



Misión Permanente de la
República Argentina
Naciones Unidas

Ministerio de Relaciones Exteriores y Culto

ARGENTINA

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La Misión Permanente de la República Argentina ante las Naciones Unidas presenta sus atentos saludos a la UNCTAD y, con relación a la Nota AHCSRDP del Secretario General de fecha 12 de enero de 2015, tiene el honor de remitir adjunto a la presente los comentarios de la Argentina respecto de elementos a considerar para el establecimiento de un marco jurídico multilateral para los procesos de reestructuración de la deuda soberana. Dichos comentarios han sido asimismo remitidos por correo electrónico a las siguientes direcciones: marie.sudreau@unctad.org y myriam.azar@unctad.org.

La Misión Permanente de la República Argentina ante las Naciones Unidas aprovecha esta oportunidad para reiterar a la UNCTAD las expresiones de su consideración más distinguida.

Nueva York, 23 de enero de 2015

Conferencia de las Naciones Unidas sobre Comercio y Desarrollo

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Nueva York

**TOWARDS A MULTILATERAL LEGAL FRAMEWORK FOR SOVEREIGN DEBT
RESTRUCTURING PROCESSES
PROPOSAL BY ARGENTINA**

I. THE PROBLEM OF SOVEREIGN DEBT CRISES

Sovereign debt crises involve serious political, economic and social consequences which, in turn, affect the right to development and the full enjoyment of human rights, especially economic, social and cultural rights.

Sovereign debt restructurings are a frequent phenomenon in the international financial system contributing to the prevention and management of sovereign debt crises both before and after a sovereign default. These processes constitute an adequate tool in order to guarantee the sustainability of sovereign debt, an essential condition for sustainable growth and development. However, the lack of a proper comprehensive multilateral legal framework for the restructuring of sovereign debt in the international financial system has permitted a small cadre of highly speculative and litigious funds to scheme abusive strategies in order to collect windfall profits by blocking the legitimate efforts of sovereign States to find efficient, equitable, legal and sustainable solutions to their debt crisis.

Two main approaches have been proposed to solve this gap: a contractual approach and a statutory approach. Although one solution does not exclude the other, the modification of standard contractual clauses used in sovereign debt instruments, though a positive and important step forward, has proved insufficient in solving the multiple and complex challenges posed by sovereign debt restructurings.

A statutory approach, on the other hand, provides a more comprehensive and complete solution that adds to and complements the contributions of the merely contractual approach. A multilateral legal framework, reaching all sovereign restructurings, gives a cohesive and structured answer to the restructuring problem and deals with questions that the contractual approach cannot.

Among other benefits, the statutory approach proposed herein:

- Guarantees a uniformity of criteria;
- Results in a more predictable and legally secure process for the restructuring State and its creditors, as well as the international community;
- Encompasses more types of sovereign debt;
- Provides the restructuring State with the possibility to access immediate financial aid;
- Establishes a maximum length period during which the restructuring process must be completed, ensuring a rapid solution;
- Obliges restructuring States to comply with the principles and rules established in the legal framework (i.e. equal treatment of creditors; transparency) that otherwise would only remain voluntary for the State;

- Provides a stay on jurisdictional proceedings and enforcement measures, facilitating a more orderly and faster restructuring, reducing the costs of the process.

There is a need for States and relevant international organizations to adopt all the necessary measures to prevent any actions —and their effects— that may frustrate or impede the implementation and completion of sovereign debt restructuring processes with a view to providing lasting and sustainable solutions to sovereign debt crises.

II. PREMISES OF THE PROPOSAL

Argentina proposes a legal framework that facilitates the orderly restructuring of sovereign debts, allows the re-establishment of viability and growth without creating incentives that inadvertently increase the risk of non-compliance and acts as a deterrent to disruptive litigation.

The proposed legal framework comprises a series of principles and a Multilateral Sovereign Debt Restructuring Mechanism, including the constitution of an Oversight Commission composed by three States that would participate voluntarily, allowing the engagement of the international community in key aspects of the sovereign debt restructuring process.

Premises on which the proposal is based:

- Sovereign debt restructurings constitute a sovereign decision.
- However, as problems arising from sovereign debt crises do not only affect the restructuring State but also the international community as a whole, the participation of the international community in the process must be guaranteed.
- Creditors subject to the jurisdiction of State Parties will be bound by the provisions of the proposed multilateral legal framework.
- The proposed multilateral legal framework embodies principles and rules that already bind all States under international law and its adoption can send an unequivocal signal of the commitment of the international community to those principles and rules.
- This multilateral legal framework allows for the restructuring of the current stock of outstanding debt.

III. MAIN ASPECTS OF THE PROPOSED MULTILATERAL LEGAL FRAMEWORK FOR SOVEREIGN DEBT RESTRUCTURINGS

1. STATEMENT OF THE PRINCIPLES APPLICABLE TO ALL SOVEREIGN DEBT RESTRUCTURINGS

The proposed legal framework codifies a set of existing general principles of law and customary rules regarding sovereign debt restructurings which include the following:

- A sovereign debt restructuring is a right of a State and a sovereign decision under international law.
- Under general international law, States have immunity from jurisdiction and execution, which must be respected and observed in good faith by all States, and the exceptions thereto must be given a restrictive interpretation.
- States may not, either through administrative or judicial authorities or through any of its agencies, exercise jurisdiction or adopt measures at the request of a creditor or a minority of creditors of a State, in such a way as to affect a restructuring agreement entered into between the debtor State and a majority of its creditors.
- Any waiver of immunity from jurisdiction and/or execution that a State may have included in its sovereign debt instruments cannot give rise to the adoption of measures that affect the claims and other rights of the creditors included in a sovereign debt restructuring agreement entered into with the debtor State.
- States and their creditors must act in good faith and in a spirit of cooperation during sovereign debt restructuring processes, with a view to arriving at an agreement that allows adjustment of obligations in a sustainable fashion, while safeguarding the principle of equal treatment towards creditors. As a corollary of the principle of good faith, the prohibition against fraud is especially significant and must be particularly taken into consideration in cases where a creditor simultaneously holds both sovereign debt securities and hedge instruments which may generate proceeds in the event of non-payment by the debtor State.
- Sovereign debt restructurings that are approved by a majority of a State's creditors cannot be jeopardized, frustrated or otherwise impeded by a non-representative minority of creditors.
- The decisions adopted by a majority of the creditors of a State must be binding upon the minority of creditors, even if they oppose such decision or have not participated in its adoption.
- Sovereign debt restructuring processes must be negotiated in a timely and transparent manner, within a reasonable term and subject to a framework that guarantees equitable, legal, sustainable and fair conditions.
- Sovereign debt restructuring processes and their outcome must be applied and interpreted considering, in full, the sovereign status of States and the political, economic and social consequences of these processes.
- Sovereign debt restructuring processes are an efficient tool in order to guarantee the sustainability of sovereign debt, the sustainable growth and development of States and equal treatment towards creditors.

2. CREATION OF A MULTILATERAL SOVEREIGN DEBT RESTRUCTURING MECHANISM

Argentina proposes the creation of a Multilateral Sovereign Debt Restructuring Mechanism whereby any State party to this framework (hereinafter State Parties) may propose to its creditors an agreement that may modify the amount of principal or interest, the maturity and/or any other original terms, conditions, or forms of payment of a sovereign debt with a view to fulfilling such State's obligations in a sustainable fashion.

The proposed Multilateral Sovereign Debt Restructuring Mechanism should be initiated at the request of the restructuring State. No other condition is required other than the will of a State to restructure its debt.

However, as sovereign debt restructurings do not only affect the debtor State but the international community as a whole, the debtor State should notify its decision to restructure the debt to both its creditors and all States Parties.

The commencement of the Multilateral Sovereign Debt Restructuring Mechanism shall not cause, in itself, the suspension of payments of the proposing State's sovereign debt. The proposing State may choose to initiate the Multilateral Sovereign Debt Restructuring Mechanism after having suspended payments or without suspending them.

The proposing State shall provide its creditors and the Oversight Committee for the Multilateral Sovereign Debt Restructuring Mechanism with information relating to the situation that triggered the initiation of the mechanism and the implementation of the economic policies which, together with the sovereign debt restructuring process, will allow its debt level to be sustainable in the future.

The proposing State shall ensure that the interests of creditors are genuinely and effectively represented during the course of the Multilateral Sovereign Debt Restructuring Mechanism.

2.1. Definition of sovereign debt determined by the restructuring State

To echo the different characteristics of sovereign debts around the globe and propose a solution that can adapt to each one of them, no definition of eligible debts is included in this proposal. It is left to each State to define which sovereign debts will eventually be subject to the restructuring mechanism.

However, following the practice of States, the concept of "Sovereign Debt" shall not include (i) debts of the State Party to other States and their agencies, (ii) debts of the State Party to international organizations, (iii) debts governed by domestic law and subject to the exclusive jurisdiction of domestic courts, (iv) debts incurred after the initiation of the Multilateral Sovereign Debt Restructuring Mechanism, notwithstanding the fact that they may be included in a subsequent Multilateral Sovereign Debt Restructuring Mechanism.

2.2. Conclusion of the multilateral mechanism

One of the main features of this Multilateral Sovereign Debt Restructuring Mechanism is that its conclusion is set in advance. The restructuring mechanism will conclude:

- When a restructuring agreement is approved; or
- By the decision of the restructuring State; or
- When 18 months have elapsed since the constitution of the Oversight Commission (extensible by a majority of creditors for an additional 12-month period).

2.3. Verification and registration of claims

It is proposed that the restructuring State establishes a procedure for verification and registration of claims. Within the framework of the process for verification and registration of claims, creditors should be required to state whether they, their subsidiaries or related companies have any hedge instrument or mechanism which may generate proceeds in the event of non-payment by the debtor State —or similar instruments— relating to the Sovereign Debt which is subject to the Multilateral Sovereign Debt Restructuring Mechanism.

The registration of claims in the register of claims shall grant creditors voting rights within the framework of the Multilateral Sovereign Debt Restructuring Mechanism. Creditors whose claims are not Registered Claims shall have no voting rights within the framework of the Multilateral Sovereign Debt Restructuring Mechanism. Notwithstanding the foregoing, their claims shall be subject to the provisions of the restructuring agreement reached between the creditors with registered claims and the proposing State. To avoid conflicts of interest, no credit held on behalf of the restructuring State or by any entity controlled by that State shall grant any voting right.

3. AN OVERSIGHT COMMISSION ALLOWS THE PARTICIPATION OF THE INTERNATIONAL COMMUNITY

3.1. Participation of State Parties

The proposed Multilateral Sovereign Debt Restructuring Mechanism comprises the creation of an Oversight Commission, composed by three States—one chosen by the restructuring State and the remaining two by all the States Parties—acting on a voluntary basis, which would allow the engagement of the international community in the restructuring process.

This Oversight Commission would be responsible for the supervision of the whole debt restructuring mechanism by verifying compliance with the guidelines and provisions of this legal framework. To achieve this objective, the Oversight Commission would produce a report which would be subject to commentaries by all States Parties.

3.2. Participation of non-party States

Non-party States will be able to consult with the Oversight Commission regarding cases under their jurisdiction related to debts subject to the multilateral sovereign debt restructuring mechanism.

4. FACULTIES OF THE OVERSIGHT COMMISSION

The proposed faculties of the Oversight Commission include:

- The study of the records and information presented by the restructuring State regarding the initiation of the Multilateral Sovereign Debt Restructuring Mechanism;
- The resolution of disputes relating to the registration and verification of the credits and the issuance of a report on that matter;
- If necessary, making its good offices available to bring the parties to the restructuring agreement negotiation closer;
- The issuance of a final report regarding the compliance by the restructuring State with the guidelines and provisions of the multilateral legal framework for sovereign debt restructuring processes;
- Addressing consultations formulated by non-party States to the Multilateral Sovereign Debt Restructuring Mechanism in respect of cases regarding debts subject to the mechanism;
- Making submissions to the different agencies of non-party States in relation to sovereign debts being restructured within the Multilateral Sovereign Debt Restructuring Mechanism (i.e. as *amicus curiae*), in accordance with domestic procedural legislations.
- Meet regularly for a period following the signature of the restructuring agreement in order to assess its status and inform the State Parties.

The Oversight Commission would not be able to review the sovereign decision of a debtor State to restructure its debt (*jure imperii*) nor the restructuring agreement approved by the majority of its creditors (in accordance with the principle of party autonomy).

5. RESTRUCTURING AGREEMENT SHOULD BE BINDING UPON ALL CREDITORS

The objective of the Sovereign Debt Restructuring Mechanism is to provide a forum where the restructuring State may submit a proposal to its creditors and put it to the vote, under the supervision of the Oversight Commission.

The Sovereign Debt Restructuring Mechanism allows the restructuring State to initiate the process before or after defaulting on its debt and to select which debts it will restructure through that process.

The restructuring State may propose:

- A general restructuring agreement with terms substantially equivalent for all credits;
or

- A restructuring agreement that offers different terms to the different classes of credits, drawing a reasonable and equitable distinction among the different groups of creditors whose claims are subject to the Multilateral Sovereign Debt Restructuring Mechanism.

Following domestic bankruptcy practice, an agreement approved by the established qualified majorities will be binding upon all creditors.

It is proposed that during the period between the commencement and the conclusion of the Multilateral Sovereign Debt Restructuring Mechanism, the proposing State may incur new debt and give it preferential treatment with respect to the rest of its Sovereign Debt, provided that it considers such new debt to be necessary for its operation and/or for satisfactorily concluding the Multilateral Sovereign Debt Restructuring Mechanism, and the amount and rate of return of the new debt reasonably reflects such purpose.

6. SUSPENSION OF LITIGIOUS ACTIONS

A stay for any litigious actions—including, without limitation, enforcement proceedings—initiated under the jurisdiction of a State Party by or on behalf of the creditors of the restructuring State, will guarantee an orderly and non-disrupted restructuring and will remain effective during the sovereign debt restructuring mechanism.

7. RESOLUTION OF DISPUTES BETWEEN STATE PARTIES

The State Parties should attempt to settle any disputes arising in relation to the interpretation and application of this legal framework through negotiations. If the dispute concerns the interpretation or application of the provisions of the mechanism related to the suspension of litigious actions or to the restructuring agreements, and any of the parties to the dispute considers that the negotiations failed to achieve a satisfactory outcome within a certain deadline, the dispute could be submitted by any of the State Parties to the International Court of Justice unless they mutually agree to submit it to an arbitration tribunal.