The New Vulture Culture:

Sovereign Debt Restructuring in Trade and Investment Treaties

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The Point

- Investors are beginning to use trade and investment treaties as a way to challenge sovereign debt restructurings.
- New global sovereign debt regime must have precedent over trade and investment treaties.

CASES PENDING

- *Abaclat and Others v. Argentine Republic*
  ($1 billion)
- *Postova banka v. Greece*
  ($??)
- *Marfin v. Cyprus*
  ($1 billion)

ISSUES

- Jurisdiction
- National Treatment
- Expropriation
- Fair and equitable treatment
- Transfers

MAJOR ISSUE: Investor-State Dispute Resolution System

US treaties

- NAFTA does not include government bonds in definition of investment
- Three treaties have SDR annex: Uruguay BIT, Peru and Colombia FTAs.
  - Restructuring has precedent if adheres to NT, MFN, FET and is "negotiated."
  - If restructuring was "non-negotiated" the claimant has to wait 270 days before filing a claim ("cooling off")

Why Global Cooperation?

- In the interest of sovereign debtors to support a regime that allows for debt service and recovery. **BUT:**
  - Reluctance to express true interests for fear that the nation would be seen as more willing to default.
- In the interest of private creditors to support a regime to prevent all creditors from "rushing to exit." **BUT:**
  - Individual creditors have an incentive to quickly exit before other creditors do, and
  - Added incentive to holdout and go court route
  - IIAs are a new 'route' for investors.

Recommendations

- Do not include sovereign debt as covered investment in treaties
- Include language on financial crises as applying to exceptions for "essential security"
- Include balance-of-payments exceptions with reference to SDR