The IMF's 2018 Stand-By Arrangement with Argentina: An Ultra Vires Act?

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Abstract

The 36-month exceptional access Stand-By Arrangement (SBA) with the Republic of Argentina approved by the International Monetary Fund (IMF) in June 2018, later augmented in October 2018, represents the largest programme in the history of the Fund. The programme, however, has failed in all its core objectives. While the programme has been subject to macroeconomic critiques, this is the first study that integrates such analyses into a comprehensive legal evaluation, with resort to general Public International Law, the law of the IMF and, where international law is uncertain, relevant analogies with English private law.

We introduce the hypothesis that the SBA violated the core purposes of the IMF as per its Articles of Agreement and, therefore, constitutes an ultra vires act. To explain why, we proceed as follows. Section 1 provides the legal foundations of our analysis. First, it explains the ultra vires doctrine in international law and outlines key considerations drawn from case law of the International Court of Justice for the recognition of ultra vires acts. Second, it draws on core provisions of the Articles of Agreement to discuss relevant purposes of the IMF, as well as a set of authorisations and limitations to its powers established in the treaty to achieve such purposes. Section 2 draws on macroeconomics to discuss how those substantive rules were violated in the SBA in a way that is too manifest to be open to reasonable doubt, thereby raising suspicion that the SBA's approval was ultra vires. In particular, the programme was characterized by egregious assumptions and accounting inconsistencies that meant the objectives were impossible to attain. Section 3 considers the impact of the IMF's recently published Ex-Post Evaluation of Exceptional Access Under the SBA on our legal analysis. Section 4 draws on the premise that the SBA's approval constituted an ultra vires act to discuss the potential legal implications of its invalidity. Section 5 concludes this piece by summarising its key findings and reflecting upon the need for clarification on the legal validity of the SBA, as well as further scholarly research on ultra vires lending by the IMF.

Introduction

The 36-month exceptional access Stand-By Arrangement (SBA) with the Republic of Argentina approved by the International Monetary Fund (IMF) in June 2018, later augmented in October 2018 (henceforth, 'the SBA'), represents the largest programme in the history of the Fund.[1] The total augmented SDR purchase made available to Argentina amounted to SDR 40.7bn (USD 56.3bn or 1,277 percent of quota or nearly 15 percent of GDP). Actual purchases reached SDR 31.9bn (USD 44.1bn) in July 2019 before the programme went 'off track'. As of end-November 2021, SDR 30.6bn remained outstanding. Since Argentina's gross international reserves (excluding gold) were only SDR 27.7bn as of end-October, and since market access remains severely impaired, there is no prospect of making scheduled re-purchases any time soon. A new programme is currently under negotiation, absent which default on the IMF is likely.

The programme's objectives included restoring market confidence, putting Argentina's public debt on a firm downward trajectory, and setting more realistic inflation targets while protecting society's most vulnerable.[2] However, none of those objectives were met. Market confidence deteriorated quickly—in fact, the programme was augmented already at the time of the First Review. Financing needs quickly increased as public debt, which is highly dollarized, moved onto a higher trajectory due to ongoing exchange rate weakness—and was eventually restructured in mid-2020. Inflation consistently overshot the 'more realistic' targets as the currency was compromised. The Central Bank of the Argentine Republic (BCRA) was forced to ever-greater monetization to cover the cost of running policy—a hidden deficit not included in the programme's design. In the meantime, society's most vulnerable suffered the most as exchange rate weakness and inflation eroded nominal incomes and savings, spreading poverty despite stated intentions to the contrary.

While it has been already argued elsewhere that the failure to meet those objectives was easily foreseen and represents a programming failure by the IMF,[3] this is the first study that integrates those macroeconomic critiques into a comprehensive legal evaluation, with resort to general Public International Law (PIL), the law of the IMF and, where international law is uncertain, relevant analogies with English private law.

We introduce the hypothesis that the SBA violated the core purposes of the IMF as per its Articles of Agreement (AoA) and, therefore, constitutes an ultra vires act. To explain why,

[1] International Monetary Fund, 'Argentina: Request for Stand-By Arrangement—Press Release and Staff Report', Country Report No 18/219 (July 2018) <https://bit.ly/3dA04Tu> accessed 3 December 2021.
[2] International Monetary Fund, 'IMF Executive Board Approves US$50 Billion Stand-By Arrangement for Argentina', Press Release No 18/245 (20 June 2018) <https://bit.ly/3dA04Tu> accessed 3 December 2021.
[3] See, eg, Chris Marsh, 'Recalibrating Argentina's Ponzi Program' (General Theorist, August 2019) <https://thegeneraltheorist.com/2019/08/13/recalibrating-argentinas-ponzi-program/> accessed 1 January 2022.

we proceed as follows. Section 1 provides the legal foundations of our analysis. First, it explains the ultra vires doctrine in international law and outlines key considerations drawn from case law of the International Court of Justice (ICJ) for the recognition of ultra vires acts. Second, it draws on core provisions of the AoA to discuss relevant purposes of the IMF, as well as a set of authorisations and limitations to its powers established in the treaty to achieve such purposes. Section 2 draws on macroeconomics to discuss how those substantive rules were violated in the SBA in a way that is too manifest to be open to reasonable doubt, thereby raising suspicion that the SBA's approval was ultra vires. Section 3 considers the impact of the IMF's recently published Ex-Post Evaluation (EPE) of Exceptional Access Under the SBA on our legal analysis. Section 4 draws on the premise that the SBA's approval constituted an ultra vires act to discuss the potential legal implications of its invalidity. Section 5 concludes this piece by summarising its key findings and reflecting upon the need for clarification on the legal validity of the SBA, as well as further scholarly research on ultra vires lending by the IMF.

1. Legal foundations of the analysis

1.1. Ultra vires acts of international organizations in international law

The ultra vires doctrine in international law originates from domestic constitutional, administrative, and corporate law. It is based on the premise that, in contrast to States, international organizations are of limited legal capacity. Essentially, their functions and powers are confined to those conferred to them by their member States in their core constituent instruments.[4] When international organizations act beyond their legal capacity, they are deemed to act ultra vires. It follows that any acts that overstep the powers of international organizations—as determined in their founding treaties—are invalid and void.[5]

Despite this general definition, there is no coherent legal doctrine of ultra vires acts in international law. To a great extent, this is due to the multiple elements associated with the definition of ultra vires, which may either relate to acts that are beyond the competence assigned to an international organization or to a set of limits on their actions, regardless of their nature, which might entail the invalidity of their acts.[6] Due to this distinction, an ultra

[4] K Schmalenbach, 'International Organizations or Institutions, General Aspects' (October 2020) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn) paras 51-52.
[5] Art 69 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (UN Doc A/CONF129/15).
[6] E Cannizzaro and P Palchetti, 'Ultra Vires Acts of International Organizations', in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 366.

vires act may be understood as an act taken outside or beyond the constitutionally ascribed functions or powers of the organization in question.[7]

In deciding on the legal validity of the acts of international organizations, international courts and tribunals have generally adopted a restrictive interpretation of what constitutes an ultra vires act that may lead to the recognition of its invalidity. Two considerations drawn from case law of the ICJ seem relevant in this regard.[8] The first is the presumption established in the advisory opinion on *Certain Expenses of the United Nations* that an act appropriate for the fulfilment of an attributed function of an international organization is not ultra vires, and therefore is valid.[9] As Judge Fitzmaurice put it in regard to the validity of the UN General Assembly's expenditure on that occasion, the presumption of validity applies unless the invalidity of the act is 'apparent on the face of the matter, or too manifest to be open to reasonable doubt'.[10] The presumption, however, is rebuttable on the facts 'by whatever means it may be practicable to have recourse to'.[11]

The second consideration drawn from the ICJ's case law is that not every act that does not conform with the organization's constitutive instrument or other governing rules should be deemed to be ultra vires. As established in the 1996 advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, a distinction should be made between any acts that are ultra vires the organization itself and therefore are affected by a 'fundamental defect' and those that, while falling within the competence of the organization, were not dully adopted from a procedural or formal point of view.[12] Therefore, ultra vires acts are conceived as those that violate substantive rules and principles enshrined in the constituent treaty and should normally be invalid, while the violation of procedural rules would not, in principle, constitute a ground for the invalidity of the act.[13]

While the constitution of most international organizations does not expressly create an adjudicative procedure for challenging the validity of their decisions, it is understood that

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[7] K Schmalenbach, 'International Organizations or Institutions, General Aspects' (October 2020) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn) para 52.

[8] E Cannizzaro and P Palchetti, 'Ultra Vires Acts of International Organizations', in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 376.

[9] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion of 20 July 1962) ICJ Reports 1962 151, 168.

[10] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion of 20 July 1962) ICJ Reports 1962 151, Separate Opinion of Judge Sir Gerald Fitzmaurice 198, 205.

[11] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion of 20 July 1962) ICJ Reports 1962 151, Separate Opinion of Judge Sir Gerald Fitzmaurice 198, 204.

[12] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion of 8 July 1996) ICJ Reports 1996 66, 82, para 29.

[13] E Cannizzaro and P Palchetti, 'Ultra Vires Acts of International Organizations', in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 377.

States have the right to do so.[14] In their capacity as members of an international organization, States have the inherent right to supervise the implementation of its constituent treaty, as well as to ensure that the organization does not adopt decisions that violate its purposes or jeopardise the interests of its member States in excess of the commitments they assumed as the basis for their membership.[15] In fact, it is not uncommon for member States to claim the invalidity of acts *ipso iure* if taken outside the attributed functions and powers of international organizations.[16]

1.2. Relevant purposes and constitutional powers of the Fund as per the AoA

Created at the United Nations Monetary and Financial Conference in Bretton Woods in 1944, the IMF is the world's international monetary institution par excellence.[17] The purposes of the Fund are established in Article I of the AoA, the constituent treaty of the organization. Such purposes include promoting international monetary cooperation; facilitating the expansion and balanced growth of international trade; promoting exchange rate stability to avoid competitive exchange depreciation; and ensuring current account convertibility, as per paragraphs (i) to (iv) of this Article.

Of crucial interest in our analysis, however, are paragraphs (v) and (vi) of Article I, which assign the following purposes to the Fund:

> (v) To give confidence to members by making the general resources of the Fund **temporarily available** to them under **adequate safeguards**, thus providing them with opportunity to correct **maladjustments in their balance of payments** without resorting to measures destructive of national or international prosperity.
>
> (vi) In accordance with the above, to **shorten the duration and lessen the degree of disequilibrium** in the international balances of payments of members [our emphasis].

[14] As Judge Bustamante noted in his dissenting opinion in the *Certain Expenses of the United Nations* case, 'when, in the opinion of one of the Member States, a mistake of interpretation has been made or there has even been an infringement of the Charter, there is a right to challenge the resolution in which the error has been noted for the purpose of determining whether or not it departed from the Charter' (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion of 20 July 1962) ICJ Reports 1962 151, Dissenting Opinion of Judge Bustamante 288, 304.

[15] E Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations' (1983) 77 American Journal of International Law 239, 240.

[16] K Schmalenbach, 'International Organizations or Institutions, General Aspects' (October 2020) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn) para 53.

[17] J Gold, *Legal and Institutional Aspects of the International Monetary System: Selected Essays*, vol II (IMF 1984) 17-39.

The competence assigned to the IMF in its constituent treaty is, therefore, both functional—providing balance of payments support to its members—and substantive—the support must be provided under certain conditions. These cumulative conditions are, as explicitly set out in the paragraphs above, that **(a)** the general resources of the Fund should only be made available to its members on a temporary basis; **(b)** the support must be provided under adequate safeguards; and **(c)** the support must shorten the duration and lessen the degree of disequilibrium in the balance of payments of the beneficiary.

By providing support on a temporary basis and under adequate safeguards, the AoA expects that members will have the opportunity to correct their balance of payments imbalances without resorting to measures destructive of national or international prosperity. Such measures, in particular competitive currency devaluations, were experienced during the inter-war gold exchange standard and were widely understood to represent beggar-thy-neighbour policies.[18] Balance of payments support, therefore, is intended to fulfil the purpose of promoting exchange rate stability set forth in paragraph (iii) of Article I, thereby preventing contractionary adjustments at domestic and international levels.

A proper construction of the scope of the Fund's competence to provide balance of payments support to its members should consider the interconnectedness between the substantive cumulative conditions set out in paragraphs (v) and (vi) of Article I. If the balance of payments imbalance is not temporary or adequate safeguards are not adopted, the provision of general resources to a member would only enlarge the duration and augment the degree of disequilibrium.[19] In a scenario of deepened disequilibrium, the conditionalities required to ensure the recovery of the Fund's general resources are likely to consist in measures destructive of national or international prosperity.

Article I establishes that all the policies and decisions of the Fund—including, of course, the approval of programmes for the use of its general resources—shall be guided by the purposes set forth in such Article. It is in light of those substantive requirements, therefore, that all the remaining provisions of the AoA should be properly construed. Take, for instance, Article VI of the AoA, which entitles the Fund to request that a member implements capital controls in order to prevent the use of its general resources to meet a large or sustained outflow of capital in excess of a member's reserve tranche. In essence, the rationale for this express authorisation is to fulfil the Fund's constitutional purpose of shortening the duration and lessening the degree of disequilibrium in its members' balance

[18] D Moggridge (ed), *The Collected Writings of John Maynard Keynes*, vol 25 (Royal Economic Society and CUP 1980) 404.

[19] It is for this reason that, when the balance of payments problem does not fall within the category of temporary, the IMF is precluded from providing financial support to the State concerned unless specific steps—normally a debt restructuring—are adopted that credibly address the debt sustainability problem. Thus, the IMF does not have a legal mandate to make its general resources available to a member in situations where debt is assessed to be unsustainable.

of payments. If, after receiving such a request, a member fails to exercise appropriate controls, the IMF may declare the member ineligible to use the general resources of the Fund.

In consonance with the Fund's purposes, Article V(3) of the AoA sets out certain conditions governing use of the Fund's general resources. Crucially, paragraph (a) reads:

> The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems **in a manner consistent with the provisions of this Agreement** and that will establish **adequate safeguards** for the **temporary use** of the general resources of the Fund [our emphasis].

In addition, paragraph (c) mandates the Fund to examine any requests for the use of its general resources to determine whether the proposed arrangement would be consistent with the provisions of the AoA, with the caveat that requests for the use of the reserve tranche of members shall not be subject to challenge. As established in the IMF Executive Board Decision No 287-3 (17 March 1948), the phrase 'consistent with the provisions of this Agreement' means consistent both with the provisions of the AoA other than Article I and with the purposes of the Fund contained in Article I.[20] Therefore, in examining any requests for the use of its general resources, the Fund must ensure that the substantive conditions that enable its functional competence to provide balance of payments support to its members—set forth in Article I, paragraphs (v) and (vi)—are met.

In relation to paragraphs (a), (b) and (c) of Article V(3), the IMF's Executive Board has interpreted the AoA to mean that 'authority to use the resources of the Fund is limited to use in accordance with its purposes to give temporary assistance in financing balance of payments deficits on current account for monetary stabilization operations'.[21] Later on, it was clarified that this interpretation does not preclude the use of the Fund's resources for capital transfers 'in accordance with the provisions of the Articles'.[22] In other words, this means that the Fund's general resources should only be used to finance capital transfers when **(a)** they are directed towards temporary balance of payments assistance, under adequate safeguards, and the support is designed to shorten the duration and lessen the degree of disequilibrium, as per Article I(v) and (vi); and **(b)** the resources are not used to

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[20] International Monetary Fund, 'Executive Board Decision No 287-3 (17 March 1948)', in *Selected Decisions and Selected Documents of the International Monetary Fund* (41st issue, IMF 2020) 293.

[21] International Monetary Fund, 'Executive Board Decision No 71-2 (26 September 1946)', in *Selected Decisions and Selected Documents of the International Monetary Fund* (41st issue, IMF 2020) 293.

[22] International Monetary Fund, 'Executive Board Decision No 1238-(61/43) (28 July 1961)', in *Selected Decisions and Selected Documents of the International Monetary Fund* (41st issue, IMF 2020) 293.

meet a large or sustained outflow of capital, as per Article VI(1)(a), in which case the support would only worsen the duration and degree of the disequilibrium.

To conclude this part of the analysis, it is important to stress that the substantive conditions discussed in this Section for the exercise of the IMF's functional power to provide balance of payments support to a member are not optional but rather hard law obligations. The Fund is obliged by treaty to adopt adequate policies and decision-making processes to ensure the fulfilment of those conditions in each programme. Thus, the temporary character of liquidity support, the need to ensure adequate safeguards for this support, and the need to ensure that it will shorten the duration and lessen the degree of disequilibrium in the beneficiary's balance of payments are requirements that cannot be waived in the design of any given programme, including on grounds of ownership of the borrowing country. Rather, the concept of country ownership in IMF programmes can only be properly construed in light of those substantive requirements.

In a nutshell, ownership relates to the way in which IMF conditionality is designed and implemented. The IMF imposes a range of conditions in the approval of its programmes, which ultimately serve to ensure that the borrowing country will be able to repurchase the arrangement.[23] Some of these conditions might be prerequisites for an initial disbursement, while others will be requirements for subsequent SBA drawings. In a traditional and more restrictive sense, the concept of ownership expresses the conviction by the government and other relevant constituencies in the borrowing country that the conditions attached to the programme are appropriate, thereby enhancing compliance and engagement in the implementation of such policies.[24] For the IMF, programme ownership raises the probability of success and thus increases the 'value' of the safeguards on its resources provided by conditionality.[25] In a broader sense, the idea of ownership recognises that there is not a single policy pathway to achieve macroeconomic goals, and therefore it refers to the possibility of allowing the borrowing country to make specific choices among different policy alternative options towards achieving the objectives required by the Fund under the

[23] International Monetary Fund, 'IMF Conditionality' (last updated 22 February 2021) <https://bit.ly/32DAJ8E> accessed 23 December 2021.

[24] As defined by IMF staff:

> 'Ownership is a willing assumption of responsibility for an agreed programme of policies, by officials in a borrowing country who have the responsibility to formulate and carry out those policies, based on an understanding that the programme is achievable and is in the country's own interest.'

International Monetary Fund, 'Strengthening Country Ownership of Fund-Supported Programs' (5 December 2001) 6.

[25] MS Khan and S Sharma, 'IMF Conditionality and Country Ownership of Programs', IMF Working Paper No 01-142 (September 2001) 4; International Monetary Fund, 'Strengthening Country Ownership of Fund-Supported Programs' (5 December 2001) 12-17.

programme, as opposed to just accepting a single option prepared by the IMF.[26] Yet regardless of the scope of the concept of ownership one adopts, the IMF is prevented by treaty from agreeing on policies that would breach any of the substantive requirements set out in Article I AoA.

2. Macroeconomic foundations of the analysis

Based on the previous considerations, this Section analyses the macroeconomic foundations of the initial SBA to evaluate compatibility with the Fund's legal mandate. Crucially, we seek to determine whether the substantive requirements for the exercise of the IMF's functional competence to provide balance of payments support to the Republic of Argentina, outlined in Section 1.2, were properly met. We argue that they were not and, as a result, the SBA's approval constituted an ultra vires act of the Fund.

To explain why this is so, **our legal argument is built upon two core submissions**. **The first one is that the Fund failed to ensure adequate safeguards for the provision of its general resources.** To demonstrate this, we adopt the following steps. Section 2.1 discusses the financial programme at initiation, built on lack of external adjustment, unrealistic assumptions, as well as an accounting 'black hole' of at least USD 20bn. Together, these made quantitative programme targets impossible to meet, offering no safeguards in the discharge of public funds. Section 2.2 discusses how the debt sustainability analysis was therefore certain to fail, while Section 2.3 analyses how the exceptional access criteria were not reasonably evaluated.

The second submission is that it was reasonably foreseeable that the design of the programme would result in an extension of the duration and magnification of the degree of disequilibrium in Argentina's international balance of payments for want of appropriate capital flow management (CFM) requirements, which the Fund was legally mandated to request. In support of this submission, Section 2.4 considers whether, at the time of the SBA's approval, the Fund has reasonably evaluated and acted upon the risk that its general resources would be used to finance large or sustained capital outflows, as was effectively the case.

As a result, we maintain that the ultra vires character of the SBA is too manifest to be open to reasonable doubt, and therefore, the presumption of validity discussed in Section 1.1 should be lifted.

[26] MS Khan and S Sharma, 'IMF Conditionality and Country Ownership of Programs', IMF Working Paper No 01-142 (September 2001) 18.

Three annexes support our analysis in this Section. Annex 1 presents a brief history of the IMF financial programming approach. Annex 2 explores the accounting constraints in this case, explaining in detail how to derive the accounting 'black hole' at the heart of the programme. Annex 3 presents, in summary form, the key tables contained in the document initiating the programme.

2.1. Programme design

The first element of our submission on the inexistence of adequate safeguards for the provision of balance of payments support relates to the SBA's programme design. The IMF's financial programming approach, developed from the 1950s, served as a core element in the development of safeguards in Fund lending. Through an iterative process to ensure internal consistency between different sector accounts, Fund staff developed a technique to project macro-financial stocks and flows to inform sustainable policy choices and quantitative targets (see Annex 1).

As such, the financial programme that informed the Argentina SBA requires careful study. Absent a consistent set of macro-financial accounts, made internally consistent through an iterative process, the Fund would be failing to deliver on adequate safeguards.

To this end, at least three red flags signal the failure to adopt such safeguards: first, lack of external adjustment; second, manifestly unreasonable assumptions about private financial inflows; and third, a substantial accounting 'black hole' in the construction of the programme.

2.1.1. Lack of external adjustment

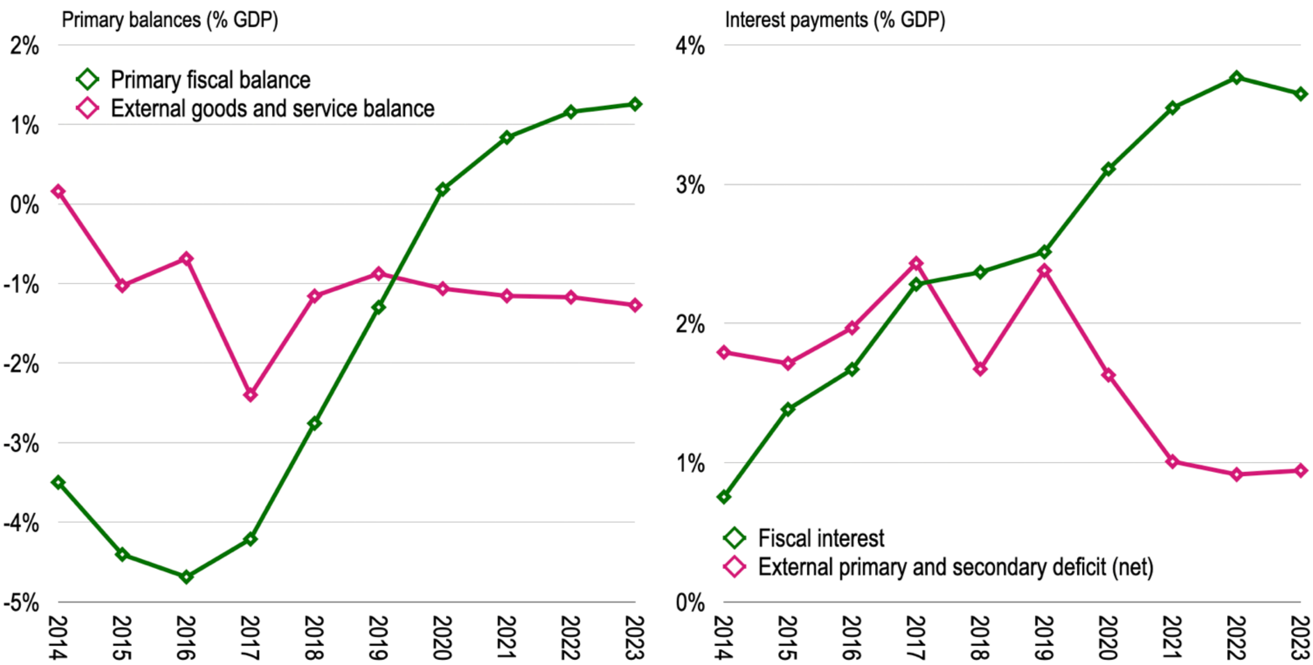
The IMF's core focus since inception is the adjustment of external accounts to ensure balance of payments sustainability. This meant traditional IMF financial programming hinged on *external* adjustment. But since at least the millennium Fund interventions have largely focussed on fiscal adjustment without consideration of the external counterpart. This change of focus is under the illusion that if the programme delivers on the 'sustainability' of fiscal accounts—and primary fiscal balance adjustment in particular—external adjustment can be treated with benign neglect. Yet, in the presence of a large share of debt held by non-residents, primary fiscal adjustment alone cannot generate the foreign exchange to service the external component of debt. This is an expression of the transfer problem that arose in the context of the German reparations debate in the 1920s—the making of reparation payments was not simply a matter of taxing residents, but also required a trade balance surplus to generate the hard currency to make payments abroad.

In short, fiscal-only sustainability is wrong-headed. Absent accompanying external adjustment to service externally held debt, fiscal adjustment alone will fail to deliver sustainability. And absent such external adjustment, capital flight is a rational response by private investors whose claims cannot be serviced with hard currency.[27]

What then was assumed of external adjustment in contrast to the programmed fiscal adjustment? Figure 1 shows: (i) the primary fiscal and external goods and service balance projections (left panel); and (ii) fiscal interest payments and the external net primary and secondary income payments (centre), projected in June 2018, all reported relative to GDP. Some observations:

- **First, primary balances**. The programme assumed substantial primary fiscal adjustment (of roughly 5 percent of GDP) but limited external primary balance—i.e., goods and service balance—adjustment. As noted, while primary fiscal adjustment is often assumed necessary and *sufficient* for fiscal sustainability, only the external primary balance can generate the foreign exchange to *service* the external component of debt. Absent accompanying external adjustment, existing and prospective non-resident debt could not be assumed sustainable.

Figure 1: Argentina: Key program assumptions (June 2018)



Source: IMF Country Report No 18/219.

- **Second, interest assumptions**. At the same time, while the general government interest bill was expected to increase from 2.4 percent of GDP to 3.6 percent between 2018 and 2023, net external primary interest and secondary transfer debits

[27] On which see Section 2.4.

were expected to decline from about 2 percent of GDP to below 1 percent over this period. Since secondary transfers are immaterial, this is entirely a judgment on net external primary income payments, mainly interest flows. And the external primary balance improvement was expected despite the share of government debt held externally increasing from 41 percent to 49 percent of total over the period (Table 9, p. 40) and increase in overall fiscal interest payments. In other words, the programme inexplicitly assumed away the growing interest burden on fiscal debt as expressed in the external accounts.

The contrary movement of the fiscal and external balances—both primary and interest—is clearly a red flag on the lack of internal consistency of the sector accounts. The residual—the difference between the external and fiscal balances—is the implied private sector saving-investment balance. In effect, the private sector was expected to enjoy a consumption and/or investment boom in 2019 and 2020 during a period of fiscal austerity and tight money, an impulse that would sustain domestic absorption and GDP growth.

This lack of external adjustment implied that the Republic of Argentina's sovereign debt could not be considered sustainable despite the programmed fiscal adjustment. Moreover, it would be irrational for private investors to increase exposure to Argentina given the lack-of-adjustment of external accounts since, despite expected primary fiscal adjustment, external debt could only be serviced by continued capital inflows. Put another way, there was no 'sustainability' assumed in the external accounts.

A basic element of programme design in the 1950s and 1960s, in the early years of the Fund, was the adjustment of the external accounts to support the balance of payments. However, the exclusive focus on fiscal sustainability in recent years—in fact, since the Argentina debacle in the early-2000s—has resulted in a neglect of external adjustment in programme design. This neglect also implies the misplaced belief—if not pure hope—that the private sector will respond to austerity with an acceleration in spending, which is both entirely irrational and contrary to historical experience.[28]

2.1.2. Unreasonable assumptions about private financial inflows

As noted above, lack of external adjustment implied it was irrational for private investors to increase exposure to the Republic of Argentina during the programme projection horizon. However, the programme instead assumed substantial private financial inflows. This was necessary to present the substantial increase in gross international reserves from 2018, giving the impression the programme would help improve the central bank balance sheet position and restore external viability to the Republic of Argentina. Indeed, such an increase

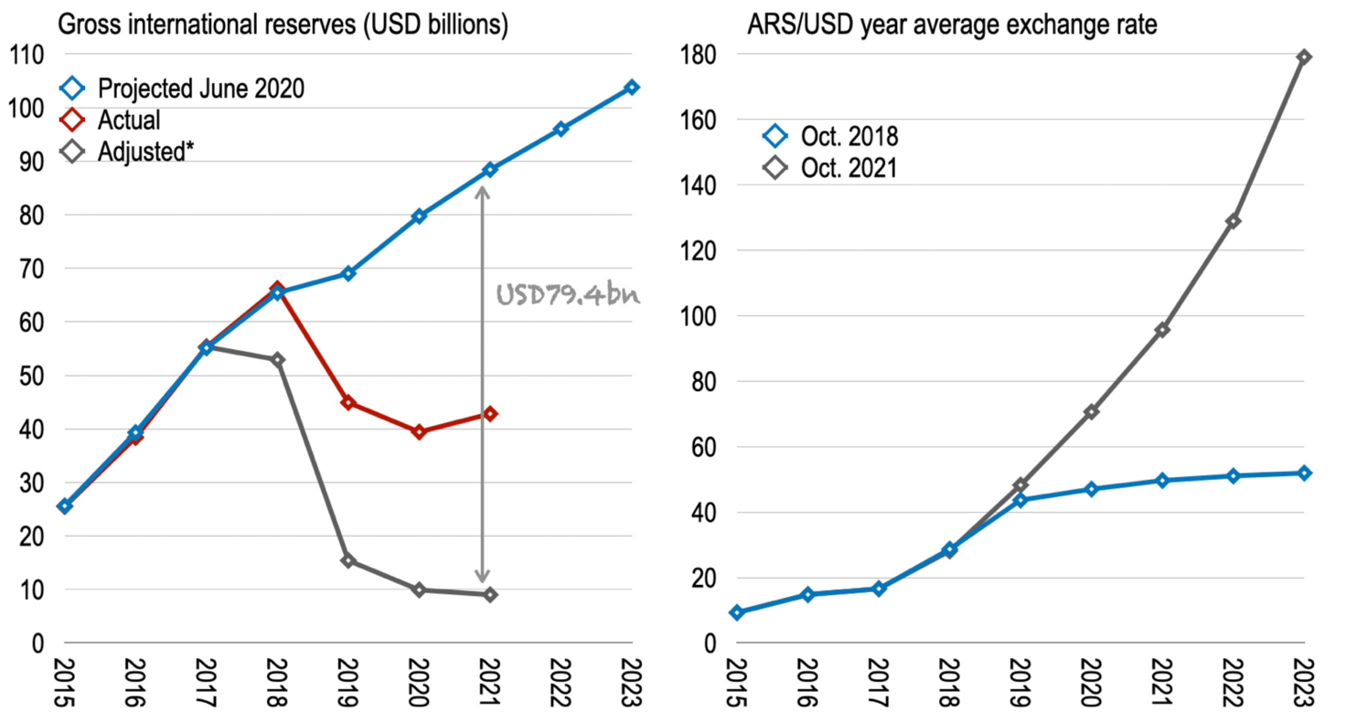
[28] The reader is invited to confirm that similar assumptions underpinned the Greece programme initiation in May 2010 with similarly disastrous results.

in reserve assets imply greater exchange rate stability as necessary to contain the highly dollarized public debt. Yet if the assumptions that underpinned such reserve asset accumulation were impossible to obtain, the programme document was offering false hope on the prospects for external sustainability.

Figure 2 shows the projected gross international reserves (GIR) of the central bank (left side) and vintages of nominal exchange rate projections from 2018 and more recently (right). Recall, at the time it was thought only USD 15bn in IMF purchases would be made in 2018 after which the remaining programme envelope would be treated as precautionary. GIR was projected to reach USD 88.4bn by end-2021 and USD 104bn by end-2023. The latest reading for gross reserves is USD 42.8bn, a shortfall of USD 45.6bn. However, this realized figure includes disbursements not anticipated at that time (USD 29.5bn of precautionary purchases) as well as the recent SDR allocation (USD 4.3bn.)

Taken together, after these adjustments, *there is roughly USD 80bn in foreign exchange anticipated at the time of the programme by end-2021 'missing'* over only 3½ years. And this despite a more substantial current account adjustment than was anticipated as well as capital controls having been subsequently introduced.

Figure 2: Argentina: Key program assumptions and outcomes



Source: IMF Country Report No 18/219, BCRA and IMF World Economic Outlook (various). * Adjusted for unplanned program purchases and SDR allocation.

Given limited current account adjustment, such an outcome was only possible due to inflows on financial account. But what were the assumptions exactly? Unfortunately, this is not an easy question to answer. The Staff Report contains three different versions of the balance of payments/external financing accounts and there are inconsistencies between each presentation.

These three tables are the BOP (Table 4, p. 36), the gross external financing needs (GEFN, Table 11, p. 42) and the text table External Financing Requirements and Sources (EFRS, p. 20) which should replicate, in summary form, the information in Tables 4 and 11. It is impossible to reconcile the three tables, however. For example:

- Non-resident rollover assumptions summarized in the text (p. 25) give a baseline for government debt rollover by non-residents at 90% and for LEBACs 75%.

- The EFRS table (text table p. 20), however, implies 100% rollover of maturing portfolio debt and LEBAC loans—notice how the available financing under bonds and loans (bottom half of the table) is identical to the amortization needs (top half).

- Further, this is inconsistent with GEFN table (p. 42) which shows that for 2018 (June to December) and 2019, the private debt rollover rate is 191% and 370%, respectively—after which the rollover rates moderate to 69% and 46% in 2020 and 2021, respectively.

- Meanwhile, the non-resident public debt rollover rate in GEFN is 98% for the remainder of 2018, and then above 150% over 2019 to 2021, bringing USD 25bn in net inflows. Against this, rollover rates on LEBACs are lowest, at 31%, 10% and 50% in 2018, June-December 2019 and 2020, respectively.

In other words, key assumptions on external financial flows are confused—riddled with internal inconsistencies between different presentations of the same information—and appear cooked to meet the favourable projections of gross international reserves.

Indeed, what these three tables have in common, if they cannot be reconciled, is reliance on remarkable private financial inflows beyond the rollover of existing debt. The text table EFRS offers the line item 'other inflows (including errors and omissions)', which we net of 'other outflows' to show USD 79.9bn of inflows—almost exactly equal to the 'missing' foreign exchange noted in Figure 2 above (although these flows are more than double 'other net inflows' in the GEFN table—USD 33.4 bn—through 2021).

But what exactly are these mysterious 'other flows'? It ought to be possible to understand which sector of the economy was drawing on such external resources, but we are left guessing. The BOP table provides a clue. It implies USD 71.8bn in total net portfolio investment inflows over 2019-21, and USD 117.8bn over 2019-23. So if it is not non-resident portfolio inflows, it must be resident repatriation of external portfolio claims that carry the burden of the remarkable increase in GIR expected of the central bank.

Yet the assumption of the spontaneous repatriation of external claims at programme initiation was exactly the opposite to what was happening on the ground at that time. Just as the programme was being negotiated in Washington, D.C.—to avoid the ignominy of having the Fund 'on the ground' in Buenos Aries—resident capital flight was ongoing and in acceleration. Indeed, reflecting on the scale of resident outflows after the fact, the BCRA noted how 'from May 2018 capital flight accelerated, escalating to USD 45.1bn' until end-2019.[29]

In sum, not only was the magnitude of private capital flows assumed in June 2018 questionable, but the direction of these flows was entirely neglected. A programme based on irrational private financial inflow assumptions to inflate gross international reserves cannot be considered as providing adequate safeguards in the discharge of public resources.

2.1.3. An accounting 'black hole'

The direction of private capital flows was understandable once the final red flag in programme design is understood. That is, as well as lack of external adjustment and unjustified assumed capital inflows, the programme was characterised by an accounting 'black hole' or inconsistency of about USD 20bn (see Annex 2 for detailed discussion). As noted, the financial programming approach involved an iterative process to achieve internal consistent projections of macro-financial variables. So, if there is an accounting black hole—a fundamental inconsistency within the programme—there could be no financial programme at all, and therefore no safeguards.

To understand this accounting error, we need to recall the role the BCRA played in the years prior to the crisis in financing government deficits. Indeed, BCRA issued substantial non-monetary liabilities (LEBACs) to absorb liquidity and offset possible inflationary consequences of recourse to money printing, creating a hidden quasi-fiscal liability. These legacy non-monetary liabilities carried a substantial interest burden, with the policy rate reaching 40 percent at the time of the programme.

[29] Banco Central de la República Argentina (BCRA), 'Mercado de cambios, deuda y formación de activos externos, 2015-2019' <http://www.bcra.gov.ar/Noticias/publicacion-de-informe-mercado-cambios-deuda-2015-2019-i.asp> accessed 28 December 2021.

Crucially, this monetary deficit was *on top of* the fiscal deficit. And while the programme insisted upon a strict prohibition on monetary financing to control base money growth and support the inflation target (para 22, p. 17), the BCRA was not provided with the interest-bearing assets up front needed to pay for the legacy interest cost on these outstanding non-monetary liabilities. Instead, structural conditionality only required that recapitalization of BCRA should happen by end-2019 'to ensure it has the adequate level of capital as percent of the monetary base plus the outstanding stock of LEBACs' (para 24, p. 17 and Table 15, p. 46). Until then, despite lack of resources, the programme did not model this monetary deficit. BCRA domestic liabilities were assumed to contract through end-2019 even though the central bank had no means to finance the growing interest burden on LEBACs.

How large was the monetary deficit? Well, LEBACs outstanding in May 2018 amounted to USD 48bn. Given the interest rate at the time, despite their programmed reduction through end-2019, it is reasonable to pencil in a deficit due to the interest on these quasi-fiscal liabilities of about EUR 23bn through end-2021—though potentially much higher, as turned out to be the case. This is on-top of the fiscal deficit of USD 82.1bn over the same period, taking the consolidated government deficit to well over USD 100bn over the ½ years through end-2021.[30]

Since this monetary deficit was not explicitly programmed, the SBA was agreed while understating the true deficit position of the consolidated government. And so, the domestic financing necessary to finance this deficit was not modelled. The consequences follow from standard international finance models. The monetization needed to cover this deficit would put pressure on the exchange rate and inflation pressure as resident demand for domestic financial assets was less than supply. The drain on gross reserves would also be understated. It is little wonder that those 'on the ground' saw accelerated capital flight as the logical response to the SBA.[31]

2.2. Debt sustainability analysis

Another evidence of the absence of adequate safeguards in the programme concerns the IMF's debt sustainability framework, which, as noted above, failed to integrate a holistic

[30] There are other concerns about the presentation of the monetary accounts under the programme which we might briefly touch upon. The definition of BCRA net foreign assets changed over the course of various reviews, until this was eventually pinned down consistent with the official published data. The technical memorandum of understanding defines a various "programme exchange rates" for valuing monetary targets, yet this was never used, and the monetary accounts were not based on constant exchange rates—but revalued with exchange rate movements. In addition, the plan to repay LEBACs involved the government issuing 'peso- denominated securities in the local market [and] repayment of government liabilities held by the central bank … to drain peso liquidity, thereby lessening the central bank's reliance on issuing its own (LEBAC) securities'. However, there was a disconnect between the planned issuance in the fiscal account and that built into the monetary accounts.

[31] On which see Section 2.4.

view of the sector accounts. This analytic shortfall has resulted in an unreasonable overestimation of debt sustainability—preventing timely restructuring as a precondition for programme approval.

In some sense the 2018 SBA brings us full circle from the IMF-Argentina imbroglio in the early-2000s. Back then, there were hidden fiscal deficits run by the provinces which Fund staff failed to grasp, making the overall fiscal position and public balance sheet misunderstood.[32] Absent adjustment, the overall fiscal position endorsed by the Fund was eventually found to be unsustainable, with default and the abandonment of the currency board the result.

An innovation that followed this, and related, Fund experience was the development of formal debt sustainability analysis (DSA) as well as the exceptional access criteria in SBAs. But the DSA framework subtly shifted emphasis in the provision of Fund resources under adequate safeguards away from the general equilibrium financial programming framework, discussed above, onto a simplistic 'partial equilibrium' assessment of public debt. Hence, sector consistency and a holistic view of financial flows was sacrificed in favour of narrow focus on fiscal adjustment.

The application of the DSA framework for the Republic of Argentina needs to be understood in this light. To be more specific, since Argentina's debt was (and remains) largely dollarized, the debt-to-GDP ratio is very sensitive to monetary sustainability and the path of the nominal exchange rate. Indeed, the public DSA acknowledged that '[n]early 70 percent of Argentina's debt stock is denominated-in or linked-to a foreign currency, mainly the US dollar. Of the peso-denominated debt, just under one-quarter is linked to inflation' (p. 52).

Moreover, the public DSA implicitly relied upon real exchange rate stabilization or *appreciation* to help bring down debt-to-GDP metrics. At the same time, however, monetary sustainability—that is, of the central bank balance sheet—required real exchange rate *depreciation* to revalue up international reserves in terms of local currency.

This neglect of monetary sustainability meant the exchange rate could not be stabilized as expected. In turn, the local currency value of dollarized public debt could not be contained—or, alternatively, the dollar value of GDP fell sharply as the exchange rate depreciated.

Ironically, just as in the early-2000s there were hidden deficits due to the provinces, more recently hidden quasi-fiscal deficits due to past monetization were overlooked. This failure

[32] See M Mussa, 'Argentina and the Fund: From Triumph to Tragedy', Peterson Institute of International Economics (August 2002).

to acknowledge the true consolidated government deficit became fatal; the true scale of needed fiscal consolidation obscured.[33] The DSA could not therefore offer a sensible baseline for debt sustainability, finding that 'debt is sustainable but not with a high probability under both the baseline and adverse scenarios' (p. 32) and, therefore, delaying debt restructuring.

2.3. Exceptional access

Another crucial factor in the analysis on adequate safeguards for the provision of IMF general resources relates to the extraordinary level of exceptional financing approved in the programme without reasonable regard as to whether the conditions for the approval of exceptional access were properly met.

The exceptional access criteria, as updated in 2016 after their ad hoc modification during the Greek Crisis, only authorises IMF lending as long as the member also receives financing from other sources during the programme on a scale and terms that improve debt sustainability and sufficiently to enhance the safeguards for Fund resources.[34] And where market access has been lost, debt sustainability is expected to be improved through 'reprofiling'—a more limited, marked-based form of restructuring involving the extension of maturities of private debt.[35]

Despite public debt not considered sustainable with high probability, to overcome the need for reprofiling, the Staff Report argued that (i) the long maturity of privately held foreign currency debt meant exposure was being maintained; and (ii) domestic and foreign market access was maintained.

These arguments are, however, open to reasonable doubt. First, as it relates to the first requirement set out in the 2016 exceptional access rules, the EAC requires the assessment of sustainability to be conducted initially on 'rigorous and systematic analysis'. But given the arguments above—notably the failure to incorporate central bank balance sheet sustainability—such an analysis could not be discerned from the Staff Report. Recall how the Exceptional Access Policy specifically requires that 'the analysis of such public debt sustainability will incorporate any potential contingent liabilities of the government'. Yet

[33] There were other issues with fiscal accounts and the DSA. The fiscal accounts (Table 6, p. 38) did not include intra-public sector payment of interest on debt meaning the interest bill in percent of GDP was understated. This was added back in the DSA to reveal that interest payments between 2019 and 2021 were about USD17bn higher than in the fiscal tables, contributing to the illusion of a stronger fiscal position.
[34] International Monetary Fund, 'Press Release: IMF Executive Board Approves Exceptional Access Lending Framework Reforms' (28 January 2016) 2 <https://bit.ly/3FEkLK9> accessed 28 December 2021.
[35] International Monetary Fund, 'The Fund's Lending Framework and Sovereign Debt—Preliminary Considerations' (June 2014) 1-3 <https://bit.ly/3z7ncT2> accessed 28 December 2021.

BCRA recapitalization was acknowledged in the programme for completion by end-2019, a contingent liability not incorporated into the DSA.

Second, as it relates to whether Argentina had lost or retained market access at the time of request for exceptional financing, the evaluation that market access had been retained is not reasonably justified. Crucially, the exceptional access review in 2016 noted four indicators against which access should be judged: spreads, credit ratings, non-resident holdings of debt, and changes in maturity and currency composition of sovereign debt. Instead of reviewing Argentina's performance against these metrics to judge market access, the evaluation simply asserts such access was available based on recent auction results—despite the metrics under consideration flashing red.

If staff had explored the metrics for sustainability relative to previous cases where market access had been lost (Box 2, p. 30), it would have been difficult to argue that market access would be maintained. For example, sovereign bond spreads at 491bps and credit rating of B (DSA p. 55) were close to median of past cases when market access was lost.

Instead of exploration of market access against metrics recommended during the review of exceptional access policy, the Staff Report draws comfort from the success of recent debt auctions. What were these auctions? They are referred to in EAC3 (p. 32): 'Argentina continues to maintain access to both domestic and foreign financial markets, as evidenced by recent peso- and US$-denominated bond placements in domestic markets and the rollover of 100 percent of the central bank's paper that came due on May 16'. But the LEBACs falling due on May 16 were only rolled over due to exceptional, and unsustainable, actions by the BCRA. As they explained in their Monetary Policy Report of July 2018:[36]

> [T]he market started to feel uncertain as to the LEBAC auction on May 15, because of the possibility of non-renewal of … ARS 615.88 bn [roughly USD 25 bn], equal to approximately half the stock of such securities. The Central Bank's strategy to deal with such doubts was to reach the day of the auction with yields on shortest-term LEBACs around an annual rate of 40% … In addition, [BCRA] submitted to the market an offer of USD 5 bn at ARS 25 to contain the exchange rate increase, and relaxed the minimum cash requirement of May for financial entities, by making a quarterly calculation instead of monthly calculation and by eliminating the daily minimum compliance in pesos during such month in order to facilitate the renewal of LEBACs. During the auction, finally all maturities were renewed with cut-off rates at the levels of the secondary market. This result jointly with the monetary policy actions and the

[36] Banco Central de la República Argentina (BCRA), 'Monetary Policy Report – July 2018' 41 <https://www.bcra.gob.ar/Pdfs/PoliticaMonetaria/IPOM0718_i.pdf > accessed 28 December 2021.

announcements made in previous days eased the tension of the foreign exchange market, which was calm during the negotiations with IMF.

These LEBAC securities issued by the central bank were of 154- and 36-day maturities. And the rollover of LEBACs noted by the IMF as a signal of continued market access was only achieved by exceptional actions by BCRA, including raising the interest rate and selling foreign exchange into the market. Moreover, since the announcement of negotiations with the IMF was made on 8 May it was anticipated by investors. Indeed, the IMF even issued a press statement on 14 May, the day before the auction needed to rollover maturing LEBACs, to clarify that negotiations were ongoing.[37]

And so, when BCRA referred in their July 2018 Monetary Policy Report of 'announcements made in previous days' helping to ease tensions in the foreign exchange market around the time of the LEBAC rollover, the circularity of the reasoning becomes clear. The IMF could argue in favour of continued market access to justify exception access. But that market access itself hinged on participant expectations of forthcoming IMF financing—including due to a press release conveniently timed one day before the auction date.

It should be acknowledged that, as per the 2016 exceptional access rules, market access indicators 'can only inform but not substitute for staff's judgment' (p. 31). However, it does not seem reasonable to expect that decisions to grant exceptional access should be made without resort to sufficiently sound justification, which raises suspicion of negligence in the evaluation.

2.4. Capital flow management

The core of our second submission relates to the want of appropriate CFM requirements in the design of the SBA. As discussed in detail in Section 1.2, a core substantive requirement underpinning the IMF's functional power to provide financial support is that it must shorten the duration and lessen the degree of disequilibrium in the balance of payments of the borrowing country. While, as per Article VI(1)(a) of the AoA, the Fund is not necessarily obliged to request a member to exercise capital controls in each of its programmes, a proper construction of this article in conjunction with Article I(vi) indicates that it is legally

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[37] See International Monetary Fund Statement on Argentina, May 14, 2018. The statement in full runs as follows:

> Gerry Rice, the International Monetary Fund's spokesperson, made the following statement today: 'IMF staff are continuing discussions with the Argentine authorities toward a Fund-supported program. Our shared goal is to reach a rapid conclusion of these discussions. An IMF Board meeting on Argentina is scheduled for Friday, May 18. This will be an informal meeting, as part of our usual process of briefing the Board on negotiations for high access IMF programs.'

mandated to do so when its general resources may be used to meet a large or sustained outflow of capital. Otherwise, the provision of IMF financing would only enlarge the duration and augment the degree of disequilibrium, thereby directly violating a core substantive condition for the exercise of the Fund's functional to provide balance of payments support.

In the case of the SBA, the programme was approved without any CFM requirements. It was later recognised by the IMF that its resources were used to sustain large and sustained capital outflows.[38] In fact, as the BCRA reported *ex post facto*, the Fund's disbursements, together with the BCRA's international reserves, sustained USD 45.1 bn of capital flight by the private sector, USD 11.5 bn in speculative capital outflows, and USD 36.9 bn in debt servicing (public and private).[39]

The core question that arises in relation to the SBA, therefore, is whether the Fund has reasonably evaluated the risk those large and sustained outflows at the time of the programme's approval. In other words, it is necessary to establish whether the substantive condition for the exercise of its functional power to provide balance of payments support has been met.

Crucially, we argue that it has not. In fact, based on the information that was available at the time of programme initiation, it was reasonably foreseeable at the time of the programme's approval that the provision of financing without appropriate CFM requirements would result in an extension of the duration and magnification of the degree of disequilibrium in the international balance of payments of Argentina.

The justification for our argument is both historical and contextual. Argentina's dollarization of public debt and history of capital flight,[40] including in previous IMF programmes,[41] would argue for careful consideration of CFM requirements in the design of the programme. Yet, while the risk of large capital outflows is acknowledged in the staff evaluation at the time of programme approval,[42] no appropriate measures towards preventing such risks were adopted. Rather, as discussed in the previous sub-sections, the focus on fiscal policy without considering external adjustment; the extra-ordinary capital

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[38] International Monetary Fund, 'Ex-Post Evaluation of Exceptional Access Under the 2018 Standby Arrangement—Press Release and Staff Report', IMF Country Report No 21/279 (December 2021).

[39] Banco Central de la República Argentina (BCRA), 'Foreign Exchange Market, Debt and Build-Up of Foreign Assets 2015-2019' 19 <http://www.bcra.gov.ar/Noticias/publicacion-de-informe-mercado-cambios-deuda-2015-2019-i.asp> accessed 28 December 2021.

[40] See, eg, E Basualdo (ed), *Endeudar y fugar: un análisis de la historia económica argentina de Martínez de Hoz a Macri* (Siglo XXI 2020).

[41] Independent Evaluation Office, 'Evaluation Report: The IMF and Argentina, 1991-2001' (International Monetary Fund 2004).

[42] International Monetary Fund, 'Argentina: Request for Stand-By Arrangement—Press Release and Staff Report', Country Report No 18/219 (July 2018) 28 <https://bit.ly/3dA04Tu> accessed 3 December 2021.

inflow assumptions, contrary to developments on the ground at the time; the failure to acknowledge the true fiscal deficit by consolidating the government with the central bank, and subsequent failure to incorporate these contingent fiscal liabilities into the DSA, along with the unreasonable analytical flaws in applying the exceptional access policy, were all factors that contributed to the high levels of capital flight by private actors that effectively materialized.

In sum, the failure to adopt appropriate CFM requirements as a condition for programme approval, associated with lack of consideration of relevant factors that could potentially lead to large and sustained capital outflows and were reasonably foreseeable at the time, raise suspicion of ultra vires lending by the IMF in a way that is too manifest to be open to reasonable doubt.

3. The IMF's Ex-Post Evaluation of Exceptional Access Under the SBA

In the context of the above discussion, it is worth considering the recently published Ex-Post Evaluation (EPE) of Exceptional Access Under the SBA, prepared by a staff team of the IMF for the Executive Board's consideration on 22 December 2021.[43]

The report suggests in many of its passages[44] that an early debt operation and CFM measures were ruled out by the government of Argentina, thereby leading to the failure of the programme. The argument appears to hinge, however, on the matter of programme ownership. Indeed, the document includes the word 'ownership' over 50 times. Doing so, the IMF appears to be shifting the burden of its legal mandate on those matters, further discussed in Section 2, to a member State.

However, from a legal perspective, this argument does not stand up to scrutiny. Regardless of the member's policy preferences, it is the IMF's role to ensure that its general resources are provided in accordance with the requirements set out in Article I AoA. Crucially, it is the Fund's purpose to ensure appropriate safeguards for the provision of financing,[45] including by requiring an adequate level of debt restructuring as a condition for approving a programme, as well as requesting that the borrower country adopts CFM when it is reasonably foreseeable that those resources may be used to finance large and sustained

[43] International Monetary Fund, 'Ex-Post Evaluation of Exceptional Access Under the 2018 Standby Arrangement—Press Release and Staff Report', IMF Country Report No 21/279 (December 2021).
[44] See, for instance, ibid 1-4.
[45] Article I(v) AoA.

outflows of capital.[46] As discussed in Section 1.2, those hard law treaty obligations cannot be waived on country ownership grounds, as the EPE appears to suggest.[47]

4. Legal implications of the SBA's invalidity

Drawing on the premise that the SBA's approval constituted an ultra vires act of the IMF, we now consider some potential legal implications of its invalidity.

4.1. Legal status of the act: void ab initio or voidable?

The legal status of an ultra vires act or decision adopted by an international organization is a disputed matter in PIL. This discussion matters because it determines the moment from which an ultra vires act—and therefore the obligations that arise from it—should be considered void. As a general rule, when the international organization has a review body with the power to invalidate an impugned act, the decision as to whether the act is to be considered void ab initio (*ex tunc*) or from the day of its invalidation (*ex nunc*) is to be taken by the review body. In this decision, the substantive or procedural character of the act appears to be of crucial relevance.[48] However, one of the main complexities of the law and practice of the IMF is that the acts and decisions adopted by both the staff and the Executive Board are not subject to appeal or review by any other organ, either judicial or political, within or outside the organization.

This brings the discussion about the legal status of the SBA into the terrain of general PIL, where the state of the law and practice of international organizations on questions of nullity and invalidity is rather unsettled. The ICJ's legal doctrine on this matter is limited. For example, in its 1960 advisory opinion on the *Constitution of the Maritime Safety Committee of the Inter- Governmental Maritime Consultative Organization (IMCO)*, the ICJ found that the Committee was constituted ultra vires by the Organization but did not indicate whether the act was void ab initio or from the date of its invalidation.[49] Following the decision, the second Assembly of IMCO decided to dissolve the committee and constitute a new one in accordance with the constituent treaty of the Organization.[50] In addition, the Assembly

[46] Article VI AoA.
[47] See, for instance, International Monetary Fund, 'Ex-Post Evaluation of Exceptional Access Under the 2018 Standby Arrangement—Press Release and Staff Report', IMF Country Report No 21/279 (December 2021) 9-11, 58-59, 65.
[48] E Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations' (1983) 77 American Journal of International Law 239, 243.
[49] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion of 8 June 1960) ICJ Reports 1960 150, 171.
[50] Inter-Governmental Maritime Consultative Organization, 'Report on Request by the First Assembly for an Advisory Opinion of the International Court of Justice on the Constitution of the Maritime Safety Committee' (Resolution No A.II/Res.21, 11 April 1962).

confirmed the measures that had been taken by the improperly constituted committee since its inception,[51] which means that it did not consider them to be void ab initio.[52]

Opinion on the legal status of substantive ultra vires acts, which is arguably the case of the SBA, appears to be divided as to whether such acts are void ab initio or voidable.[53] Some authors consider that the ultra vires acts and decisions of international organizations should not be regarded as void ab initio if it is not possible to appeal them to a review body.[54] Others argue that, regardless of the existence of a review body, the final acts and decisions of international organizations that are manifestly ultra vires—as we maintain is the case of the SBA—should be regarded as void ab initio.[55]

The former opinion appears to be more grounded on the jurisprudence of the ICJ and the law and practice of international organizations, considering cases such as *IMCO* and the subsequent decisions of the Assembly in that occasion. Even though this issue is subject to contention, we believe that the SBA is likely to be a voidable act which would only cease to produce binding legal obligations from the date of recognition of its invalidity.

4.2. Inter-party effects of the invalidity: responsibility for an international wrongful act or unjust enrichment?

Based on the premise above, the question that arises is what would be the inter-party effects of the SBA's invalidity from the date of its recognition. To consider this question, it is worth noting that the legal nature of an SBA is that of an agreement to purchase hard currency using the member's own currency, with an obligation to repurchase its currency at a later date and to pay a fee for the use of the Fund's financial resources.[56] Therefore, for the purposes of our analysis, the SBA is analogous in character to a contract between the IMF and its members—in this case, the Republic of Argentina. The SBA's invalidity leaves the parties in a situation where there is a shift of control over assets—that is, SDR 30.6bn (roughly USD 42bn) purchased by Argentina and still outstanding—where, due to the invalidity of the act, this situation is not covered by an underlying valid agreement.

The effect of the invalidity for the parties will depend on whether an internationally wrongful act is found in the approval of the SBA, in which case a duty to compensate for

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[51] ibid.
[52] E Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations' (1983) 77 American Journal of International Law 239, 244.
[53] E Cannizzaro and P Palchetti, 'Ultra Vires Acts of International Organizations', in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 378.
[54] E Osieke, 'Ultra Vires acts in International Organizations – The Experience of the International Labour Organization' (1976) 48(1) British Yearbook of International Law 259-280.
[55] D Pollard, 'Conflict Resolution in Producers' Associations' (1982) 31(1) International and Comparative Law Quarterly 99, 120.
[56] RSJ Martha, *The Financial Obligation in International Law* (OUP 2015) 54.

damages incurred to the Republic of Argentina would arise. In such case, the degree of fault involved in the act would determine the extent of the Fund's responsibility. As per the International Law Commission (ILC)'s 2011 Draft Articles on the Responsibility of International Organizations ('DARIO'),[57] it must be established that the Fund has breached an international obligation for international responsibility for a wrongful act to arise (Article 4). Such breach is to be found if the act 'is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned' (Article 10(1) DARIO). This formulation means that the primary obligation can be found in any source of international law, including the IMF's AoA, customary international law or a general principle of international law such as due diligence,[58] a breach of which could potentially be found in the SBA's case. This includes 'the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization' (Article 10(2) DARIO).

However, even if the elements of responsibility are found to be met, there may be circumstances that preclude the wrongfulness of the respective conduct, which are set out in Articles 20 to 27 DARIO. Notably, Article 20 establishes that the valid consent of a State or international organization to the commission of a given act by another international organization 'precludes the wrongfulness of that act in relation to the extent that the act remains within the limits of that consent'. This seems to be the case of the SBA, where the valid consent of the Republic of Argentina, expressed in the Memorandum of Understanding (MoU) of the SBA and subsequent performance of the agreement, appears to preclude further considerations on the international wrongfulness of the act in question.

Considering the exclusion of responsibility for a wrongful act and the inexistence of an underlying valid agreement, a single area of law would be left to cover the inter-party effects of the SBA's invalidity—unjust enrichment.[59] The law of unjust enrichment applies by exclusion where a shift of control over assets is not covered by other areas of the law. There must have been 'an enrichment of one party to the detriment of the other… as a consequence of the same act or event'.[60] There must be 'no justification for the enrichment, and no contractual or other remedy available' between the counterparties to claim any compensation for the shift of control over the assets concerned.[61] The prohibition of unjust

[57] ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' (2011) (UN Doc A/66/10).
[58] T Koivurova, 'Due Diligence' (February 2010) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn).
[59] See C Binder and C Schreuer, 'Unjust Enrichment' (June 2017) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn).
[60] *Sea-Land Service Incorporated v Iran and Ports and Shipping Organization of Iran* (Final Award), Award No 135-33-1 (22 June 1984), 6 Iran-United States Claims Tribunal Rep 149, 1984 WL 301304.
[61] ibid. See also B Juratowitch and J Shaerf, 'Unjust Enrichment as a Primary Rule of International Law' in M Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill 2019) 228.

enrichment is recognised as a general principle of law in the sense of Article 38 1(c) Statute of the ICJ,[62] particularly in international arbitral awards.[63] Thus, the Iran-United States Claims Tribunal has found that unjust enrichment 'finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party has been enriched, but which does not arise out of any internationally unlawful act which would found a claim for damages'.[64] Exceptionally, the source of unjust enrichment in international law has also been found in equity.[65]

A second important characteristic of unjust enrichment is how the remedy to be awarded is calculated. The underlying principle of this area of law is that economic equilibrium is to be reached not by compensating the losses of the deprived party, such as with damages for wrongful acts, but rather by depriving the enriched party of its unjustly gained benefits, which are then awarded to the counterparty.[66] Thus, in cases where State contracts with private parties have turned out to be unenforceable or invalid where international responsibility of the State was not involved, it has been held repeatedly that restitution should be made to the extent of the actual enrichment.[67]

Applying those principles to case at hand, two key inter-party effects of the SBA's invalidity become apparent. First, the parties are entitled to recover the sums advanced as part of the void hard currency purchase agreement in restitution—that is, the IMF is entitled to recover the USD and the Republic of Argentina, the ARS advanced as part of the SBA. Second, the parties are entitled to recover whatever accretion of wealth the counterparty has benefited from as a result of the invalid agreement. Thus, the benefit obtained by the IMF through the

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[62] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 18 April 1946) 33 UNTS 993.

[63] See, eg, *Sea-Land Service Incorporated v Iran and Ports and Shipping Organization of Iran* (Final Award), Award No 135-33-1 (22 June 1984), 6 Iran-United States Claims Tribunal Rep 149, 1984 WL 301304, 168. See also *Libyan American Oil Company v Government of the Libyan Arab Republic* [12 April 1977] 62 ILR 141, 175-76); *Saluka Investments BV [The Netherlands] v Czech Republic* [Partial Award of 17 March 2006] para 449; *Inceysa Vallisoletana SL v Republic of El Salvador* [Award of 2 August 2006] ICSID Case No ARB/03/26, paras 253-254 (cited in C Binder and C Schreuer, 'Unjust Enrichment' (June 2017) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn) para 10).

[64] *Sea-Land Service Incorporated v Iran and Ports and Shipping Organization of Iran* (Final Award), Award No 135-33-1 (22 June 1984), 6 Iran-United States Claims Tribunal Rep 149, 1984 WL 301304, 169.

[65] C Binder and C Schreuer, 'Unjust Enrichment' (June 2017) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn) para 12; DP O'Connell, *International Law, vol II* (Stevens and Sons 1965) 780; DP O'Connell, *State Succession in Municipal and International Law, voll II* (CUP 2009) 266; DP O'Connell, 'Economic Concessions in the Law of State Succession' (1950) 27(93) British Yearbook of International Law 93, 121.

[66] C Binder and C Schreuer, 'Unjust Enrichment' (June 2017) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn) para 3.

[67] *William A Parker [US] v United Mexican States* [1926] 4 RIAA 35; *Landreau Claim* [1922] 1 RIAA 352, 364; *Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) v Burkina Faso* [Award of 19 January 2000] (ICSID Case No ARB/97/1.

charge of a lending rate, surcharges, commitment fee, and service charge in the transaction is unjustified and, therefore, should be restituted to the Republic of Argentina.

In this case, however, the immediate repurchase of ARS with hard currency by Argentina is impossible and would in fact create more hardship. As a result, it is argued that the parties should negotiate in equity an extended time horizon for the settlement of the outstanding purchase of roughly USD 42bn. It is worth stressing that this financial obligation is to be governed by the international law of unjust enrichment as opposed to the law of the IMF, which means that during this period, there will be no underlying programme between the Republic of Argentina and the IMF.

While there appears to be no jurisprudence in international law on liability for damages of staff members of international organizations, relevant principles of English private law in analogous cases would suggest that the restitution owed by the IMF to the Republic of Argentina is without prejudice of the liability for damages of staff members and officials who may be found to have provided negligent advice to the Executive Board regarding the Fund's capacity to enter into the agreement.[68]

4.3. Next step: who has the power to determine the invalidity of the SBA?

A crucial point that arises in connection with the doctrinal discussions made in this Section is who has the power to determine the invalidity of the SBA. In cases of dispute, as the *prima facie* presumption pointed out in Section 1.1 indicates, the burden of proof on the ultra vires character of the act is on the disagreeing member State, unless the invalidity of the act is 'apparent on the face of the matter, or too manifest to be open to reasonable doubt'.[69] We believe that the latter applies in the case of the SBA, as discussed in Section 2.1. Yet even if it does not, the presumption of validity is rebuttable on the facts 'by whatever means it may be practicable to have recourse to'.[70] Therefore, legal and macroeconomic analyses such as this one are valid means towards rebutting the presumption of validity of the act.

In face of the absence of a review body, either judicial or political, within the Fund's institutional framework, the most appropriate forum to decide on the validity of the act is the ICJ. The ICJ hears two types of cases: legal disputes between States submitted to it by them (contentious cases) and requests for advisory opinions on legal questions referred to it by UN organs and specialised agencies (advisory opinions).[71] Only States may be parties

[68] *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579.

[69] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion of 20 July 1962) ICJ Reports 1962 151, Separate Opinion of Judge Sir Gerald Fitzmaurice 198, 205.

[70] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion of 20 July 1962) ICJ Reports 1962 151, Separate Opinion of Judge Sir Gerald Fitzmaurice 198, 204.

[71] International Court of Justice, 'Jurisdiction' <https://www.icj-cij.org/en/jurisdiction> accessed 16 December 2021.

in contentious cases before the Court.[72] At the same time, only the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question,[73] and other organs of the UN and specialized agencies that are so authorised by the General Assembly may request advisory opinions on legal questions arising within the scope of their activities.[74]

An advisory opinion is not, strictly speaking, a method of settlement of international disputes. As the ICJ noted in *Legality of the Threat or Use of Nuclear Weapons*, '[t]he purpose of the advisory function is not to settle—at least directly—disputes between States, but to offer legal advice to the organs and institutions requesting the opinion'.[75] However, as Thirlway notes, 'there is no reason why the definition of the legal situation in an advisory opinion should not be accepted as binding through a separate agreement between two States or other entities either *ante factum* or *ex post facto*'. The binding character of the opinion then 'results not from the nature of the opinion itself but from the international agreement as a separate transaction'.[76]

In the present case, in which one of the parties is an international organization and, therefore, the contentious route cannot be adopted, two pathways are possible to bring the case through the advisory route of the ICJ. First, the Republic of Argentina may request that the General Assembly requests an advisory opinion on the validity of the SBA, as per Article 96(a) of the UN Charter. Second, the IMF itself may request the General Assembly's authorisation to request an advisory opinion of the Court, as per Article 96(b) of the UN Charter. Failing this, the dispute will require a political solution, which may be achieved at any time with the bona fide engagement of the parties and the international community in general.

5. Concluding remarks

This paper has undertaken the challenging task of conducting truly interdisciplinary research at the intersection of law and macroeconomics. In doing so, it has contributed towards expanding the frontiers of rather unsettled fields of international law such as the

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[72] Art 34(1) of the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 18 April 1946) 33 UNTS 993.

[73] Art 96(a) of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[74] Art 96(b) of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[75] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion of 8 July 1996) ICJ Reports 1996 266, 236, para 15.

[76] Hugh Thirlway, 'Advisory Opinions' (April 2006) in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn) paras 1-3.

ultra vires acts of international organizations, the law of the IMF, and the international law of unjust enrichment. At the same time, it has revived the historical role of financial programming in delivering on safeguards in IMF lending arrangements. The traditional programming approach provided the basis for IMF lending and safeguards, yet has been abused in recent Fund interventions—and Argentina is no exception. The result was an inconsistent set of macro-financial accounts based on unrealistic assumptions and accounting anomalies that could not possibly succeed.

The takeaways of this paper are manyfold. First, the IMF's functional power to provide balance of payments support to its members is conditional upon a set of cumulative substantive conditions, namely that the general resources of the Fund should only be made available to its members on a temporary basis; the support must be provided under adequate safeguards; and it must shorten the duration and lessen the degree of disequilibrium in the balance of payments of the beneficiary. Those substantive conditions are hard treaty provisions setting out the scope of the Fund's competence and cannot be waived on any grounds, including country ownership. It is the Fund's sole mandate as per its constituent treaty to ensure that those conditions are met in every circumstance by adopting appropriate evaluation and decision-making processes, as well as acting diligently in the application of such rules to individual cases.

Second, the Fund has acted ultra vires in approving the SBA for two main substantive reasons. First, it did not ensure adequate safeguards for the provision of its general resources. The lack of adequate safeguards in the programme can be evidenced not only in terms of its design—with lack of external adjustment, manifestly unreasonable assumptions about private financial inflows, and a substantial accounting 'black hole' of USD 20bn—but also because it, as a result, unreasonably overestimated debt sustainability and approved exceptional access in violation of the Fund's 2016 exceptional access policy. In doing so, the agreement has produced significant IMF exposure to Argentina's unsustainable debt, which the Fund itself has exacerbated upon the SBA's approval. Second, it was reasonably foreseeable that the design of the programme would result in an extension of the duration and magnification of the degree of disequilibrium in the international balance of payments of Argentina for want of appropriate CFM requirements, which—based on experience and data which the IMF reasonably ought to have taken into consideration—the Fund was legally mandated to request.

Third, while the law of ultra vires acts by international organizations and their legal implications is an unsettled area in PIL, it appears that the ultra vires SBA constitutes a voidable act which would cease to produce legal effects from the date of recognition of its invalidity. In the absence of either a valid underlying agreement or an internationally wrongful act upon the SBA's approval—in which case a duty to compensate for damages would arise—we argue that the inter-party effects of the SBA's invalidity are to be governed by the international law of unjust enrichment. In practice, this means that Argentina should restitute the principal to the IMF who, in turn, should restitute the lending rate, surcharges, commitment fee, and service charge in the transaction to Argentina. Considering Argentina's inability to restitute the outstanding purchase of roughly USD 42bn immediately, it is argued that the parties should negotiate in equity an extended time horizon for settlement to facilitate external adjustment without recourse to national prosperity.

Fourth, while there appears to be no jurisprudence in international law on liability for damages of staff members of international organizations, relevant principles of English private law in analogous cases seem to suggest that the restitution owed by the IMF to the Republic of Argentina is without prejudice of the liability for damages of staff members and officials who may be found to have provided negligent advice to the Executive Board regarding the Fund's capacity to enter into the agreement.

Fifth, given the absence of a review body, either judicial or political, within the Fund's institutional framework, only the ICJ would have the power to advise on the legal validity of the SBA through its advisory route, either upon request of the UN's General Assembly or the IMF itself. Failing this, the dispute will require a political solution, which may be achieved at any time with the bona fide engagement of the parties and the international community in general.

Finally, a key takeaway from this paper is the need to further develop scholarly enquiry on ultra vires lending by the IMF, which, as far as we are aware, is a completely unexplored area of legal scholarship. The lack of research in this field contrasts with the importance of the subject matter. Often, the law of the IMF is neglected in academic and policy scrutiny over its activities. It is hoped that this paper will contribute towards incentivising further scholarly and public enquiry on the adequateness of the IMF's activity to the legal framework within which it operates.

Annex 1: A brief guide to IMF financial programming

The IMF's analytical approach to SBAs, the practical delivery of adequate safeguards, developed in parallel with the legal interpretation of the AoA during the 1950s and 1960s and has come to be known as the 'financial programming' (FP) approach. This tradition, largely passed down orally through internal training and practical experience, developed independently to several related academic literatures in the post-war period. For example, to name but three, the FP approach overlaps with, but is distinct from: James Tobin's general equilibrium approach to monetary theory at Yale;[77] the Post Keynesian stock-flow consistent sector balances approach advanced by Wynne Godleyin at Cambridge;[78] and the monetary approach to the balance of payments that developed under Harry Johnson at Chicago.[79]

In short, the IMF's FP approach recognizes that the different sectors of the economy—the banking sector, including the central bank; the public sector, through the fiscal accounts; households and non-financial corporates, known as the real sector; and non-residents, through the balance of payments—are not independent, but interact to determine overall aggregative outcomes.

The balance of payments (BOP) is a key sector in the analysis, not least because the IMF's *Purposes*, recalled above, implored the Fund to 'give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments'.

However, the role of the monetary accounts—and central bank balance sheet in particular—was emphasized. In clearing external transactions, central bank reserve assets provide a crucial link between the domestic macroeconomy and the rest of the world. Indeed, although the 'balance of payments' today, through successive *Balance of Payments Manuals* developed by the IMF's Statistics Department, invokes the numerous current and financial account transactions between residents and non-residents, the BOP traditionally referred more narrowly to the change in gold and other reserve assets of the central bank—making the monetary accounts the fulcrum of interactions between the domestic economy

[77] J Tobin, 'A General Equilibrium Approach to Monetary Theory' (1969) 1(1) Journal of Money, Credit and Banking 15-29.
[78] M Godley and M Lavoie, *Monetary Economics: An Integrated Approach to Credit, Money, Income, Production and Wealth* (Palgrave Macmillan, 2nd edn 2012).
[79] H Johnson, 'The Monetary Approach to the Balance of Payments: A Nontechnical Guide' (1977) 7(3) Journal of International Economics 251-268.

and the rest of the world. In this respect, FP has much in common with the Chicago School of Harry Johnson.

Despite the emphasis on monetary accounts, the FP approach is eminently Keynesian. Nominal and real macroeconomic outcomes are intended to be *endogenous* and driven by policy choices and underlying financial flows. But unlike the workhorse IS-LM device due to John Hicks, as taught to generations of undergraduates since the war, the *stocks* of financial variables—such as the money supply, public and total external debt—are explicitly tracked through various the sector accounts. In this respect, FP has much in common with the respective approaches of Godley and Tobin.

The key analytical innovation in the FP approach, advanced by Jacques Polak[80] inside the Fund from the 1950s, is the *iterative approach* to sector consistency. This involves macroeconomic projections that are endogenous to financial flows. Intra-sector consistency—such as net financing of the government by the banking sector, and demand for money by households and firms—is assured through an iterative process until key aggregative macro-outcomes—such as nominal GDP, money stocks, net external private financing, central bank international reserve assets—are derived *endogenously* during this iterative procedure.

The output of this iterative process was then translated into quantitative targets in the IMF programme documents. The focus, and targets, then become the fiscal balance and its financing; the creation of domestic credit by the central bank or the banking system more generally; and gross or net international reserves consistent with the objectives of the programme, including making resources only 'temporarily available'.

The emergence of a 'second generation' of currency crises in the 1990s, after years of financial account liberalization, meant BOP pressure no longer became associated with domestic *flow* distortions such as excess credit creation or a fiscal deficit finding expression through the current account. Instead, BOP pressure could simply result from non-resident capital flight, despite healthy underlying fundamentals or otherwise.

Since the emergence of such capital account crises, the Fund has not revised the FP framework to account for their changing nature. However, it need not change much. The iterative approach involves bringing about sector consistency, meaning the accounts must add up all the same. But in this case, the central bank might wish to extend credit to the private sector or the government to facilitate some or all capital flight—while the underlying fundamentals are reiterated during the programme period and external confidence in solvency restored.

[80] *The IMF Monetary Model at Forty* (April 1997) IMF Working Paper WP/97/49.

In other words, while a traditional programme in the spirit of the first-generation currency crisis literature—as encountered during the formative years of the Fund—would nearly always involve a *reduction* in central bank credit to the government or banking sector, in face of capital flight an *expansion* of central bank credit is both necessary and reasonable to facilitate outflows. Reasonable, that is, if confidence can be restored in good time and BOP pressure reversed.

Annex 2: The USD 20bn 'black hole' in the SBA

To reveal the accounting 'black hole' that underpinned the SBA, we walk through the key budget constraints and how they (should) link together before exploring at the assumptions that underpinned the programme.

External accounts

Beginning with the balance of payments relation—the external sector accounts—we can summarize as:

$$CA = \Delta NFA^P - \Delta FL^G + (\Delta R - \Delta FL^{CB})$$

which shows the current account surplus ($CA > 0$) as being reflected in the accumulation of net financial claims on the non-residents, either as net foreign assets of the private sector (ΔNFA^P) a reduction in non-resident liabilities of the government (ΔFL^G) or the accumulation of reserve assets of the central bank (ΔR) net of foreign liabilities such as LEBACs (ΔFL^{CB}). Notice, this is organized by sector rather than by instrument. Within each sector net claims, there could be a variety of types of financial flows, such as FDI, other or portfolio investment for the private sector.

This can be rearranged for use shortly, as the change in consolidated government claims on the rest of the world as being the difference between the current account and change in net foreign assets of the private sector:

$$\Delta R - \Delta FL^{CB} - \Delta FL^G = CA - \Delta NFA^P \qquad (*)$$

The government can improve their net foreign asset position through the private sector running a current account surplus (net exports of goods and services above net external interest payments) or drawing down net foreign assets, suitably sterilized as it washes through the banking system to generate consolidated government claims on the rest of the world.

Fiscal accounts

The fiscal deficit (FD) can be financed domestically by private residents (ΔDL^P), by the central bank buying government debt (ΔDL^{CB}), or non-residents (ΔFL^G). There are two other sources of financing here, by transfers from the central bank (T) or by drawing down deposits held at the central bank (ΔG):

$$FD = \Delta DL^P + \Delta DL^{CB} + \Delta FL^G + T - \Delta G$$

Notice how the government can issue debt beyond that needed to finance the deficit to accumulate deposits with the central bank. While transfers from the central bank might be seen as a "free lunch" from the fiscal perspective, this only pushes the problem of debt creation to the central bank—in the case of Argentina, either adding base money liabilities or central bank bills.

Central bank balance sheet

The central bank balance sheet is organized analytically, in stock terms, whereby net foreign assets ($R - FL^{CB}$) plus net domestic assets ($DL^{CB} - G - C$) are equal to base money (M) where C represents central bank bills issued to absorb liquidity—a form of debt that does not show up on fiscal accounts but crucial for sustainability in this case.

The monetary authority could run a deficit in this case, equal to the interest on central bank bills and base money (and perhaps government deposits and foreign liabilities) net of income from holdings of government debt and international reserves. In addition, transfers to the government for fiscal policy are another deficit if this exceeds net monetary income.

This monetary deficit (MD) which equals transfers plus net monetary income ($T + NMID$) can be financed by increasing domestic liabilities ($\Delta \mathrm{M} + \Delta \mathrm{C} + \Delta \mathrm{G}$) or drawing down net external assets ($\Delta \mathrm{R} - \Delta FL^{CB}$) or selling claims on government (ΔDL^{CB}) thus sterilizing impact of deficit.

$$MD = T + NMID = \Delta \mathrm{M} + \Delta \mathrm{C} + \Delta \mathrm{G} - (\Delta \mathrm{R} - \Delta FL^{CB}) - \Delta DL^{CB}$$

Consolidated government

It is useful, but also necessary, to consolidate the fiscal and central bank accounts, to produce an alternative, or dual, expression for the balance of payments as reflected in domestic imbalances—rather than a purely external accounting exercise.

Summing the fiscal (FD) and monetary deficits (MD) and cancelling the intra-consolidated government financial flows (meaning ΔDL^{CB} and ΔG) as well as transfers from the government, we get:

$$(FD + MD - T) = FD + NMID = \Delta DL^{P} + \Delta FL^{G} + \Delta \mathrm{M} + \Delta \mathrm{C} - (\Delta \mathrm{R} - \Delta FL^{CB})$$

Which tells us that the fiscal deficit plus net monetary income deficit of the central bank (i.e., the net interest cost of running monetary policy) is financed by some combination of debt issuance to residents or non-residents, or the change in base money or central bank bills, or net central bank claims on the rest of the world.

Rearranging in terms of the consolidated government claims on non-residents, as above:

$$\Delta \mathrm{R} - \Delta FL^{CB} - \Delta FL^{G} = \Delta DL^{P} + \Delta \mathrm{M} + \Delta \mathrm{C} - (FD + NMID) \qquad (**)$$

Which gives an alternative expression for the "balance of payments" relation (*) above. Together (*) and (**) through the iterative procedure advocated by Polak at the IMF the complete financial programme is constructed.

Alternatively, the change in net foreign assets of the consolidated government ($\Delta R - \Delta FL^{CB} - \Delta FL^{G}$) equals simultaneously both the generation of foreign exchange by the private sector—the current account surplus minus net external financing ($CA - \Delta NFA^{P}$)—and the increase in domestic liabilities of the government and central bank ($\Delta DL^{P} + \Delta \mathrm{M} + \Delta \mathrm{C}$) net of fiscal deficit and the net monetary deficit of the central bank ($D + NMID$).

$$\Delta R - \Delta FL^{CB} - \Delta FL^{G} = CA - \Delta NFA^{P} = \Delta DL^{P} + \Delta \mathrm{M} + \Delta \mathrm{C} - (FD + NMID)$$

How large is the 'black hole'?

We can now size up the inconsistencies that characterized the programme baseline, concentrating on the period from May 2018 to end-2021 using Table 11 on page 42 of the staff report.

- Reserve assets were expected to increase USD 28.3bn over the period, while central bank liabilities were expected to increase USD 15bn due to the IMF programme but decrease USD 10.1bn due to LEBAC repayment. BCRA net external asset accumulation was therefore expected at **USD 23.4bn** (USD 28.3bn minus USD 15bn plus USD 10.1bn).

- Government external borrowing consisted of USD 24.4bn in private borrowing and USD 10.1bn in net financing from other IFIs, to total **USD34.7bn**.

- The change in net foreign asset position of the consolidated government by end-2021 was therefore ***minus*** **USD 11.3bn** (USD 23.4bn minus USD 34.7bn).

Alternatively, this maps into the private sector net flows against non-residents, this is equal by construction, but the decomposition is useful:

- The current account over this period was in deficit of **USD 65.8bn** (consisting of a goods and service deficit of USD 26.8bn and net external debt service of USD 39bn).

- Private net external financing comprises net FDI of USD 22bn, net private rollover of portfolio debt of USD 1.3bn plus USD 31.1bn of 'net other flows' either comprising drawdown of assets held abroad by residents or other borrowing. This is **USD 54.5bn in net external financing**.

- Netting the external current account deficit of USD 65.8bn after allowing for private net external financing of USD 54.5bn gives, once again, ***minus*** **USD 11.3bn**.

We now map this into the fiscal-monetary assumptions, using the fiscal financing Table 10, page 41 and the BCRA balance sheet on Table 12, page 43.

- The **fiscal deficit was projected at USD 82.1bn** consisting of USD 69.1bn in interest payments and USD 12.9bn in primary deficit. Note, this did not include intra-public sector interest payments which are assumed rolled over in full.

- There is no expression of net monetary income in the document, but we know LEBACs were expected to fall from ARS 1,215bn end-May 2018 to ARS 574bn. Assuming an interest rate of 40% in 2018 (generously) falling to 30% from 2019 onwards, this conservatively implies **USD 22.7bn in monetary interest**—note, the interest rate increased to nearly double the 40% at the time of programme initiation.

- Government net rollover of debt provided USD82.bn of borrowing, but this includes external borrowing; netting that off (see above), we get **USD 57.7bn in domestic borrowing**.

- Base money increases USD 34.8bn over the period, while LEBACs were projected to fall USD21.4bn—so **net private claims on the central bank increased USD 13.5bn**.

- Putting this together, we get the **flows against the consolidated government as minus USD 33.6bn** (USD 57.7bn plus USD 13.5bn minus USD 82.1bn minus USD 22.7bn).

This completes the decomposition of the fiscal-monetary programme.

What does this mean?

According to the balance of payments, roughly four-fifths of the external current account deficit over the period was expected to be financed by private sector drawing on resources from abroad. Note, how exceptional this is. The external current account deficit had been driven by official borrowing prior to this, the loosening of financing conditions.

Meanwhile, of the external borrowing by the government over this period, two-third would wash up as net reserves of the central bank. In this way, a sudden shift in external financing was expected, towards private financing of the current account and the accumulation of reserves by BCRA.

However, according to the overall fiscal-monetary stance—the consolidated deficit of the central bank and government combined—a deficit of USD 104.8bn was expected, but only USD71.2bn in domestic assets created to absorb this deficit.

There was therefore a 'black hole' in the programme greater than USD 20bn.

This additional deficit could either be spent (driving a larger current account deficit than projected) or require greater accumulation of domestic assets, such as base money, or to accumulate external assets. In any case, the quantitative performance criteria that underpinned the programme were constructed based on nonsense assumptions—thus providing no safeguards at all.

Annex 3: Summary of key tables

Argentina: June 2018 financial program (key variables)

Gross external financing flows (USD billions, Table 11, page 42)

		2018M5	2018M6	2018Q3	2018Q4	2019Q1	2019Q2	2019Q3	2019Q4	June-Dec 2018	2019	2020	2021	2022	2023	2019-2021	2022-23	TOTAL
1	**Net financing needs**		**5.4**	**8.2**	**9.0**	**3.3**	**5.4**	**5.1**	**7.8**	**22.6**	**21.6**	**17.1**	**14.5**			**53.3**		
1.1	Goods and service deficit		0.4	2.8	4.0	0.3	-0.7	2.0	3.4	7.2	5.1	6.6	7.9			19.5		
1.2	Net debt service		1.3	2.7	4.5	2.8	4.1	2.7	3.8	8.5	13.6	10.2	6.7			30.4		
1.3	Net LEBACS		3.7	2.7	0.4	0.2	1.9	0.4	0.5	6.8	3.0	0.3	0.0			3.3		
2	**Net financing**		**-2.4**	**3.1**	**5.2**	**1.5**	**8.8**	**6.9**	**8.0**	**5.9**	**25.2**	**27.8**	**30.3**			**83.3**		
2.1	Net FDI		0.4	0.6	2.6	1.0	0.9	0.6	2.8	3.6	5.2	5.5	7.7			18.4		
2.2	Net IFIs		0.3	0.8	0.8	1.2	1.2	1.2	1.2	1.8	4.8	1.3	2.4			8.5		
2.3	Net public amortizations		-0.5	1.3	-1.1	11.3	-1.6	-0.8	-0.7	-0.3	8.2	10.5	6.0			24.7		
2.4	Net private rollovers		0.3	1.5	1.3	1.7	1.7	1.7	1.7	3.1	6.8	-3.3	-5.2			-1.8		
2.5	Net other inflows		-2.9	-1.1	1.7	-13.7	6.7	4.2	3.0	-2.3	0.2	13.8	19.4			33.4		
3 (= 1 - 2)	**Net private external financing**		**7.8**	**5.1**	**3.8**	**1.9**	**-3.4**	**-1.8**	**-0.2**	**16.7**	**-3.6**	**-10.6**	**-15.7**			**-30.0**		
4 (= 3)	**IMF financing and gross reserves**		**7.8**	**5.1**	**3.8**	**1.9**	**-3.4**	**-1.8**	**-0.2**	**16.7**	**-3.6**	**-10.6**	**-15.7**			**-30.0**		
4.1	Gross reserves (-ve = increase)		0.8	1.0	0.0	1.9	-3.4	-1.8	-0.2	1.7	-3.6	-10.6	-15.7			-30.0		
4.2	IMF external financing		7.1	4.2	3.8	0.0	0.0	0.0	0.0	15.0	0.0	0.0	0.0			0.0		
5.1	*LEBAC rollover rate*		*31%*	*31%*	*30%*	*10%*	*10%*	*10%*	*10%*	*31%*	*10%*	*50%*	*n/a*					
5.2	*Private rollover rate*		*142%*	*237%*	*179%*	*267%*	*386%*	*579%*	*409%*	*191%*	*370%*	*69%*	*46%*					
5.3	*Public rollover rate*		*75%*	*120%*	*85%*	*497%*	*75%*	*75%*	*75%*	*98%*	*155%*	*229%*	*156%*					

Balance of payments flows (USD billions, Table 4, page 36)

		2018	2019	2020	2021	2022	2023	2019-2021	2022-23	TOTAL
6	**Current account**	**58.5**	**24.8**	**18.6**	**13.5**	**14.3**	**23.9**	**56.9**	**38.2**	**95.2**
6.1	Goods and service balance	8.1	5.0	6.6	7.8	8.1	8.9	19.4	17.0	36.4
6.2	Primary and secondary income	11.7	13.6	10.1	6.8	6.4	6.6	30.5	13.0	43.5
6.3	Net other investment (adjusted for IMF)	38.7	6.2	1.9	-1.1	-0.2	8.4	7.0	8.2	15.3
7	**Financial account**	**47.0**	**28.2**	**29.1**	**32.9**	**29.4**	**35.3**	**90.2**	**64.7**	**154.9**
7.1	Net FDI	4.9	5.2	5.5	7.7	8.8	9.9	18.4	18.7	37.1
7.2	Net portfolio investment	42.1	23.0	23.6	25.2	20.6	25.4	71.8	46.0	117.8
8	**IMF financing and gross reserves**	**11.4**	**-3.6**	**-10.6**	**-19.5**	**-15.1**	**-11.6**	**-33.7**	**-26.7**	**-60.3**
8.1	Gross reserves (-ve = increase)	-3.6	-3.6	-10.6	-15.7	-7.6	-7.8	-29.9	-15.4	-45.3
8.2	IMF external financing	15.0	0.0	0.0	-3.8	-7.5	-3.8	-3.8	-11.3	-15.0

Gross international reserves stocks (USD billions, Table 3, page 35; also Table 16, page 47)

		2018	2019	2020	2021	2022	2023	2019-2021	2022-23	TOTAL
9	**Gross international reserves**	**65.4**	**69.0**	**79.7**	**88.4**	**96.0**	**103.8**			
9.1	*Change*	*10.3*	*3.6*	*10.7*	*8.7*	*7.6*	*7.8*	23.0	15.4	38.4
10	**Net international reserves**	**29.7**	**33.4**	**44.0**	**54.6**	**69.8**	**83.2**			
10.1	*Change*	*1.8*	*3.7*	*10.6*	*10.6*	*15.2*	*13.4*	24.9	28.6	53.5

BCRA (central bank) balance sheet stocks (ARS billions, Table 12, page 43 and Table 7, page 39)

		2018M5	2018M6	2018Q3	2018Q4	2019Q1	2019Q2	2019Q3	2019Q4	2018	2019	2020	2021	2022	2023	2019-2021	2022-23	TOTAL
11	Net foreign assets	588	804	783	788	757	871	944	975	788	975	1357	1794	2348	2897	1006	1103	2109
11.1	*In USD at program exchange rate*	*23.6*	*32.2*	*31.4*	*31.6*	*30.3*	*34.9*	*37.8*	*39.1*									
11.2	*Change*		*8.7*	*-0.8*	*0.2*	*-1.2*	*4.6*	*2.9*	*1.2*									
12	Net domestic assets	433	312	380	472	535	493	471	554	472.1	554.5	446.4	270.7	9.6	-213.5	-201.4	-484.2	-685.6
12.1	Credit to the government	2204	2309	2221	2157	2113	2065	2057	2049									
12.2	LEBAC	-1215	-1170	-1054	-782	-686	-679	-686	-574									
12.3	Credit to the public sector (net)									2155.3	2047.1	1938.3	1806.5	1627.4	1447.5	-348.8	-359	-707.8
12.4	Credit to the financial sector (net)									-734.9	-922.9	-1200.6	-1190.1	-1168.7	-1088.7	-455.2	101.4	-353.8
12.5	Official capital and other items (net)									-948.3	-569.6	-291.3	-345.8	-449.1	-572.2	602.5	-226.4	376.1
12.6	*Other items net 1/*	*-556*	*-827*	*-787*	*-903*	*-892*	*-893*	*-900*	*-921*									
13	Monetary base	1020	1117	1163	1260	1292	1364	1415	1529	1260.2	1529.1	1803.8	2064.4	2357.9	2683.2	804.2	618.8	1423
14	Monetary base plus LEBAC	2235	2287	2217	2042	1978	2043	2101	2103									
15	ARS program exchange rate	24.96	24.96	24.96	24.96	24.96	24.96	24.96	24.96		24.96	24.96	24.96	24.96	24.96			

Federal Government Gross Financing Needs and Sources (USD billions, Table 10; page 41)

		2018M6	2018Q3	2018Q4	2019Q1	2019Q2	2019Q3	2019Q4	June-Dec 2018	2019	2020	2021
16	**Financing needs**	**17.3**	**24.0**	**41.2**	**26.0**	**28.7**	**16.8**	**24.3**	**82.4**	**95.8**	**72.9**	**58.4**
16.1	Primary balance	3.1	4.0	5.1	0.6	2.4	2.0	2.5	12.1	7.5	-1.1	-5.6
16.2	Interest	2.8	2.6	6.0	2.4	4.9	1.9	4.4	11.5	13.6	19.7	24.3
16.3	Amortiaztion	6.4	15.4	29.8	17.8	20.3	9.0	15.9	51.5	63.1	48.0	39.7
16.4	BCRA debt repaymanet	5.0	1.9	0.3	5.2	1.0	3.9	1.5	7.2	11.6	6.3	0.0
17	**Financing sources**	**12.2**	**21.7**	**41.0**	**36.4**	**23.6**	**15.3**	**20.4**	**74.9**	**95.7**	**72.9**	**58.4**
17.1	Deposit drawdown	5.0	2.2	0.0	0.0	0.0	0.0	0.0	7.2	0.0	0.0	0.0
17.2	International financial institutions	0.3	0.8	0.8	1.2	1.2	1.2	1.2	1.8	4.8	1.3	2.4
17.3	Intra-public sector rollovers	4.1	5.5	21.1	11.5	7.3	2.7	11.0	30.6	32.6	21.5	15.5
17.4	Private sector rollovers	1.3	7.9	7.5	6.9	10.0	6.1	5.6	16.7	28.6	25.5	26.6
17.5	New borrowing	1.5	5.3	11.8	16.8	5.0	5.3	2.6	18.5	29.6	24.5	14.0
17.6	o/w external		3.0	0.8	12.0				3.8	12.0	10.5	6.0
18 (= 16 - 17)	**Financing gap**	**5.0**	**2.3**	**0.2**	**-10.4**	**5.1**	**1.6**	**3.9**	**7.5**	**0.1**	**0.0**	**0.0**

Nominal GDP (ARS billions, Table 1)

		2018	2019	2020	2021	2022	2023
19	Nominal GDP	13240	16068	18746	21227	23191	25135
19.1	Implied USD GDP	700	571	620	675	700	700
20	Implied year average exchange rate	18.9	28.1	30.2	31.4	33.1	35.9

1/ Italicized calculated as a residual and not included in original table.