deposits; (b) issue letters of credit and promissory notes; (c) lend for sales by installments; (d) perform factoring and leasing contracts; (e) act as guarantors; (f) participate in transitory investments in bonds easily transferable; (g) participate in the purchase and sale of chattels; (h) act as trustee and agents in administration of investment funds; (i) obtain loans from other countries, with the previous authorization of the BCRA; and (j) act as agents and commissioners in operations related to their activities.

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161. This distinction is also important to establish the liability of banks and central banks for a breach of bank secrecy or confidentiality, which is limited by articles 39 and 40 of the FIL to passive operations and does not comprise active operations. See Delfino, supra note 52, at 167, 178.

162. See id. at 74.

5. **Societies for Savings and Loans for Housing and Other Real Property.**

Article 25 of the FIL allows these financial institutions to (a) take deposits as a previous condition for the lending; (b) take common deposits; (c) lend for construction or rebuilding of housing and other real property; (d) participate with public and private institutions for financing of savings and loan societies; and (e) act as guarantors in operations related to their activities.

6. **Savings Institutions.**

Savings institutions act as a kind of thrift. Article 26 of the FIL allows these institutions to (a) take deposits; (b) lend on a short- and medium-term basis for small enterprises, professionals, craftsmen, employees, laborers, and institutions of public good; (c) act as guarantors; (d) participate in temporary investments in bonds easily transferable; and (e) act as agents and commissioners in operations related to their activities.

D. **Prohibited Operations.**

According to article 28 of the FIL, financial institutions cannot perform the following operations: (a) exploit for their own count commercial, industrial, or farming enterprises without an express authorization given by the BCRA; this authorization shall establish limits and conditions in order to protect the solvency of the financial institution, and the SEFC shall implement all the necessary measures for an effective control; (b) create any charge over their assets without the corresponding authorization of the BCRA; (c) accept their own shares as security; (d) operate with their directors or administrators and their linked enterprises in more favorable conditions than those accorded to their customers; or (e) make transfers to another market except in the case of commercial banks.

These prohibitions are aimed to protect the liquidity and solvency of financial institutions from activities that could result in a riskier exposure and in some cases give rise to fraudulent activities, e.g., in cases of operations with directors or administrators in more favorable conditions than those accorded to their customers.

IV. **The MERCOSUR.**

On March 26, 1991, Argentina, Brazil, Paraguay, and Uruguay signed the Treaty of Asunción (TA) with the intention of creating a united common market called Mercado Común del Cono Sur (MERCOSUR) by December 31, 1994. Chile and Bolivia have also joined MERCOSUR, and associated members and other Latin American countries like Venezuela and Mexico are seeking a closer position in respect of MERCOSUR.

The establishment of MERCOSUR was confirmed by the Ouro Preto Protocol (OPP), signed by Argentina, Brazil, Paraguay, and Uruguay on December 17, 1994, which establishes the structure and institutions comprised by MERCOSUR.

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164. Translates to Common Market of the South Cone.
A. ORIGINS OF MERCOSUR.

Integration among Latin American countries has been a difficult task. Many experiences like Asociación Latinoamericana de Libre Comercio (ALALC)\(^{168}\) and Asociación Latinoamericana de Integración (ALADI)\(^{169}\) or the Andean Pact failed in the past or just had limited achievements for different reasons such as lack of legal binding effect of their rules,\(^{170}\) too small markets,\(^{171}\) and lack of foreign investment.

MERCOSUR includes two of the largest Latin American economies (Brazil and Argentina) and a market of more than 200 million people. It is the product of a process of integration started between Argentina and Brazil with the Declaration of Iguazú in November of 1985,\(^{172}\) and followed by an agreement for the Argentine-Brazilian integration in July 29, 1986, and by the Treaty of Integration, Co-operation and Development signed by both countries on November 28, 1988.\(^{173}\) In July 1990, both countries announced their intention to create a common market.\(^{174}\)

B. OBJECTIVES OF MERCOSUR.

Objectives of MERCOSUR are described by article 1 of the TA and they comprise (a) free circulation of goods and services among the states members through the removal of custom tariffs and other restrictions; (b) establishment of a common external tariff and a common commercial policy with respect to other countries that are not members of MERCOSUR; (c) coordination of macroeconomic policies; and (d) harmonization of law.

C. ORGANIC STRUCTURE OF MERCOSUR.

The highest authority of MERCOSUR is the Common Market Council (CMC), formed by the Ministers of Foreign Affairs and Economy of all the states members. CMC is in charge of economic and foreign policy.\(^{175}\) The next in hierarchy is the Common Market Group (CMG), formed by the representatives of the Ministries of Foreign Affairs and Economy and Central Banks of all the states members. It is in charge of implementing CMC decisions and Treaty compliance.\(^{176}\)

Other authorities are the MERCOSUR Trade Commission,\(^{177}\) the Administrative Secretariat,\(^{178}\) the Joint Parliamentary Commission,\(^{179}\) and the Economic Social Consultative Forum.\(^{180}\)

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169. Translates to Latin American Association of Integration.
171. Guira, supra note 166, at 70.
172. See Antillio Aníbal Alterini, La contratación en el MERCOSUR, La Ley 735, 740 (1992).
174. See Guira, supra note 166, at 53.
176. See id. arts. 10, 11, 12, 14. See also Alejandro Freeland López Lecube, Attribuciones y limitaciones de los organismos de administración del Mercosur, La Ley 900 (1993).
177. See OPP, supra note 175, art. 20.
178. See id. art. 31.
179. See id. art. 22.
180. See id. art. 28.
According to article 9 of the OPP, the CMC will issue Decisions (Decisiones) that shall be binding for member states. The CMG will issue Resolutions (Resoluciones) that shall also be binding for member states (article 15 OPP). The Commission will issue Directives (Directivas), or Proposals (Proposiciones), but only Directives shall be binding for member states (article 20 OPP). Nevertheless, MERCOSUR authorities do not bear supranational authority, and their rules are not directly applicable in the territories of member states, albeit they shall take all the necessary steps for the implementation of these rules. However, no enforcement provisions of these rules have been provided by either the TA or the OPP.

D. Financial Integration in Mercosur.

The TA addresses the coordination of monetary policies. This task involves two different steps: (1) the coordination of monetary and financial policies from an economic point of view; and (2) the harmonization of rules applicable to these policies.

Regarding the coordination of monetary and financial policies, some problems have arisen because of the existence of asymmetries in implementation by member states, e.g., devaluations in the currency of one country, leading to distortions in economic policies of the other countries, different fiscal treatment of foreign investors, different participation of foreign capital in banking activity and liberalization of financial markets, as well as important differences of size between financial sectors in each country, e.g., the Paraguayan financial sector is much smaller than those of Argentina and Brazil. Thus, achievements in MERCOSUR financial integration are not substantial from either an economic or from a harmonization of rules point of view. The process of harmonization of law, however, is not supposed to be too difficult a task for MERCOSUR, since all member states have a civil law tradition with similar legal systems.

Advances obtained in financial integration have been related to the issue of two decisions by the CMC and one resolution by the CMG. At the same time, there has been a cautious approach to the idea of a common currency for MERCOSUR, albeit this possibility is still far from being approved and implemented by member states.

1. The Decision 10/93.

The Decision 10/93 of the CMC is related to minimum capital requirements and takes into account the evaluation of asset risk of banks. It has been implemented by Argentina.

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183. See Guira, supra note 166, at 84.
184. See Sorondo, supra note 173, at 784.
186. See id. at 86-87.
187. See id. at 84.
through the Communication "A" 2136 of the BCRA, and by Brazil through the Resolution 2099 of August 17, 1994 of the Central Bank of Brazil. Paraguay implemented it through the General Law on Banks, Financial Institutions, and other Credit Institutions No. 861 of June 24, 1996. In Uruguay, the Board of Directors of the Central Bank is currently considering its implementation.

2. The Decision 12/94.

The Decision 12/94 of the CMC contains rules on consolidated supervision and has been implemented by Argentina through the Communication "A" 2227, and partially implemented by Brazil through Resolution No. 2302 of July 25, 1996 of the Brazilian Central Bank. In Paraguay, Law. No. 861 states that consolidated supervision shall be implemented by the Superintendence of Banks, but this body has not yet been created. Uruguay has not implemented the Decision.

3. The Resolution 1/96.

The Resolution 1/96 of the CMG relates to the classification of assets of the financial institutions and is only applied by Argentina through the Communication "A" 2216.

E. LESSONS FROM EUROPEAN UNION AND OTHER INTERNATIONAL EFFORTS. 189

International integration of banking activity has been achieved in other experiences; among them the European Union (EU) and the GATS (General Agreement on Tariffs and Services).

1. The EU.

The idea of a single European market with no internal barriers in the EU has its own expression in the banking activity through two basic principles: freedom of establishment, and freedom to provide services. Liberalization of services had been addressed by the original European Economic Community Treaty: articles 52 and 59 referred to liberalization of services and article 67 referred to liberalization of capital. 190 At the same time, the Council has issued three basics rules regarding the establishment of these principles: the 1973 Banking Directive; the Banking Directive of December 12, 1977; and the Banking Directive of December 15, 1989.

189. Brief reference must be made to the NAFTA (North American Free Trade Agreement), which comprises the United States, Canada and Mexico. Although it is another case of economic regional integration, it does not establish a customs union but only a free trade area with some basic principles (national treatment, most-favored-nation treatment, and transparency of regulations and practices) subject to considerable exemptions and reservations, and its achievements are fewer than in the case of the EU. Chapter 14 of the NAFTA contains rules on financial integration and, according to these rules, parties shall provide: (a) access to financial services providers of the other parties; (b) the better of national treatment, or most-favored-nation treatment, to the others parties' financial services providers. However, cross-border establishment of branches is subject to national discretion, and on the other hand, Mexico keeps reservations related to conditions and terms to open its financial markets. See CRANSTON, supra note 49, at 470; see NORTON, supra note 145, at 236-37.

190. See LASTRA, supra note 32, at 215.
Integration was achieved by the EU through a generalization of the concept of mutual recognition, which comprises an equivalence of objectives among national legislations and a harmonization of essentials instead of a detailed harmonization of legal systems.191

The 1973 Banking Directive aimed to implement the General Program with respect to financial institutions.192 However, the Directive became superfluous in implementing freedom of establishment and providing services since they had already been addressed by articles 52, 59, and 60 of the Treaty, although it contained some useful provisions relating to the use of the words “bank,” “banker,” and others.193

The First Banking Directive of December 12, 1977 was aimed at the coordination of laws and administrative provisions regarding banking activity and was the first important step towards full coordination.194 It contained certain minimum conditions for the licensing of credit institutions and liberalization of banking services.

The Second Banking Directive of December 15, 1989 was an important achievement to remove regulatory pitfalls for the freedom of establishment and freedom to provide services on a cross-border basis.195 Its basic principles are: (a) mutual recognition, which implies the fact that bank supervisors of the member states shall consider that their national regulations are not identical, but keep equivalent requirements for supervision of banks; (b) principle of home country control, which is a corollary of mutual recognition and implies that supervisory authorities from the home country have the right to supervise their own banks not only with respect to activities carried on at home, but also in respect to activities carried on in other member states, helping the consistency of banking supervision in the EU; and (c) principle of single banking license,196 which implies that only home authorities are competent to license their own banks.197 The “general good” clause is a limitation to the principle of home country control and allows restrictions on the freedom to provide services, since host countries keep the right to demand compliance with their own regulations and apply those rules in case of breaches of law committed within their territories in order to protect the “general good.”198

Harmonization in the EU has been referred to elements considered as essentially necessary for a unified banking activity consisting of licensing requirements, prevention of large credit exposures, annual and consolidated accounts, banking supervision in a consolidated basis, prevention of money laundering, rules on deposit guarantee, rules on reorganization of financial institutions, and rules on cross-border payments.199

Despite the existence of common rules, the EU does not have a centralized authority for supervision, although it could be achieved in the future through the transfer of supervisory powers to the European System of Central Banks.200

191. See id. at 218.
192. MARC DASSESSE ET AL., EUROPEAN COMMUNITY BANKING LAW 17 (1994).
193. See id. at 18.
194. See id.
195. See id. at 25.
196. See LASTRA, supra note 32, at 221-22.
197. See DASSESSE ET AL., supra note 192, at 26.
198. See id. at 41.
199. See LASTRA, supra note 32, at 219-20.
200. See id. at 222.
2. The GATS.

The GATS has been negotiated in the Uruguay Round and is the first global agreement on liberalization of services.\textsuperscript{201} It includes three basic principles: (a) most-favored-nation, which precludes discrimination among foreign countries\textsuperscript{202} and obliges a country to accord the same favorable treatment to the banks of one foreign country as those accorded to the banks of any other foreign country, although this principle has exceptions, like regional economic agreements and reciprocity provisions; (b) market access (There has not been much progress regarding this principle, but it will be accorded by countries according to term, limitations, and conditions agreed and specified in their schedules. But if a country agrees to give market access to foreign banks, then it shall allow any necessary transfer of capital.); and (c) national treatment, which implies that once a foreign bank has obtained market access it shall be treated in the same way as domestic banks,\textsuperscript{203} although members may make treatment subject to conditions and qualifications.\textsuperscript{204}

Obligations and commitments undertaken by parties to the GATS cannot be withdrawn without compensation and are subject to enforcement through a mechanism for dispute settlement under the World Trade Organization.\textsuperscript{205}

The GATS aims to remove discriminatory barriers against foreign services and service providers, with regard to entry and operation in the host-country market,\textsuperscript{206} and other barriers that have similar effects in economic terms, since they are designed to avoid the entrance of foreign services and service providers into the host-country market, e.g., limitations in market share or prohibitions on engaging in certain activities that are allowed for domestic institutions.\textsuperscript{207}

At the same time, the GATS comprises a duty of transparency among its members, which are obliged to publish all measures of general application relevant to trade in services.\textsuperscript{208}

Liberalization of financial services in the GATS has been jointly considered with provisions regarding prudential regulation and supervision to promote the stability of the international financial system through the establishment of strong prudential standards and cooperation and coordination among supervisors in different countries.\textsuperscript{209}

\textsuperscript{201} Sidney J. Key, Financial Services in the Uruguay Round and the WTO, Occasional Papers WTO No. 54, at 1 (Washington, D.C. 1997).
\textsuperscript{202} See id. at 3.
\textsuperscript{203} See id. at 10.
\textsuperscript{204} See CRANSTON, supra note 49, at 473.
\textsuperscript{205} See Key, supra note 201, at 1.
\textsuperscript{206} See id. at 5.
\textsuperscript{207} See id.
\textsuperscript{208} See id. at 6.
\textsuperscript{209} See id. at 7.
V. Conclusion.

The Argentine monetary and financial system has achieved the advantages provided by the CS and the CBI. The implementation of both principles led to a drastic reduction of inflation rates and stabilization of the economy.

Another important achievement has been the liberalization of the financial system. This process comprised large privatizations of state-owned financial institutions, the abolishment of exchange controls, and the abolishment of discrimination against foreign financial institutions.\footnote{210}

Regulatory and supervisory functions of the BCRA are performed in accordance with international standards. The experience of the 1994 Mexican peso devaluation and the 1997 East Asian crisis showed a strengthened system with efficient tools for supervision, especially in the field of crisis management.

Some changes, however, should be introduced in the area of state-owned banks for the purpose of abolishing unfair differences and privileges\footnote{211} for these banks, particularly regarding licensing, sanctioning, and crisis management processes. There is also a need for clearer rules in the field of licensing where some powers of the BCRA seem to overlap with powers claimed by the provinces.

Regarding MERCOSUR, it may offer an opportunity for integration and expansion of financial activity of all member states, although it will be necessary to abolish protectionist barriers and coordinate regulatory and supervisory policies among the authorities of each country in order to succeed in its implementation.

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\footnote{210}{Presidential Decree No. 146/94 removed all the restrictions for the establishment of foreign capitals in financial activity. Indeed, this decree also removed the requirement of reciprocity with the country where foreign capitals come from.}

\footnote{211}{See supra Parts III.B.3.a., III.B.4.c.iii, III.B.5.}