United Nations Conference on Trade and Development

Draft Principles on Promoting Responsible Sovereign Lending and Borrowing

(Amended and Restated as of)
November 2010

Geneva, Switzerland

Summary of proposals and comments

from members of the Expert Group (2 pager document prepared for the Xiamen meeting) and Italy and the United States of America

UNCTAD Project Promoting Responsible Sovereign Lending and Borrowing

Working draft for comments — November 2010

Explanatory note: This document is intended to be working document for discussion among the members of the Expert Group. This compilation of proposals and comments comprises the proposals and comments to amend, reinstate, delete and/or draft new Principles based on the documents received from the Experts and Italy and the United States. The proposals and comments have been summarized and included in the text of the Principles (including the Preface) under each relevant part or section and are accompanied by a short observation made by the Secretariat to each comment. At the end of the document an additional section has been included with general comments that could not be linked to a specific part of the Principles. Each proposal is denoted by the initials of the expert or country who advanced the proposal so as to facilitate the discussion for follow up purposes, not necessarily to assign ownership. This does not represent an exhaustive list and consideration should also be given to elements that have not yet been included.

AG:	Anna Gelpern	JK:	Jürgen Kaiser
AP:	Arturo Porzecanski	JW:	John Williamson
HT:	Hung Tran	MLF:	Maria Lucia Fattorelli
IMF:	IMF Observers	PC:	Paris Club Secretariat
Italy:	The Italian Republic	PW:	Philip Wood
JHK:	Jostein Hole Kobbeltvedt	US:	United States of America

Preface

Against the background of the global financial and economic crisis, UNCTAD launched an initiative to promote responsible sovereign lending and borrowing practices in 2009 with the generous financial support from the government of Norway.

With the increasing incidences of sovereign debt difficulties, the UNCTAD initiative has become even more relevant and consequently has been garnering increasing support from developed and developing countries alike.

Unlike international trade, there are no universally agreed rules or principles to guide sovereign lending and borrowing practices.

Commentator	Main Issue
HT	In the third paragraph of the Preface: it is not accurate to say that "there are no internationally agreed...Principles...". The Principles for Stable Capital Flows and Fair Debt Restructuring—described in my earlier comments on the Buchheit-Gulati paper—were endorsed by the G-20 in 2004 and have played a constructive role in emerging market financing since then.
PC	In the preface of the draft Principles, the 3rd paragraph indicates wrongly that there is "no universally agreed rules or principles to guide sovereign lending and borrowing practices". The OECD Sustainable Lending Principles are agreed principles, which apply to low income countries. Thus, this paragraph should be deleted.

MLF: According to Latindadd view, this paragraph should be modified to: "The few opinions about sovereign lending and borrowing practices are not universally agreed rules or principles, and do not include the experience and studies from civil society institutions and movements, that have denounced and proved, by audit procedures, the illegitimacy and illegality existing in the indebt process so far"

The purpose of this initiative is to provide a forum for debate on responsible practices and to develop a set of Guidelines based on commonly accepted principles and practices relating to sovereign debt issues.

Identifying agreed Guidelines for lending and borrowing is the first step in the process towards the adoption of general accepted practices and, prevent unconventional practices that can lead to irresponsible behavior ~~future problems~~. UNCTAD aims to build consensus around a set of universally agreed Guidelines to prevent irresponsible financing ~~lending and borrowing~~.

Commentator	Main Issue
HT	The fifth paragraph of the Preface is quite troublesome—it is open-ended in its promise to "prevent future problems" as well as to "prevent irresponsible lending and borrowing". This objective goes well beyond the premises of the WG in drafting a set of principles to promote responsible lending and borrowing. This paragraph needs to be deleted.
Italy	This paragraph should be deleted or drastically modified to take into

	account that, while it is true that no binding rules are in force, principles to guide sovereign lending and borrowing have been defined by BWI and by the OECD.

MLF: According to Latindadd view, this paragraph should be maintained, because it is necessary to build acceptable principles to prevent the irresponsible lending and borrowing. These principles must take in account the experience of historical debt process, specially the bad behavior of a few major private banks that have been using debt procedures to take public money from the nations, bringing unacceptable sacrifices to most people on earth. Besides, the existing WB and OECD principles are NOT acceptable for us, and need to be reviewed.

MLF: According to Latindadd view, the control of capital flows is urgent and necessary to prevent speculative movements that are damaging the real economy of the nations, and to identify criminal operations that use tax heaven places to 'hide'. For that, it's necessary to built rules to assure that control.

MLF: According to Latindadd view, the "loans to development" model must be reviewed, because a great part of them are made because the governments have very short money to invest due they spend a considerable part of their tax resources in order to pay their illegitimate debts. Thus, the so-called "development loans" need to be completely audited.

A new version of "loans to development" must be discussed and buildup focused in a real development which priority must be the human being and its real necessities of education and a decent life. The loans must provide funds to the real, productive and social economy, focused on the integrity of human rights, in a truly democratic and participative society - through universal access to basic public services - and to generate sustainable production, respecting ecological system and preserving cultural knowledge.

These Principles are presented as a draft to fuel discussion and debate so as to move the dialogue towards an internationally agreed consensus. The process of converging towards agreed principles aims to be transparent and inclusive in a multi-stakeholder forum. The current draft is intended to be a point of departure for international discourse that will be subject to further discussions and revisions, which includes the possibility to introduce new principles. Further comments and feedback are welcome.

An expert group was established to contribute to the process of drafting these proposed Guidelines. The group is composed of world renowned experts in law and economics, senior representatives from the IMF, the World Bank, OECD, Paris Club, private investors and NGOs. After two formal meetings and many exchanges, the first draft of the set of Principles has emerged.

MLF: Latindadd request that our comments should not be reduced to a single line, otherwise our opinion is not even known, and there will not be possibility of consensus from our organization in a Draft that doesn't take in account our arguments.

UNCTAD is grateful for the inputs and contributions provided by members and observers of the expert group, external consultants and UNCTAD staff who worked in

their professional capacities. The views expressed here do not necessarily represent the views of their institutions or organizations.

PRINCIPLES ON PROMOTING RESPONSIBLE SOVEREIGN LENDING AND BORROWING

These voluntarily Principles aim to prevent irresponsible practices in the area of sovereign ~~lending and borrowing~~ financing and are applicable to all types of sovereign obligations irrespectively of the provider of funds.

MLF – According to Latindadd view, the word "voluntarily" weakens the UNCTAD efforts to build principles that should be taken as a rule to drive the financing process back to real financing activities, preventing speculative, criminal and other bad behavior that has been using "debt" instruments to take public resources into a minority privileged private sector.

Creditor and Debtor, whether present and/or future, are used to identify the parties involved in sovereign financing. Sovereign financing includes all types of transactions that have a sovereign or a political subdivision or instrumentality as a receiver and/or provider of monies and/or other kind of obligation representing a contingent or implicit liability. Whenever the singular form of any word is used, the same shall include the plural form of such word, whenever appropriate, and vice versa.

MLF – According to Latindadd view, the term "sovereign financing" must include the internal debts in bonds, which can be bought by foreign in general, and represent the new face of the external debt, with higher interest rates and worse conditions to most countries.

Commentator	Main Issue
IMF	The draft would benefit from distinguishing Principles relevant for lenders or borrowers.
PC	The Principles proposed by UNCTAD mostly target loans aiming at financing projects and not lending and borrowing directly on financial markets, which is the predominant means of financing for developed and emerging countries. Therefore, the scope of the Principles, i.e. addressing the issues raised by lending and borrowing to/from sovereign developing

	countries, should be made clearer in the introduction.
Italy	The Principles appear to be proposed to prevent irresponsible practices that can damage developing countries/ODA recipients; but this is not clearly stated. The opening statement in the Principles could be amended as follows: "These Principles aim to prevent irresponsible practices in the area of sovereign lending and borrowing to/from developing Countries/ODA recipients. It is not clear if the Principles encompass only lending from sovereign to sovereign (essentially only ODA loans and ECA backed export credit) or if all lending to sovereigns is covered, as one can imply reading par. I.1, which states "sovereign borrowing and lending to sovereigns involves diverse interests, including future generations of citizens, and a wide range of public and private, domestic and international claimants". We are open to discuss the idea that these Principles should cover private lending to sovereigns. In addition, limiting the scope to sovereign borrowers makes it difficult to see the whole picture. Therefore, we would add that also loans representing a contingent or implicit liability for the State should abide to the Principles.

MLF: According to Latindadd view, the Draft built by UNCTAD efforts should cover all kinds of public debts, because the debt audits have proved that there has been many conversions and exchange of existing illegitimate or illegal debt contracts or bonds into new types of bonds or other financial markets instruments, in order to try to legitimate the process, always benefiting only the private financial sector.

I. FIDUCIARY DUTY

1. Sovereign ~~borrowing and lending to sovereigns~~ financing involves diverse interests, including future generations of citizens, and a wide range of public and private, domestic and international claimants on state resources.

Commentator	Main Issue
IMF	It would seem useful to clarify the scope of the financing transactions to be covered under the Principles.

MLF: According to Latindadd view, the Draft built by UNCTAD efforts should cover all kinds of public debts, because the debt audits have proved that there has been

many conversions and exchange of existing illegitimate or illegal debt contracts or bonds into new types of bonds or other financial markets instruments, in order to try to legitimate the process, always benefiting only the private financial sector.

2. There is a presumption of international law that recognized governments have the legal authority to bind their states in matters of international relations and commercial affairs.

Commentator	Main Issue
AP	add at the end "... and that their successors must honor any commitments undertaken".
JW	Recognition is an ambiguous key: by some governments (so Abkhazia would be entitled to take sovereign loans?) or by all (so China would not, because there is still a rump of countries that recognize Taiwan?). Moreover, this standard might preclude the international community preventing a regime from sovereign borrowing on grounds of odiousness.
PC	This principle should be more assertive: recognized governments do have the legal authority to bind their States. This is not only a presumption.
US	Governments do have the legal authority to bind their states. This is not only a "presumption." Regarding the notion of "recognized governments," the U.S. government "recognizes" countries, not particular governments. It would be better to say is that "duly authorized representatives of states have authority to speak for – and to legally bind – their respective states." Regrettably missing from this section (or anywhere in the draft) are clear Principles that: 1) contracts freely entered into between debtors and creditors are binding on those parties unless all parties (or their successors) agree to amend the contracts; and 2) governments are bound by loan agreements concluded by their predecessors.

MLF: According to Latindadd view, their successors must audit the process and honor only the legal and legitimate debts.

MLF: According to Latindadd view, in Latin America the actual external debt and good part of internal debt has its origin in the totally illegitimate dictatorships since the 60`s till the 80`s. These dictatorships can NOT be considered as "recognized governments" to the effects of this Draft.

3. Governments are agents of the state and stand in a fiduciary relationship to their present and future citizens.

Commentator	Main Issue
US	The premise of this entire section is that nation-states have a "fiduciary relationship" with their "present and future citizens." In the case of the United States, the U.S. government certainly has a "duty" to its citizens. But the words "fiduciary relationship" and "fiduciary duty" incorporate concepts from trust law that imply a special duty of care with respect to certain kinds of financial and/or property matters. We would not say that the U.S. government has this kind of relationship with or duty to all of its citizens, let alone its "future citizens."

MLF: According to Latindadd view, if the paragraph stands, it should also include the Governments' responsibility over the illegal and illegitimate debts transactions, that must to be extinct.

II. TRANSPARENCY & ACCOUNTABILITY

4. The process for obtaining financing ~~contracting~~ and assuming sovereign debt obligations and liabilities should be transparent. Governments should put in place arrangements to ensure proper oversight of official borrowing or other forms of financing and guarantees by state-related entities. All new financing should be incurred according to specific national norms and, t~~T~~o the extent possible, ~~all new indebtedness proposed by an executive body ought to~~ be approved by a legislative body.

Commentator	Main Issue
IMF	Requiring all new loans to be approved by a legislative body may not be practical or even consistent with many countries' established procedures
JHK	Neither am I convinced that the Principles as they currently are stated would give the citizens sufficiently oversight and control over government lending and borrowing – which is a key objective of this whole exercise. These aspects should be seen as an integral part of the due diligence Principles.
PW	It is it universally true that borrowings are authorized by legislation? Much of it is done under enabling powers.
PC	The form taken by the approval of a loan should be left to constitutional arrangements in every country. The last sentence of this principle seems therefore too intrusive.
US	The implied desirability of loan-by-loan legislative approval is excessive. Perhaps the principle should be the desirability of legislatively-granted

	authority to the executive to incur new indebtedness.

MLF: According to Latindadd view, we agree that the Principles must be better stated to guarantee the necessary transparency on debt transactions, as we obtained in Ecuador in the official debt audit with citizen participation.

In addition, the approval by a legislative body is necessary to guarantee the transparency on debt transactions, which is the main principle of the paragraph. For that reason, all kinds of debt transactions should be easily reachable by any citizen, through a system of transparency and accountability with public access.

All terms and conditions of a financing agreement ~~debt obligation~~ ~~agreement~~ including its purpose—should be included in a single written document signed by all parties and be disclosed and made publicly available ~~. The terms and conditions of the agreement must be available~~ in the official language(s) of the country.

Commentator	Main Issue
AG	All documents relevant to a debt obligation be truly accessible to the stakeholders in real time.
JHK	A reference to the intended benefits of the loan should be included in this principle.
AP	This principle should include a reference to "how amounts contracted will be serviced and repaid"
PW	This principle does not seem feasible. I wonder if there is another way of addressing seriously abusive practices?
PC	The purpose of the loan should not necessarily be part of the terms and conditions of a debt contract. For instance, this is not possible in the case of general budgetary assistance, which is an increasingly important form of assistance, allowing for a better ownership in developing countries. More generally, general public disclosure of terms and conditions of a debt agreement could entail problems relating to data protection and confidentiality, in particular in the case of a private lender. This could also induce additional administrative burden. The OECD Sustainable Lending Principles do not envisage a general publication.
Italy	We think that the purpose of a loan should be declared. At the same time, in those cases where the lender is a private entity not assisted by an ECA, the transparency requirement on all terms and conditions could be tempered by the necessity to recognize some degree of confidentiality.
US	It would be impractical to include the purpose of the loan in the case of general budgetary assistance and other types of non-project lending.

MLF: According to Latindadd view, we agree with the Draft proposal. In addition,

- All documents relevant to a debt obligation should be truly accessible to any citizen, not only to the stakeholders in real time;
- A reference to the intended benefits of the loan should be included in this principle;

- In the case of general budgetary assistance or other types of non-project lending exactly these terms should be mentioned as the purpose of the loan, because thus it is.

5. ~~Borrowers~~ Debtors should disclose complete and accurate information on their economic and financial situation that conforms to standardized reporting requirements.

Commentator	Main Issue
AG	This principle should refer to an agreed standard and mode of disclosure, not standardization in general.
IMF	This principle could include a reference to the IMF data dissemination standards (SDDS/GDDS).
AP	Use IMF's standardized reporting requirements.
JW	This principle state that borrowers have a responsibility to supply data to the IMF's Special Data Dissemination Standard. We should not be afraid to refer approvingly to the IMF where it is doing things right.
US	We support the general principle of the desirability of information disclosure by borrowers. That said, if/when it comes to turning Principles into Guidelines, it will be necessary to be much more precise than "standardized reporting requirements" when describing borrowers' disclosure responsibilities.

MLF: According to Latindadd view, the standardized reporting requirements must be clear to guarantee the necessary information to every citizen and not only to the borrowers and other institutions. Some standards consider only percentages (result of debt/exportation; debt/GIP; etc) and do not inform the Debt numbers (as every citizen needs to know, for example: nominal amount of each kind of debt, nominal paid interests, commissions and other costs and expenses related to each negotiation, conditions, clauses and attached compromises).

III. DUE DILIGENCE

6. Debtors are responsible for designing and developing a debt sustainability and management strategy and ensuring that their debt management is adequate. Creditors are also responsible to should contribute to that purpose and should not incite irresponsible practices. In the case of low-income countries, donors should stand ready to provide the needed technical assistance. ~~Lenders~~

MLF: According to Latindadd view, Debtors and Creditors are equally responsible for debt transactions and practices. There must be a further discussion on the Principles about the Co-responsibility of creditors, the historical asymmetry between parts, the

violation of international right principles like Reasonability, *Rebus sic Stantibus,* the Right to Development and Right to Sovereignity and use of debt process to Violation to Human Rights

7. Creditors and ~~borrowers~~debtors should undertake ex ante qualitative and quantitative macro-economic credit analyses based on the best available information.

Commentator	Main Issue
AP	Re-draft the principle to include: Lenders and borrowers should undertake ex ante qualitative and quantitative ~~macro-economic~~ credit risk analyses based on the best available information.
US	To elaborate on the "best available information," reference should be made to information available through the IMF and World Bank Debt Sustainability Framework.

MLF: According to Latindadd view, the Principles must clear up the necessary information to guarantee to both Debtors and Creditors, and also civil society, the knowledge of the macroeconomic situation.

8. ~~Borrowers~~ Debtors and creditors ~~lenders~~ should conduct an assessment ~~cost risk analysis~~ of debt sustainability levels as part of their due diligence. In performing this analysis and setting debt thresholds, a number of factors should be considered including, inter alia, the interaction between private external debt and public debt, the maturity and currency composition of debt and, the flexibility of fiscal and monetary policies. Debt sustainability thresholds could be higher for countries with a large share of debt which is more closely related to countries' capacity to repay, as is the case with obligations linked to commodity prices or real GDP.

Commentator	Main Issue
AG	A common reference point for establishing a range of sustainable outcomes.
IMF	This principle could stress the importance of an aggregate approach to debt sustainability, and the advantage for both borrowers and lenders to use common instruments and Principles in this area (for example the debt sustainability framework of the World Bank and IMF).
AP	Borrowers and lenders should conduct an assessment ~~cost risk analysis~~ of debt sustainability levels as part of their due diligence.
JW	We need to give some guidance as to how much is too much (e.g. Greece).
JW	Vague: higher than what?
PC	It is important to mention that the IMF and the World Bank have developed a methodology to perform debt sustainability which is widely

	recognized as relevant. They already conduct Debt Sustainability Analysis which are already used by lenders, such as sovereign and multilateral lenders, in order to estimate the sustainability of the debt of those countries (low, moderate or high risk of debt distress). For low income countries, the Debt Sustainability Framework developed by the IMF and the World Bank, is key to guide responsible lending and borrowing practices and should therefore be promoted by the Principles. According to the actual level of the debt of the country and its capacity to manage the debt, the DSF is a useful tool, recognized widely, in order to set the capacity of the country to borrow while keeping a sustainable level of debt. Last but not least, whenever the country is under an IMF program, the program might set rules relative to the indebtedness of the country (level of concessionality of the loans contracted or maximum non concessional lending authorized for example). Those rules play also a significant role to ensure responsible lending and borrowing.
Italy	Debt sustainability cannot be assessed on a loan-by-loan basis.
US	In elaborating the factors to be considered, the Principles should cite and promote the IMF and World Bank Debt Sustainability Framework, which is widely recognized as a useful methodology in assessing debt sustainability and has already been endorsed by virtually all UNCTAD member-states. For countries on IMF programs, the relevant factors should also include any program conditions related to the level or concessionality of new debt to be incurred during the program period. Indeed, a useful principle would focus on minimizing the chances that new lending undermines efforts by the international financial institutions to promote sound economic management in the borrowing country. Perhaps: "New lending and borrowing should not, in the view of the international financial institutions to which the borrower may belong, conflict with efforts of, or programs supported by, these institutions to promote sound economic management in the borrowing country." We believe it is inappropriate to include normative statements about any particular debt instrument, such as those whose amortization is linked to external variables (e.g. commodity prices).

MLF: According to Latindadd view, the IMF and World Bank Debt Sustainability Framework, have failed for decades (in Argentina, for example). To have a serious analysis of debt sustainability we should audit and take off the illegal and illegitimate debts, which should be extinct.

9. For purposes of due diligence, debtors ~~borrowers~~ should provide among others the following information: (i) accurate and timely fiscal data; (ii) level and composition of external and domestic sovereign ~~government~~ debt including maturity, currency, and forms of indexation and covenants; (iii) debt generating contingent explicit and implicit liabilities; (iv) external accounts; (v) the use of derivative instruments; and, (vi) details of any kind of sovereign guarantees~~; and, (vii) the institutional capacity of the debt management office~~.

Commentator	Main Issue

IMF	It is unclear how a borrower would share information on "the institutional capacity of the debt management office". It would seem better to say that borrowers are responsible for designing and developing a debt sustainability and management strategy and ensuring that their debt management is adequate. In the case of low-income countries, donors should stand ready to provide the needed technical assistance.
JW	This principle should state that lenders have a responsibility to study the data called for in Principle 6

MLF: According to Latindadd view, the Principles must clear up the necessary information to guarantee to both Debtors and Creditors, and also civil society, the knowledge of the macroeconomic situation.

10. Parties dealing with agents of the state have an independent responsibility to inquire into the background of the financing ~~debt obligation~~, acknowledging that money is fungible.

Commentator	Main Issue
IMF	Who are the "parties dealing with agents of the state"?
JW	Individual loans should be evaluated in the light of their impact on the general debt situation of a country, rather than it being assumed that individual loans can be meaningfully evaluated in isolation (fungibility is a fact which must be recognized.)
PW	This is an anti-fraud provision which might impose unrealistic obligations on lenders. Nevertheless, the purpose of borrowing is often a normal part of credit analysis and I wonder if there is some other way of making the point.
PC	This appear very far-reaching and we believe that compliance with it would involve a disproportionate effort.
US	It is very unclear what the main import is of this principle or how it would be translated into a practical guideline. It appears to suggest that because money is fungible, lenders have an obligation to enquire as to the "real" purposes for which the sovereign is seeking the loan, notwithstanding the ostensible purposes that the sovereign claims for the loan. In other words, sovereigns cannot be trusted, lenders need to perform due diligence as to the purposes of the loan, and (implicitly) the loan may be unenforceable if it is entered into for an "impermissible" purpose, whatever that may be. If that understanding is correct, the principle would be in direct contradiction to paragraph 2, especially as we have proposed clarifying that paragraph above, and should be deleted.

11. Due diligence should consider whether (i) the financing ~~debt obligation~~ has been appropriately authorized; (ii) the official representatives entering into an agreement have the authority to bind the state; and (iii) there are any features of

the transaction that would cause the debtor ~~borrower~~ and the creditor ~~lender~~ to violate any norms or contractual commitments to third parties.

Commentator	Main Issue
JHK	Who are the "third parties" referred to in (iii)?
PC	At present, the OECD Principles only require confirmation from the local government authorities, defined as follows: "buyer government authorities in the buyer country are those authorities that, according to the buyer specific national legislation, are responsible for the country's development and borrowing plans".
US	The phrase "violate any norms" is excessively broad. Also, subparagraphs (i) and (ii) appear to attempt an altered reformulation of the concepts set out in paragraphs 2 and 4 above; if so, this paragraph and those paragraphs should be made consistent.

IV. AUDIT

12. The ~~borrower~~ debtor should conduct independent periodic audits of their debt portfolios to assess the validity and legitimacy of the recently incurred obligations. ~~and publicize t~~ Debt audits should assess ~~address~~ the financial, economic and social consequences of sovereign financing ~~particular borrowings~~. The findings of such audits shall be publicized to ensure transparency and accountability in debt management.

Commentator	Main Issue
MLF	Audit Existing Debt
AG	This section should set out the criteria for a legitimate audit process. Under what conditions it should be accepted by any or all of the stakeholders?
IMF	Rather than independent debt audits, is the issue not more generally the need for governments to review periodically public policies to assess that meet their assigned goals? If so, this goes beyond debt issues, and may not be appropriate for these Principles to cover
JW	I would prefer its total deletion on the grounds that we should not encourage additional bureaucratic processes. But at the very least the last sentence should go as it is a denial of fungibility.
PC	This paragraph does not explain the purpose of this kind of audit and therefore is very problematic.
US	While we value transparency, it is unclear how an audit of debt portfolios would serve the stated objective of accountability. Moreover, that an audit might associate a loan with negative "financial, economic [or] social consequences," particularly if these could not be foreseen at the time of loan agreement, would not diminish the validity of the lender's claim to repayment. If this principle is to be retained, it should be clarified by elaborating that, "An audit's finding that a loan did not accomplish the purposes stipulated at the time of loan agreement would not absolve the borrower from obligation to repay." In the same connection, we wonder

	about the basis for the principle that the "social consequences" of particular borrowings should be audited.

MLF: According to Latindadd view,

- We ask that our suggestions sent in September/2010 be completely included - like the Draft does with other members of the expert group – so that the purpose of the paragraph gets clear for all members.
- The existing debt audit and other investigations based in documents have proved that currently, most of the debts that have been undertaken by southern countries are destined to pay previous illegitimate and illegal debts. So, the first fundamental step, to ensure that the loans be "responsible", is to audit the existing debt and to refute the illegal or illegitimate debts. There is a history of odious and illegitimate debt, so countries should audit their debts and have the right to unilateral cancellation of part or all of these debts, as in the case of Ecuador. There should also be an "Independent Court of Arbitration" to settle differences in this matter as well as regular audits of the debts. Countries should be provided with an appropriate finance system with principles of transparency and accountability, as well exists in other economic spheres. Any illegal and/or illegitimate debt should not be paid.
- We do not agree that the audit should reach only the "recently incurred obligation", as it is in "red" in the Draft, because recently incurred debts are being done to pay original illegal or illegitimate debts
- The audit process should be Integral, as in Ecuador, reaching not only financial and economic matters, but also social, historical and ecological impacts and the Right to Sovereignty must be respected in the audit process.
- It is indispensable and totally fundamental that the Principles cover the necessity of debt audit, otherwise, the reason of these efforts to built basic principles to "Responsible Sovereign Lending and Borrowing" falls down.
- The debt audit process is not a bureaucratic process (as said in one of the comments), but a crucial and appropriate step to guarantee "Responsible Sovereign Lending and Borrowing" and avoid the utilization of debt process as a mechanism of transference of public funds to the private financial sector.

V. COUNTRY OWNERSHIP

13. New ~~lending and borrowing~~ financing should not conflict with the country-designed development strategy in effect at the time of securing such financing.

Commentator	Main Issue
MLF	No conditionality
AG	Design and ownership by an oppressive regime should be excluded, as should a strategy that is badly designed and harmful to some or all stakeholders.

JW	Probably delete.
US	This principle is impractical and could not be translated into a useful guideline. As drafted, it assumes, in the face of ample experience to the contrary, that the borrower's development strategy is a good one. The strategy might or might not be one approved by the international financial institutions or other representatives of the international community. Also, who is competent to decide if a loan "conflicts" with the borrower's development strategy? If these issues could somehow be resolved, it would at a minimum be necessary to limit the reference to those development strategies "in effect at the time of the loan agreement."

MLF: According to Latindadd view,

- We ask that our suggestions sent in September/2010 be completely included - like the Draft does with other members of the expert group – so that our position is clear for all members.
- Debt instruments should not have any conditionality that interferes in internal national matters. Countries have the sovereign right to manage their policies and public finances, not only in tax matters but also on issues of regulation and capital flows control. The International Financial Institutions should not impose policies that violate the countries interests and rights. Countries must be less dependent on external financing by the sovereign control of their own resources.

VI. SOCIAL RESPONSIBILITY

14. Sovereign debtors ~~borrowers~~ and creditors ~~lenders to sovereigns~~ should take into consideration the consequences of their activities; and, abide by internationally recognized treaties and conventions.

Commentator	*Main Issue*
IMF	This principle is vague and unclear, and could be drafted more precisely.
JHK	The paragraph should be amended so that it states: "Sovereign borrowers and lenders to sovereigns take into consideration the consequences of their activities; and, abide by internationally recognized treaties and conventions".
JW	Probably delete
PC	This paragraph is quite weak. The OECD Guidelines mention explicitly the need to take into account of human rights, governance, environmental and social conditions. A more explicit statement of the importance of those issues should be made.
US	This assertion is indisputable in principle but hard to translate into a guideline. Who decides if such consequences were considered and the relevant treaties were abided by? What is the effect of a negative finding? This principle is too broad and, in guideline form, could become a pretext to rationalize repudiation. Also, private lenders are not necessarily bound by "internationally recognized treaties and

	conventions," which are binding on governments, not private parties.

MLF: According to Latindadd view,

- We ask that our suggestions sent in September/2010 be completely included - like the Draft does with other members of the expert group – so that our position is clear for all members.
- Loans for development should not lead to or encourage violations of human rights, displacement, social conflicts, and environmental impacts. Similarly, the criteria for funding should not be strictly economic; it should take into account the impact on development. Negotiations with corrupt governments or dictatorships (military or civilian) must be banned.
- If the text of the paragraph will be amended (like suggested in one of the comments) we add: "Sovereign borrowers and lenders to sovereigns MUST take into consideration the FINANCIAL, ECONOMIC, ENVIRONMENTAL AND SOCIAL consequences AND THE HUMAN RIGHTS IMPACTS of their activities; and, abide by internationally recognized treaties and conventions".

VII. CONTRACTUAL COVENANTS

15. Financing agreements and other ~~Debt obligations~~ instruments may include covenants stating that the debt cannot be sold to a third party without the explicit authorization of the ~~borrowing~~ debtor country. However, the presence of such covenants should not be a requirement ~~for borrowing~~. Third parties acquiring discounted debt in the secondary markets should not expect better treatment of their credit ~~debt~~ than that of other public or private creditors.

Commentator	Main Issue
AG	Restrictions on assignment may make sense in official debt, but not in private bonds
JHK	[Vulture Fund covenants]: The paragraph should be more mandatory: "Debt obligations MUST include…."
JW	I want to know whether the lawyers think this is a feasible way of disciplining vulture funds.
PW	I do not think that this principle is appropriate. It obviously cannot apply to capital markets instruments and in any event transferability of property is fundamental to the idea of ownership.
PC	The presence of covenants stating that the debt should not be sold to a third party without the authorization of the borrower is a principle we consider as a useful way to avoid the selling of the debt claims to vulture funds. However the scope of this paragraph should probably be restricted to specific cases (loans to the poorest and more indebted countries) because such a constraint could also be detrimental to the liquidity of sovereign debt secondary markets.
US	The reference to optional inclusion of no-sale clauses should be limited to the poorest borrowers, in order to avoid inadvertent harm to the

	operations of secondary markets for sovereign debt.

MLF: According to Latindadd view, the paragraph should include the obligation for all markets to transparence completely the negotiations (including amount and parts) dealing with sovereign debt bonds, to avoid utilization of debt issues as a speculative paper, which signifies strong consequences to peoples and countries and benefit only bad behavior of private financial sector.

16. It is recommended that debtors ~~borrowers~~ and creditors ~~lenders~~ should include collective-action clauses in their multi-party debt instruments to facilitate the restructuring of obligations should circumstances require a modification of the original terms.

Commentator	Main Issue
MLF	Discourage the use of CACs because they come with other clauses.
JHK	[CACs]: The paragraph should be more mandatory. BORROWERS and lenders MUST...." (delete the "It is recommended that..").
US	We support the general recommendation to include collective action clauses, though the principle should be qualified to make clear that it does not apply to government-to-government lending or loans extended by the international financial institutions. Regarding government-to-government loans, a useful principle would cite the desirability of having all significant official bilateral creditors participate in an established multilateral forum for managing sovereign debt workouts, e.g., the Paris Club. We also lament the omission of any other Principles relating to debt restructuring: the desirability of debtor-creditor dialogue, voluntary agreement, good-faith process, fair treatment, etc.

MLF: According to Latindadd view,

- We ask that our suggestions sent in September/2010 be completely included - like the Draft does with other members of the expert group – so that our position is clear for all members.
- This item should be deleted because the existing audits and other investigations based in documents have showed that collective-action clause – as it is in debt contracts - comes together with other clauses that allow the lender to disregard the sovereignty of the indebted country to define the way in which the debt should be restructured.

VIII. APPLICABLE LAW & JURISDICTION

17. The parties to a debt obligation should agree on the applicable law and jurisdiction.

Commentator	Main Issue
PW	The public debt of many countries does not state applicable law and jurisdiction. This is a considered a matter for the contract and the parties.

MLF: According to Latindadd view,

- There should be an "Independent Court of Arbitration" to settle differences in this matter as well as regular audits of the debts.

Countries should be provided with an appropriate finance system with principles of transparency and accountability, as well exists in other economic spheres.

18. A debt obligation is binding and has to be honored on the presumption that it is valid and enforceable until a competent authority rules to the contrary. Debtors and Creditors are bound by the obligations concluded by their predecessors.

Commentator	Main Issue
IMF & JHK	It is unclear who the "competent authority" would be
JW	Presumably a competent authority would be a court of the country according to whose law the contract has been signed, why not say so?
PC	The meaning of this paragraph is self-evident but its drafting could be misleading. Therefore we suggest deleting it.
US	This principle provides an open invitation to debt repudiation and must be deleted. What "competent authority" may opine on validity and enforceability? According to what criteria? Instead, the principle must be: "Contracts freely entered into are binding on the parties to them (and their legal successors) unless all parties (or their successors) agree to amend them."

MLF: According to Latindadd view,

- We ask that our suggestions sent in September/2010 be completely included - like the Draft does with other members of the expert group – so that our position is clear for all members.

- This item should be deleted because countries should be allowed to cancel their debts in a sovereign manner, based in results of debt audits (that should guarantee the participation of civil society, as in the case of Ecuador). Otherwise, the debt will continue enslaving the people indefinitely, obligating states to take more loans to pay current illegitimate and illegal debts.

19. It is desirable that the parties adopt these Principles on a voluntarily basis in their negotiations and drafting of their debt agreements.

Commentator	Main Issue	Secretariat's Observations
AG	What is the intended effect of these Principles where the parties do not refer to them explicitly? Should they be ignored altogether, be less persuasive to a judge, or apply regardless?	Since there still is a lack of consensus and we still need to gain support from different constituents we consider that it is better to keep these Principles on a "soft" law basis. If the Principles are widely accepted and become common practice this can change (although in practice will not be required).
JHK	The paragraph should be more mandatory: "THE parties MUST adopt....." (delete "It is desirable that the"... and "on a voluntary basis").	See comment above.

MLF: According to Latindadd view, the paragraph should be more mandatory, because the initiative of the Draft comes from UNCTAD, and, as an important part of UN, that has the mission to defend humanity from the reasons of the tremendous lack of Human Rights and Justice nowadays, like the illegitimate and illegal debt process that must come to at least some few principles like this initiative is trying to build.

20. If these Principles have been adopted by the parties, it is advisable to include a reference to the Principles in order for a competent judge to be able to take them into account in the event of any dispute. The following wording is recommended: "The parties to this [agreement] acknowledge that they have used the Principles on Promoting Responsible Sovereign Lending and Borrowing during the negotiation and drafting of this [agreement] and therefore are bound by their terms".

Commentator	Main Issue
IMF	We wonder what would be the legal value of the proposed provision. This raises the question of what would be the nature of the Principles that would allow them to have legal force.
JHK	More mandatory: "A reference to the Principles MUST BE INCLUDED IN THE CONTRACT in order for...." (delete "If these Principles have been adopted by the parties, it is advisable to include a...").
PW	I doubt that parties would be willing to allow the strict contract terms they have agreed to incorporate these Principles into their contracts. I believe that these propositions are not contractual terms but rather are codes of conduct separate from the contracts themselves.

PC	We understand that those draft Principles are not legally binding: therefore this paragraph is misleading and introduces ambiguity on the legal force of the draft Principles and it should be deleted.
US	This Principle (jointly with the previous one) go beyond development of Principles per se and deal with how the agreed Principles should be used, i.e., they prematurely enter the realm of actionable Guidelines. We would prefer to focus on the Principles at this stage. Only when/if there is international consensus on the Principles would we be in a position to consider how those Principles might be then translated into actionable Guidelines. These paragraphs should therefore be deleted.

MLF: According to Latindadd view, the paragraph should be more mandatory, because the initiative of the Draft comes from UNCTAD, and, as an important part of UN, that has the mission to defend humanity from the reasons of the tremendous lack of Human Rights and Justice nowadays, like the illegitimate and illegal debt process that must come to at least some few principles like this initiative is trying to build.

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General Issues Raised by the Experts

Commentator	Main Issue
JK & JHK	The Principles need to at least consider sanctions mechanisms for various types of non-compliance
JK & JW	There is a need for a debt workout mechanism.
AP	Short and obscure general Principles will do little to change actual behavior in sovereign lending/borrowing. Only a sharper edge will do that, and thus his constructive suggestion "that we include under each Principle a discussion of its practical implications."
JW	I would have preferred to see the main body of the Principles divided into those relevant for borrowers and those relevant for lenders.