

THE BAILIFF OF GUERNSEY
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The President
States of Alderney
Island Hall
Royal Connaught Square
ALDERNEY
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01 July 2013

Dear Sir

I enclose a copy of a States Report dated 1 October 2012, from the Policy Council, concerning Heavily Indebted Poor Countries Initiative.

On the 28 November, 2012, the States of Deliberation resolved as follows:-

1. To resolve to support the Heavily Indebted Poor Countries Initiative as recommended in that Report.
2. To direct the preparation of such legislation as may be necessary to give effect to their above decision.

On the 26 June 2013, the States of Deliberation approved a Projet de Loi entitled "The Debt Relief (Developing Countries) (Guernsey and Alderney) Law, 2013" which gives effect to the above Resolutions.

I enclose fifteen copies of the Projet de Loi and shall be obliged if you will place it before the States of Alderney for their approval at their next meeting.

Yours faithfully,

A handwritten signature in dark ink, appearing to be 'Richard J. Collas'.

POLICY COUNCIL
HEAVILY INDEBTED POOR COUNTRIES INITIATIVE

Executive Summary

1. The Heavily Indebted Poor Countries Initiative ("HIPC Initiative") aims to ensure that no poor country faces a debt burden it cannot manage. Since its launch, responsible members of the international financial community have worked together to reduce to sustainable levels the external debt burdens of the most heavily indebted poor countries.
2. Despite the largely successful efforts to implement the HIPC Initiative by some of the largest institutional creditors, other commercial creditors have lagged behind in their efforts. In addition some commercial organisations have established funds (sometimes referred to as "vulture funds") designed to acquire debt (which it is intended should be reduced in accordance with the Initiative) and enforce payment of the debt through legal proceedings.
3. This States Report proposes that legislation designed to limit the capacity of "vulture funds" to enforce payment of relevant debts through courts in the Bailiwick be prepared and laid before the States of Deliberation.

Background

4. The HIPC Initiative was launched in 1996. Under the Initiative, the International Monetary Fund ("IMF") and World Bank calculate the proportionate reduction required in a country's external debts in order to return them to 150% of the value of the country's annual exports, which is considered to be a sustainable level. All creditors – multilateral, bilateral and commercial – are expected to provide the proportionate reduction that will achieve this. At present, the UK authorities, and many governments of other countries, multilateral lenders (e.g. the World Bank, the African Development Bank, the IMF, the Inter-American Development Bank and all Paris Club creditors) and commercial creditors do so.
5. Debt relief is one part of a much larger effort to address the development needs of low-income countries and make sure that debt sustainability is maintained over time. Thirty nine countries are currently designated by the IMF and World Bank as eligible or potentially eligible under the Initiative. The current position of eligible or potentially eligible countries in the Initiative is set out in the Annex to this Paper¹.
6. Whilst many creditors do reduce the amount of their debts in accordance with the Initiative, some creditors have instead sought to recover the full value of the debt

¹ For current status: <http://go.worldbank.org/4IMVXTQ090> or <http://www.imf.org/external/np/exr/facts/hipc.htm>

plus accumulated interest and any associated charges owed to them. Repayment of these creditors has the effect of inhibiting the full benefit of the HIPC Initiative, as resources provided through debt relief and which are intended to support development and poverty reduction in the country are diverted for the purpose of satisfying the full value of the debt concerned.

Debt Relief (Developing Countries) Act 2010

7. The Debt Relief (Developing Countries) Act 2010 (the 'UK Act') was enacted following a private members Bill introduced by Andrew Gwynne MP. The purpose of the Bill was to limit the amount that can be recovered by commercial creditors from HIPCs by reference to the proportionate reduction calculated as set out in paragraph 4 above in order to return the debtor country's debt to sustainable levels. The Bill was supported by H.M. Government in the UK. The response to the consultation on this Bill from the financial services sector was general opposition to the legislation, and the non-governmental organisations (NGOs) were in favour. The Bill received broad cross-party support in the UK.
8. During its progress through Parliament concerns were raised with regard to: the interference with contractual rights; human rights issues, including Article 6 and Article 1 of the First Protocol of the European Convention on Human Rights; the retrospective impact of applying the legislation to judgement already made; uncertainty about the scale of benefits to developing countries; potential 'spillover' effects, including developing countries' ability to borrow; whether other countries would take similar action; and the possible impact on the UK as a financial services centre.
9. In order to address some of these concerns, and to allow the future review of unintended consequences caused by the proposed measures, a sunset clause was inserted. The sunset clause meant that the legislation would expire after a year unless renewed by the House of Commons by an order approved by both Houses of Parliament. The UK Act received Royal Assent on 10 April 2010 and entered into force two months later.
10. The UK Act prevents creditors of HIPCs recovering an amount of debt in excess of that consistent with the HIPC Initiative. The main provisions of the UK Act are to: reduce the amount recoverable on a debt to which the Act applies to the amount which the creditor could recover if the creditor provided the level of debt relief expected under the HIPC Initiative and to reduce the value of judgments and arbitration awards relating to debts to which the UK Act applies. The UK Act applies to: a fixed stock of historic debts (that are eligible for the HIPC Initiative), and does not apply to new borrowing undertaken by HIPC governments; to judgments given in the UK before commencement of the UK Act, so that such judgments may be enforced only for the reduced amount; and to the enforcement of awards and foreign judgments in the UK (so that those awards and judgments may only be enforced for the reduced amount). It excludes debts where the debtor does

not make an offer to repay the amount which remains recoverable by the creditor under the terms of the UK Act.

11. The compliance with Article 6 and Article 1 of the First Protocol of the European Convention on Human Rights was debated. It was considered that, in respect of Article 1 of the First Protocol, creditors would not be deprived of their property and that they would retain an asset of some economic value. Article 6 is potentially engaged because the Act will reduce the enforceability of judgements, including existing judgments. The legislation would not be effective without these measures.
12. The sunset clause inserted in the UK Act meant that it was due to expire on 7 June 2011. The UK coalition Government consulted with representatives of the financial services sector, lawyers, civil society, the international financial institutions (IMF, World Bank) and HIPC country Governments. The evidence suggested that the UK Act had had some benefit on HIPCs and no evidence was found of unintended or adverse effects. Legislation to make these provisions permanent was made on 16 May 2011.

Proposed Guernsey legislation

13. Following the move to make the UK Act permanent the Policy Council considered a report in relation to Heavily Indebted Poor Countries Initiative on 6 June 2011 and agreed that:

“A report should be prepared recommending the enactment of appropriate legislation designed to limit the capacity of “vulture funds” to enforce payment of debts through Courts in the Bailiwick. The Council is aiming for proposals to be laid before the States at the earliest possible juncture.”

14. On 27 June 2011 Lord Sassoon, the Commercial Secretary to the Treasury, wrote to the Chief Minister to welcome the Policy Council decision and offered to share the UK’s experiences on the development and implementation of the Debt Relief (Developing Countries) Act 2010. The Policy Council subsequently liaised at officer level with HM Treasury and has maintained an ongoing dialogue in this matter.
15. In August 2011, the Policy Council issued a consultation which invited comments from business on the enactment of legislation similar to the UK Act. The consultation closed on 16 September 2011, and only three responses were received. Two responses were from NGOs supporting the enactment of legislation similar to the UK Act. One business respondent raised concerns aligned to those raised in the UK Parliament and described above. No response suggested that the enactment of a Law containing provisions similar to those of the UK Act would have adverse consequences on Guernsey businesses. Following the consultation the Policy Council received a message of support from the Jubilee Debt Campaign.

16. On the 18 November 2011 the Policy Council issued the following statement to clarify the position should a vulture fund be established in Guernsey prior to the proposed legislation:

“It is anticipated that the legislation will follow the UK example [the Debt Relief (Developing Countries) Act 2010] , which will ensure that if a fund has the right to recover a qualifying debt incurred prior to the commencement of the law there will be appropriate restrictions on the right to recover the amount owed after the law is enacted.”

17. To date the courts within the Bailiwick have not been used to enforce payment of debts covered by the HIPC Initiative. However, this is not an academic or theoretical issue. Judgment for a debt involving La Générale des Carrières et des Mines Sarl (“Gécamines”) company owned by the Democratic Republic of Congo (“the DRC”) was given in the Royal Court of Jersey on 27 October 2010². In this case F.G. Hemisphere purchased two arbitration awards against the DRC and sought to enforce these awards against Gécamines in the Jersey courts. The Gécamines case had a high profile in the national media and within UK Parliament.
18. On 27 October 2010 the Royal Court of Jersey enforced the debt against Gécamines. On appeal, on 14 July 2011 the Jersey Court of Appeal affirmed this judgement by a majority.³ Gécamines appealed to the Judicial Committee of the Privy Council, with leave of the Court of Appeal and judgement was handed down on 17 July 2012⁴. The Privy Council ruled that Gécamines was not an “arm of the State” and held that Gécamines and the DRC were not so closely associated that they should have to bear each other’s liabilities. It held that Gécamines was ‘a real and functioning corporate entity’ which was clearly distinct from the executive organs of State.
19. The judgement of the Privy Council suggests that it will be more difficult for the Guernsey courts to enforce arbitration awards or court judgements against state-owned entities; it does not obviate the need to legislate in line with the UK Act to prevent the enforcement of these debts.
20. The concerns raised in the UK Parliament have not transpired, and the UK has not experienced any consequences that have impacted businesses adversely outside of the area intended to be affected by the UK Act. In respect of concerns with regard to human rights compliance, thus far no successful challenge has been brought. In addition, it should be noted that it is the UK which is the State party to the European Convention on Human Rights and by replicating the provisions in the UK Act, it therefore follows that the UK is likely to defend the position of the Islands in respect of those rights that might be engaged. In the circumstances, it seems that there are limited grounds upon which to base a policy which does not support the HIPC Initiative in a manner consistent with that of the UK's.

² *FG Hemisphere Associates LLC v Democratic Republic of Congo & Others* [2010] JRC 195

³ *FG Hemisphere Associates LLC v Democratic Republic of Congo & Others* [2011] JCA 141

⁴ *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27

21. The implementation of similar legislation to the Debt Relief (Developing Countries) Act 2010 would demonstrate Guernsey's shared aims with the HIPC Initiative. In light of the high profile nature of 'vulture funds' there are significant adverse consequences for Guernsey's international reputation unless the issue is addressed in an acceptable manner within a reasonable time-frame.

Proposed Legislation in Other Crown Dependencies

22. The States of Jersey published a consultation document on the 'promotion of debt relief for poorer countries' on 15 September 2011, with the consultation period ending on 8 December 2011. On 1 February 2012 the Chief Minister made an announcement he was proposing to introduce legislation '*designed to stop creditors, including so-called 'vulture funds', from pursuing inequitable payments through Jersey's courts*'. Jersey received 25 responses to the consultation from private individuals, companies and representatives of non-governmental organisations, as well as the United Nations. The Chief Minister of the States of Jersey commented:

"By bringing forward a law to discourage so-called vulture funds from using our courts, Jersey will be sending a clear and positive message that ours is a well-regulated, co-operative and transparent jurisdiction. In proposing this legislation, our aim is to ensure that Jersey continues to support international debt relief efforts, while at the same time upholding the sanctity of contract law and remaining compliant with our human rights commitments."

23. Legislation has not yet been laid before the States of Jersey, but a draft Law is currently being prepared.
24. The Isle of Man announced that it intended to progress legislation to prevent the Isle of Man being used as a jurisdiction for enforcement of relevant debts by 'vulture funds'. The Treasury Minister stated that:

"We have no evidence of vulture fund activity in the Isle of Man and as an internationally responsible country we do not want it here. The Manx Government is happy to introduce legislation to ensure that our Island is not used for the disreputable business of exploiting Heavily Indebted Poor Countries."

25. The Isle of Man's Tynwald published the Heavily Indebted Poor Countries (Limitation on Debt Recovery) Bill 2012 on the 1 May 2012. This Bill had its third reading on 12 June 2012 in the House of Keys and first reading in the Legislative Council on 26 June 2012.
26. The States of Alderney have been consulted and agreed that they would wish to have legislation along the line proposed in this report.
27. The General Purposes and Advisory Committee of the Chief Pleas of Sark has declared that they would not wish the legislation to be drafted on their behalf.

Whilst it would be preferable for any Law to be Bailiwick-wide and therefore include Sark, the risk of someone having, or establishing, a right to litigate before the Court of the Seneschal for the purpose of trying to recover a debt subject to the HIPC Initiative, is probably fairly remote. The absence of a Sark companies law also mitigates the risk of any fund or other necessary vehicle for use by relevant creditors being set up in Sark. Thus a Law that applies to Guernsey and Alderney (which has its own companies legislation) should be effective to deter use of the whole Bailiwick as a jurisdiction within which to try to recover debt contrary to the intention of the HIPC Initiative.

Principles of Good Governance

28. The proposal meets the relevant principles of good governance. In supporting the HIPC Initiative the States will be meeting its objective, as agreed in the States Strategic Plan, of *“maintenance and enhancement of Guernsey’s standing in the global community”*. This promotes values of international cooperation by supporting this IMF and World Bank initiative and reduces the risk of damaging the reputation of the Bailiwick. The Policy Council has engaged with the relevant stakeholders and the general public in relation to this proposal, and has made public announcements as to the intentions of the Policy Council.

Recommendation

The Policy Council recommends that the States of Deliberation resolve to support the Heavily Indebted Poor Countries Initiative and direct the preparation of legislation, based upon the provisions of the Debt Relief (Developing Countries) Act 2010, to prevent creditors of Heavily Indebted Poor Countries recovering an amount of debt in excess of that consistent with the Heavily Indebted Poor Countries Initiative.

Deputy Peter A Harwood
Chief Minister

1 October September 2012

Deputy J P Le Tocq
Deputy Chief Minister

Deputy G A St Pier
Deputy R Domaille
Deputy D B Jones
Deputy R W Sillars
Deputy P A Luxon

Deputy A H Langlois
Deputy K A Stewart
Deputy A H Adam
Deputy M G O'Hara

Eligible or potentially eligible countries in the HIPC Initiative (as at June 2012)

<i>Eligible for the Initiative</i>		<i>Potentially eligible for the Initiative</i>
Post-Completion Point (33)	Post-Decision Point (3)	Pre-Decision Point (3)
Afghanistan	Chad	Eritrea
Benin	Comoros	Somalia
Bolivia	Guinea	Sudan
Burkina Faso		
Burundi		
Cameroon		
Central African Republic		
Republic of Congo		
Democratic Republic of Congo		
Côte d'Ivoire		
Ethiopia		
The Gambia		
Ghana		
Guinea-Bissau		
Guyana		
Haiti		
Honduras		
Liberia		
Madagascar		
Malawi		
Mali		
Mauritania		
Mozambique		
Nicaragua		
Niger		
Rwanda		
São Tomé Príncipe		
Senegal		
Sierra Leone		
Tanzania		
Togo		
Uganda		
Zambia		

Note: Applicant countries must meet certain criteria, commit to poverty reduction through policy changes and demonstrate a good track-record over time. The IMF and World Bank provide interim debt relief in the initial stage (post decision point countries) and, when a country meets its commitments, full debt-relief is provided (post-completion point countries)

(NB As there are no resource implications identified in this report, the Treasury and Resources Department has no comments to make.)

The States are asked to decide:-

V.- Whether, after consideration of the Report dated 1 October 2012, of the Policy Council, they are of the opinion:

1. To resolve to support the Heavily Indebted Poor Countries Initiative as recommended in the Report.
2. To direct the preparation of such legislation as may be necessary to give effect to their above decision.