

Human Rights and Sovereign Debt Restructurings: Considerations on States' Legal Arguments in Disputes under Public International Law

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This article delves into the intersection of sovereign debt restructurings with human rights. It emphasises that, in disputes under international law, States often omit to raise arguments concerning how adverse judgments could potentially harm the economic, social, and cultural rights of their citizens. The article also draws attention to the applicable law approach of some arbitral tribunals and the behaviour of certain holdouts, explaining how they can also contribute to this ecosystem. Ultimately, it is argued that the current hard-law international architecture is neither optimal nor encouraging to robustly link sovereign debt restructurings and human rights.

To this end, the article recommends that these processes be guided by certain general principles of law. These principles, considered sources of international law, should be infused with international human rights law nuances. Rather than advocating for an overhaul, suggestions are made to refine the existing international legal framework and better suit human rights in sovereign debt restructurings.

Keywords: sovereign debt, debt restructuring, human rights, social, economic and cultural rights, vulture funds

Introduction and terminology

Global dynamics are in a constant state of evolution. This phenomenon is rooted in various factors, including the active engagement of States in international capital markets. These entities often participate in this domain to acquire debt, commonly referred to as “sovereign debt” owing to their public nature as borrowers.

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Sovereign debt generally serves as a tool for implementing domestic economic and social policies aimed at fostering growth and development. Yet, inadequate management, especially leading to a debt crisis, holds the potential to thrust millions of people into poverty, impacting not only financial stability and economic growth matters but also the realisation of economic, social, and cultural rights.² In such instances, sovereign debt can inevitably lead to both international as well as domestic complications when faced with sustainability challenges.

In the international capital markets scenario, it is commonly acknowledged that creditors are becoming more numerous, hard to identify, and challenging to coordinate. The variety of debt instruments and the different jurisdictions at play, coupled with the absence of a singular applicable legal framework, also motivates some creditors to litigate in various venues for better outcomes. This procedural behaviour has led to increasingly complex and aggressive sovereign debt restructuring processes in the early 21st century, evidenced from both bondholders, as was the case with Argentina during 2001 and 2002, as well as sovereign debtors, as seen with Ecuador in 2009.³

Traditionally, the solution for an unsustainable sovereign debt has often been restructuring it. This process typically involves undertaking complex negotiations with a diverse range of creditors, aiming for a voluntary trade of their original debt instruments for new ones with different terms. The new bond classes usually include an extension of the maturity period, a reduction in the nominal value, and a lower interest rate, or a combination of these mechanisms. The objective is to provide economic relief, allowing sovereign debtors to address payment difficulties and meet new financial obligations.

Nevertheless, when certain creditors accept the new the terms, but other bondholders are not persuaded by the exchange offer, a “holdout problem” can arise, rooted in the existence of a group of creditors who refuse to participate in negotiations and decide, instead, to pursue other avenues in a quest to obtain payments in full.⁴

Taking these scenarios into consideration, this article argues that States involved in prominent sovereign debt restructuring processes under international law often omit, at least as a central argument, key considerations regarding the potential impact of adverse judgments on human rights in their domestic sphere. It will also be asserted, among other arguments, that this oversight is largely a result of an unsuitable international architecture that is not able to encourage such linkage. Despite significant progress made under soft-law provisions, a more robust legal framework is deemed necessary to solidify the existing connection between sovereign debt restructurings and human rights.

2 Economic Commission for Latin America and the Caribbean 2023.

3 OLIVARES-CAMINAL 2011: 382.

4 FANG et al. 2020: 4.

Evaluation of States' human rights arguments in international disputes

Defining the pool of sovereign debt restructuring cases under international law

Methodologically, this article studies disputes decided under international law, and the cases assessed have been solely sourced from UNCTAD's Investment Dispute Settlement Navigator. The rationale here is linked to the idea that evaluating the interaction between sovereign debt restructurings and international human rights obligations can be done in an effective manner within a unified international legal framework. While analysing each applicable framework and its interplay with human rights obligations in domestic court sovereign debt restructuring cases is certainly important, such evaluation would exceed the scope of this work.

It is also worth noting that, in investment cases, the States' consent is typically limited to the obligations emerging from the investment agreements themselves.⁵ However, when these treaties include a provision of applicable law allowing tribunals to resort to other international rules, a window of opportunity opens for them to assess the interconnection of investment obligations with supplementary international obligations. Thus, without exceeding the limits of consent, the tribunal would be able to interpret the investment agreement's obligations in light of complementary standing international obligations.

Abaclat and others v. Argentina

The two cases against Argentina in this section are a consequence of the 2001 crisis which led, among other things, to Argentina's sovereign debt restructuring. Italian bondholders brought two cases against the State claiming breaches of the bilateral treaty between Argentina and Italy.

In the case of *Abaclat and others v. Argentina*, the State raised, as a jurisdictional objection, the argument that the sovereign bonds in dispute, which were later defaulted, did not constitute a protected "investment" in the terms of the Argentina–Italy Bilateral Investment Treaty (BIT) and the ICSID Convention. Indeed, one of Argentina's main arguments was that the bonds did not contribute to its economic development, being this, according to the State, one of the key elements that needed to be present in order to truthfully regard this scenario as an investment. Argentina, however, raised no argument specifically considering human rights: its position only highlighted that the funds raised by the bonds in dispute were used to pay pre-existing debt, and/or general government spending being, thus, not instrumental in fostering the country's economy.⁶

5 SCHREUER 2014: 2–3.

6 *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 378.

The tribunal in *Abaclat and others v. Argentina*, on the contrary, understood that because the funds raised by the bonds in question were ultimately made available to the State, the concrete use that the State gave to those funds was irrelevant. Arguably, whichever allocation that these funds were given would still contribute to the economic development of Argentina by the sole reason that they were made accessible to the country.⁷

In this case, Argentina missed the opportunity to present to the tribunal allegations of human rights which could have been a consequence of the debt issuance and later restructuring. While Argentina did explain the social unrest that occurred due to its 2001 crisis,⁸ it did not invoke international human rights obligations and standards, nor it invoked their interplay with its sovereign debt. Consequently, Argentina only considered this issue as a factual contention, but neither tied this contention to human rights obligations, nor advanced any human rights arguments because of it. This is considerably relevant as the Argentina–Italy BIT contained a specific provision on applicable law which included principles of international law.⁹ This provision allowed the tribunal to resort to international law beyond the agreement itself, and could have potentially opened the opportunity for the State to invoke other sources of international law to be analysed in line with the existent investment obligations under the BIT. In fact, in the case of *Urbaser v. Argentina*, the State had even filed a counterclaim alleging that the investor’s failure to provide water constituted a violation of the human right to water.¹⁰ The applicable treaty in that case was the Argentina–Spain BIT, which contained a similar provision empowering the tribunal to apply principles of international law.¹¹

Ultimately in *Abaclat and others v. Argentina*, the dispute was settled and finalised by a consent award.¹² The award itself does not reveal arguments in the merits of the

7 *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 378.

8 See e.g., *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 57: “These economic difficulties were accompanied by considerable political and social unrests, leading eventually to the resignation of the then President Fernando de la Rúa and his entire cabinet on 19 December 2001.”

9 Agreement between the Argentine Republic and the Italian Republic on Investment Promotion and Protection, signed on 22 May 1990, entered into force on 14 October 1993, Article 8(7).

10 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 36.

11 Agreement between the Argentine Republic and the Kingdom of Spain on the reciprocal promotion and protection of investments, signed on 3 October 1991, entered into force on 28 September 1992, Article IX(5): “The arbitral tribunal shall issue its ruling in accordance with the provisions of this Agreement, with those of other agreements existing between the Parties, with the laws in force in the country in which the investments were made and with the universally recognized principles of international law.”

12 *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Consent Award under ICSID Arbitration Rule 43(2), 29 December 2016.

dispute, and the settlement terms were not published. Therefore, it is not possible to ascertain the arguments that the State posed on the merits of the dispute.

Ambiente Ufficio and others v. Argentine Republic

The case of *Ambiente Ufficio and others v. Argentina*, postdates that of *Abaclat and others v. Argentina*. This case belongs to the same set of facts, albeit with different bondholders. The applicable treaties were also the Argentina–Italy BIT and the ICSID Convention. In this opportunity, Argentina also raised the same argument as in *Abaclat and others v. Argentina*, being that the sovereign bonds in question did not contribute to its economic development. Argentina argued, in line with this point, that the contribution to the development of its economy had to be substantial. In this regard, it stated that the investors had acquired the bonds in the secondary market, and therefore did not transfer their funds to the State itself, hence making no contribution as such.¹³

Additionally, Argentina posed the argument that, even if there was a contribution, the participation of each bondholder “would still be of too small a magnitude to qualify as a ‘contribution’ to the economic development of the Respondent” in any relevant way.¹⁴ Finally, Argentina also argued that the bondholders could not “prove if the proceeds of a particular bonds issuance were used to finance increasing interest payments” as these had no lasting value for the country’s economic development.¹⁵

Ultimately, the tribunal rejected Argentina’s objection considering that “given the unity of the economic operation” of bond issuance, “the funds generated through the bonds issuance process were ultimately made available to Argentina” and must therefore be deemed to have contributed to the economic development of the country.¹⁶ In *Ambiente Ufficio and others v. Argentina*, the State missed once again the opportunity to raise the matter of human rights against the economic development in the case of sovereign debt restructuring. As seen in *Abaclat and others v. Argentina*, the treaty allowed for the tribunal to resort to other sources of international law, by which the State could have introduced human rights analyses.

Poštová banka and Istrokapital v. Greece

The case of *Poštová banka and Istrokapital v. Greece* involved a sovereign debt restructuring as a result of the 2008 global financial crisis. The bank had filed an

13 *Ambiente Ufficio S. p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 369.

14 *Ambiente Ufficio S. p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 370.

15 *Ambiente Ufficio S. p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 371.

16 *Ambiente Ufficio S. p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 487.

international arbitration claim against Greece claiming that the State had adopted measures in breach of the Slovakia–Greece and Cyprus–Greece BITs, depriving the value of their investments in Greek bonds in 2012. In this case, the State also raised the argument that the sovereign bonds had not fostered economic development.¹⁷ However, Greece did not develop the argument much further, not raising, in fact, any human rights arguments regarding its debt restructuring.

Interestingly, the Slovakia–Greece BIT had the following applicable law provision: “[t]he arbitration tribunal shall decide on the basis of respect for the law, including particularly the present agreement [...] and the generally acknowledged rules and principles of international law” which granted to the tribunal, accordingly, the power to resort to supplementary rules and sources of international law.¹⁸

Similarly, the Cyprus–Greece BIT also contained a provision which permitted the tribunal to resort to “[...] other relevant agreements existing between the parties and the generally accepted rules and principles of international law” which include, indeed, general principles of law as sources of international law.¹⁹

Ultimately, the tribunal upheld the objection raised by Greece but for a completely different reason: the tribunal considered that the Slovakia–Greece BIT, by not expressly including “bonds” in its investment definition, despite including other instruments such as debentures, did not protect sovereign debt as foreign investment.²⁰ This case also illustrates a missed opportunity for the corresponding State to bring to the arbitration human rights considerations and the links they hold with sovereign debt restructuring litigations under international law, despite the treaties’ generous applicable law provisions.

Brief remarks on the role that “vulture funds” play in impacting human rights

Academia and practitioners generally agree that the voluntary nature of debt relief measures has opened avenues for certain creditors to refrain from participating in restructuring negotiations and seek, subsequently, debt recoveries through “predatory” behaviours such as litigation, seizure of assets or political pressure.²¹ These creditors, often labelled as “vulture funds” acquire defaulted sovereign debt

17 *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 140.

18 Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the Hellenic Republic for the Promotion and Reciprocal Protection of Investments, signed on 3 June 1991, entered into force on 30 December 1992, Article 9(5).

19 Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments, signed on 30 March 1992, entered into force on 26 February 1993, Article 8(5).

20 *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 333.

21 United Nations General Assembly 2014.

at vastly reduced prices, await the concurrence of other creditors to endorse debt cancellations and then aggressively pursue excessive repayments.²²

In these scenarios, their ultimate goal is to recover the full value of the debt and maximise their returns.²³ Consequently, understanding this concept involves at least three central arguments, which, when combined, shed light on the operation of such funds, the role they play in sovereign debt restructurings and the corresponding repercussions that may be evidenced on human rights.

Firstly, it is crucial to note that, in these cases, sovereign debts are generally acquired in the secondary market when the indebted country is either close to default or has already defaulted on its debt. The purchase of distressed sovereign debt is, thus, a key indicator of dealing with vulture funds.²⁴ Additionally, these creditors exhibit a clear intention not to participate in orderly and voluntary negotiations that could lead to a potentially successful debt exchange or restructuring. Finally, for these bondholders, litigation is strategically pursued to seek repayment of the full-face value of the sovereign debt together with interests, penalties, and legal fees.²⁵

It is worth noting that this opportunistic behaviour contradicts with at least two widely accepted legal principles in most domestic legal systems, also sourced in international law: the principle of good faith and the principle of non-abusive exercise of rights.

Considering the dynamics that vulture funds trigger in the ecosystem of sovereign debt restructurings, it is necessary to analyse the influence and impact their actions have on the human rights scenario, as the excessive claims made by these bondholders against countries with unsustainable debt levels can have direct negative effects on their governments' ability to meet their human rights obligations.

Specifically, the Human Rights Council adopted Resolution No. 27/30 in October, 2014 to consider the effects of the activities of vulture funds on the full enjoyment of all human rights in debtor States and, in particular, the economic, social, and cultural rights. One of the main arguments presented in this document highlighted that vulture funds, through litigation and other means, oblige indebted countries to divert financial resources saved from debt cancellation and diminish the impact of, or dilute the potential gains from, debt relief for these countries, thereby undermining the capacity of governments to guarantee the full enjoyment of human rights of the population. Following this line of thought, the resolution affirmed that the activities of vulture funds highlight certain issues within the global financial system and serve as a reflection of the unjust nature of the existing framework, which directly affects the enjoyment of human rights in debtor States and calls upon nations to consider

22 United Nations General Assembly 2010.

23 United Nations General Assembly 2016.

24 United Nations General Assembly 2010.

25 United Nations General Assembly 2016.

implementing legal architectures to curtail predatory vulture fund activities within their jurisdictions.²⁶

This is not the only instrument that has alluded to the activities of the vulture funds. Reviewing prior records, the Human Rights Council adopted Resolution No. 23/11 in June, 2013, which also stated that, from a human rights perspective, the settlement of aggressive vulture fund disputes directly undermines governments' ability to meet their human rights responsibilities, especially with regards to economic, social, and cultural rights.²⁷

In July 2012, the Human Rights Council adopted Resolution No. 20/10 essentially underlining the same issues arising under Resolution No. 23/11, clearly portraying that the subject in question has been problematic for, at the very least, a decade.²⁸

Overall, all these instruments highlight that the challenges arising from the *modus operandi* of vulture funds stem from the strategies they deploy to gain disproportionate benefits, coupled with the diminished ability of States to respectively fulfil their human rights obligations. Yet, this perspective is not unanimous. Some scholars argue that the ability to litigate the enforcement of obligations arising from sovereign debts optimises the functioning of the international capital market by reducing financing costs for States' while, simultaneously, increasing the yield of debt instruments for creditors. Thus, imposing legal limitations on negotiations in the secondary market or in the possibility of litigating in foreign jurisdictions could negatively impact States' borrowing costs.²⁹

This article does not disregard the need for a certain degree of flexibility in these scenarios. Certainly, the criterion advocated in the last paragraph is based on legal and economic logic. However, examining sovereign debt restructurings through the lens of international human rights law holds the potential to unfold an array of often omitted components that are embedded in the system. The baseline objective is, thus, to avoid a derailing international sovereign debt market signed by unnecessary conflicts and costly delays that collectively have a negative impact on human rights.

Current international architecture on sovereign debt restructurings and human rights

The overarching theme of this article has been to highlight that both States as well as certain holdouts play a significant role when considering the lack of human rights arguments presented in disputes under international law. Nevertheless, it could certainly be argued that the main responsibility of clearly illustrating this linkage falls under the States' umbrella, being them the primary "caretakers" of their citizens'

²⁶ United Nations General Assembly 2014.

²⁷ United Nations General Assembly 2013.

²⁸ United Nations General Assembly 2012.

²⁹ FISCH–GENTILE 2004: 1112.

human rights and having the duty, as such, of assuming the responsibilities that come with said position.

It is worth noting that the previously cited Human Rights Council Resolution No. 27/30 from 2014, had already underlined that the global financial system lacked a robust legal structure for the systematic and foreseeable restructuring of sovereign debt, thereby exacerbating the economic and social consequences of non-compliance. Following this observation, it encouraged States to participate in negotiations aimed at establishing a multilateral legal framework for managing sovereign debt restructuring processes, while urging them to ensure its alignment with prevailing international human rights law standards and its corresponding obligations.³⁰

The same year, in response to the increasing demand for an international framework on the matter, the United Nations General Assembly adopted Resolution No. 68/304 to consider the establishment of a multilateral legal framework for sovereign debt restructuring processes, which is a soft-law piece that called for the creation of a legal structure designed to streamline sovereign debt restructuring processes while dissuading creditors from engaging in disruptive litigation.³¹

In 2015, one of the most significant contributions in this scenario was evidenced with the United Nations General Assembly Resolution No. 69/319, which underscored the basic principles to be considered in sovereign debt restructuring processes. The salient provision in this soft-law piece highlighted the need for sustainability in these processes, implying that sovereign debt restructuring workouts should preserve the outset creditors' rights while promoting inclusive economic growth and development, which necessarily included respecting human rights in this scenario.³²

During 2019, following the contributions developed in Resolution No. 20/10, Resolution No. 23/11, and Resolution No. 27/30, the Human Rights Council published its final report on the activities of vulture funds and their impact on human rights under Resolution No. 41/51. Interestingly, this document highlighted one of the main aspects presented in this article while evaluating States' human rights arguments in international disputes, assessing that the current international legal system "appears to be manifestly inadequate to solve complex sovereign debt restructuring disputes, as investment tribunals too often tend to ground their decisions in purely economic terms while ignoring the broader human rights implications of such situations" which leads to believe that this is also a problem anchored in the sources of international law that deal with these particular disputes, potentially affecting even *iura novit arbiter* considerations.³³

While the current international hard-law architecture still seems insufficient to properly address human rights and sovereign debt restructurings, there is still hope: the idea that general principles of law, such as good faith and the non-abusive exercise

30 United Nations General Assembly 2014.

31 United Nations General Assembly 2014b.

32 United Nations General Assembly 2015.

33 United Nations General Assembly 2019.

of rights, are capable of conducting these disputes, must be seriously considered. Indeed, it has been explained in detail how “[g]ood faith has a bearing upon contemporary sovereign debt workouts in at least four respects” evidenced through enabling sustainable sovereign debt restructurings under the obligation to negotiate; ensuring fair treatment of all creditors by the debtor State; exercising voting rights; and imposing a standstill on litigation by holdout creditors, which is also restricted by estoppel and, notably, the abuse of rights principle.³⁴

Overall, the principle of good faith, the principle of non-abusive exercise of rights and any other general principle of law applicable in these scenarios should also be enriched by human rights obligations and international standards in order to avoid only targeting creditors’ behaviour. This understanding is crucial, as general principles of law structure the backbone upon which treaties and customary international law owe their legal rationale, influencing, undoubtedly, the volitive reasoning of States in the creation process of international hard-law. The underlining objective is, thus, to recognise (or avoid omitting) that States are lacking both in the creation of a solid international law framework as well as in presenting arguments in international disputes that play a crucial role in consolidating this linkage.

Final remarks

This article has briefly reviewed the role that different actors play on a single matter: as human rights concerns remain unaddressed in debt restructuring cases under hard-law provisions in international law, there are several reasons that explain this phenomenon.

Firstly, States have, thus far, failed to develop an appropriate international ecosystem to successfully manage debt restructuring processes. The mechanism as it stands has fostered decentralised litigation in court proceedings and international arbitration, increasing the difficulties for States to implement majority-agreed debt restructuring plans which, at the same time, incentivises “forum-shopping” and interferes with bondholders who had agreed to the terms of such a restructuring plan.

States have also failed, as a rule, to avail of their opportunity to raise human rights implications of debt restructurings in international arbitration cases decided under international law. While in different investment cases States have raised human rights matters, and even filed counterclaims on such bases, cases involving debt restructuring processes have not seen considerations on human rights challenges in light of awards that would potentially be averse to the States involved in the dispute.

In addition, stemming from the publicly available decisions, it is apparent that arbitral tribunals have not resorted to their *iura novit arbiter* to fill the gap created by the States’ legal arguments. In general, tribunals are permitted to introduce certain legal rationales within the applicable law also relevant to the corresponding

³⁴ GOLDMANN 2016: 129.

dispute. However, possibly due to an abundance of caution, the cases reviewed do not provide evidence that arbitrators have effectively exercised their authority to consider potential human rights implications in investment cases.

Finally, the role of vulture funds in attempting to maximise their gains while potentially affecting certain general principles of law, such as good faith and non-abuse exercise of rights, puts the States between a rock and a hard place: with no international hard-law architecture designed to bind a minority to the plan approved by the majority, holdouts are permitted to energetically attempt litigation in different forums to recover the face value of defaulted bonds, ignoring broader human rights implications.

It is of utmost importance that States evaluate human rights implications in debt restructuring processes. The global frequency of debt defaulting calls for immediate action to design an international hard-law framework for sovereign debt restructuring processes besides the existent general principles of law. This design must be guided by the human rights implications that sovereign debt restructuring can have and should, in parallel, empower courts as well as tribunals to rule on any possible disputes with human rights implications as a centrepiece of their assessment.

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