

Comments to draft version of the UNCTAD Guidelines

We welcome a guide to implementation of the Principles and are grateful for the opportunity to comment on this draft version. The Guidelines for implementation are an important extension of the Principles, as they have the potential to make the Principles more tangible and thereby increase compliance. However, if the Principles are to durably change the behavior of sovereign lenders and borrowers, as they aim to do, the Guidelines must be significantly strengthened.

Comments on style:

One of the main purposes of the guidelines is to take the responsible borrowing and lending agenda further and promote the actual implementation of the UNCTAD Principles by moving from the abstract principles approach to a concrete guidelines approach. This step is key to inform decision-makers and practitioners about what steps to take in order to implement the principles in practice, and what kind of lending and borrowing can be considered compliant with the Principles, or not. We believe that the current draft of the principles is still too abstract to achieve this.

The guidelines would be more useful for all relevant stakeholders if they were presented in a much more precise manner, for example in a 'tick the checkbox' style, wherever possible. The authors should keep in mind to draft a 'user's guide' or even an 'idiot's guide' to the implementation of the UNCTAD principles. The interactions that we as CSOs had with governments since the launch of the principles indicate that even the most sympathetic do not fully understand what they are expected to do. It seems that much of the decision-makers' reluctance to implement or even endorse the Principles is due such uncertainties. The guidelines should eliminate such uncertainties to the maximum extent possible, which requires precision and clarity.

On this occasion, we would encourage the drafting team to revisit CSO products on the responsible financing theme such as the Eurodad Responsible Financing Charter or the Afrodad Borrowing Charter. These give, while addressing largely the same thematic axes as the UNCTAD Principles/Guidelines, often much clearer guidance.

The Guidelines variably employ description and prescription, and it is not always clear why. Under some principles, a list of examples of implementation are described without clarifying which examples are best practice, while under other principles, there will be normative comments on what a lender or borrower "should do" in order to adhere to the Principles. We commend the presentation of examples that could be useful to countries looking to implement the Principles, and recommend that these are emphasized more. Furthermore, we would like to see more explicit recommendations on how the Principles could best be implemented, instead of just a list of descriptive examples. The Guidelines must provide a minimum benchmark for compliance that countries could aspire to reach.

Comments on content:

Not all of the examples listed constitute best practice in the field. For example:

- **Principle 4** lists a few places where lenders can find information on debt sustainability, such as the IMF and credit rating agencies, without assessing the quality of these sources. This is unfortunate, as IMF has faced on-going criticism of their debt sustainability analyses that are often unrealistic and too optimistic. We would have liked to see the Guidelines go further in many ways, in order to ensure responsible lending and borrowing. We welcome the reference to the odious debt doctrine under principle 4 and would like to see this elaborated on and some examples provided.
- **Principle 5** on project financing covers an important part of development finance, and we are happy to see that the Guidelines outline clear recommendations to the lenders and that project financing is required to be in line with the debtors' development plans. We suggest that the question of loan tying is elaborated on in this section. Loan tying has often resulted in poor project financing that has been more geared towards the lender's interest in selling goods or services than towards the developmental aims of the borrower country. Moreover, there is no reference to human rights or labor impacts, although these would certainly qualify as "likely effects" of many loan-financed projects.
- **Principle 8**, it would make sense to include a reference to odious debt. Again we recommend that the Guidelines actually refers to best practice such as those referred to in part II, where several jurisdictions have rules stating that a contract is null and void if it lacks due authorization (Germany, Brazil, India). Furthermore, we welcome that other UN guidelines are employed, such as the UN Convention on Corruption, OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights. We suggest that the Guiding Principles on Debt and Human Rights and the Eurodad Responsible Finance Charter are also referenced where relevant.
- **Principle 9**, pointing to the example of Serbia, undermines the sovereign's freedom to protect the wellbeing of its citizens (as Principle 8 stipulates), as the case in Serbia is that public debt repayment, by law, has priority over social expenditures. We propose that the UN Guidelines on foreign debt and human rights are references here instead.
- **Principles 9** relates to what constitutes a binding loan agreement and part II of the Guidelines states that although debt contracts should be honored, there are exceptional cases where the debtor is either in a «state of economic necessity» that prevents timely repayment, or «a competent legal authority may rule that circumstances giving rise to legal defense have occurred». Although we commend the inclusion of examples of types of legal defenses that a debtor can invoke, we would like to request some examples of this. One relevant example could be Argentina, where the court ruled that Argentina's debt stemming from the military dictatorship was illicit and illegal.
- In addition, this part of the Guidelines narrows down the scope of the legal defense, arguing that the circumstances of the borrower can only give rise to two types of legal defenses:

1) The Guidelines argue that natural disaster can be made as a legal defense, but economic necessity is not an accepted argument in international law. We would rather see a reference to the UN Guidelines on debt and human rights which argues differently.

2) Circumstances at the time of contraction only mention fraudulent actions from the lender, and if there has been a breach of UN sanctions. There is no reference to the previous case of German rules, where lack of authorization makes a contract null and void, nor is there reference to the obligation for the lender to make a realistic assessment of the borrower's capacity to service the loan or act in good faith. The language in part III makes it unclear what actions, or lack of such, could make a contract null and void.

- Notably, the Guidelines' recommendations on restructuring (**7 and 15**) are disappointing. We propose that some examples of best practice are cited here, as is the case with most of the other principles. For example, the case of Norway's cancellation of illegitimate debt or the London Accord of 1953 and particularly Indonesia 1969/70, where an independent mediator played a key role would be some relevant examples for Principle 7. More examples are needed to clarify what the terms «manifestly unable to service its debt» and act in «good faith and with cooperative spirit to reach a consensual re-arrangement of those obligations», really entails. We would also like to see a reference to the need for space to challenge the legitimacy of claims during the verification of claims process, i.e. by encouraging debt audits. This exercise will help borrowers and lenders to see the nature and the history of the loan, whether the lending process has been responsible or not and enable the parties to improve their lending practice.
- Strikingly, the Guidelines encourage debtors to seek economic adjustment programs with the IMF in face of repayment difficulties, despite the heavy criticism of these programs. The programs impose harmful conditions on debtors and are not an efficient path to alleviate countries' debt burdens. We strongly suggest that reference to the IMF is removed, and that more innovative examples are included.

While the launch of the Principles on Promoting Responsible Lending and Borrowing in 2012 was an important step towards more responsible lending and borrowing practices, this draft version of the Guidelines relies heavily on examples that encourage a creditor dominated status quo.

We strongly encourage UNCTAD to incorporate our suggestions, and thank you in advance for the consideration.

Kind regards,

SLUG - The Norwegian Coalition for Debt Cancellation

Jubilee Debt Campaign UK

Erlassjahr.de (Germany)

Eurodad - European Network on Debt and Development

World Economy, Ecology & Development – WEED (Germany)

Both ENDS (The Netherlands)

CNCD-11.11.11" (Belgium)