ADDITIONAL COMMENTS

CREDITOR PARTICIPATION IN THE HIPC DEBT RELIEF INITIATIVES: THE CASE OF GUYANA

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I. INTRODUCTION

The burden of Guyana's public debt has for several decades acted as one of the main impediments to poverty reduction and economic growth. This was recognized by the international community in December 1997 when the International Monetary Fund (IMF) and the World Bank decided that Guyana's external debt was unsustainable and thus that Guyana was eligible for debt relief under the Highly Indebted Poor Countries (HIPC) Initiative. Since then, Guyana has received debt relief totalling $560.9 million (U.S.) within the context of the original and the enhanced HIPC initiatives implying a reduction in debt stocks of fifty-four percent.[1]

Debt relief operations are a tricky business, however. In particular, there will always be a temptation for so-called "rogue" creditors not to participate in debt relief operations and instead try to ensure that the resources made available as a result of debt relief from other creditors are used to repay their debts. In other words, there is a danger that unless all creditors participate in the debt relief operation, it simply deteriorates into a transfer of resources from one creditor to another whilst not actually benefiting the debtor country itself.

Guyana was faced with this kind of situation recently when one of its commercial creditors—the Big Food Group, based in the United Kingdom—refused to participate in the HIPC initiative and instead resorted to

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1. Press Release, International Monetary Fund, IMF and World Bank Support US$334 Million Additional Debt Relief for Guyana (Dec. 19, 2003), *available at* http://www.imf.org/external/np/sec/pr/2003/pr03224.htm.

litigation in an attempt to recover its claim in full. Although not the first HIPC country to be faced with the threat of litigation, Guyana's plight drew the attention of international media and pressure groups, as well as the Bretton Woods institutions, for the way in which it highlighted some of the inherent contradictions of the HIPC initiative. This Comment will attempt to outline some of the issues raised by arbitration proceedings between the Big Food Group and the Government of Guyana, as well as make some tentative recommendations. Prior to that, however, it will briefly outline the origin and current status of Guyana's external debt burden.

II. BACKGROUND TO GUYANA'S EXTERNAL DEBT SITUATION

Guyana's indebtedness can be traced back to the oil crisis of the 1970s, when rising oil prices adversely affected the balance of payments, forcing Guyana to begin borrowing from abroad to finance imports. By the mid 1990s, Guyana had become one of the world's most heavily indebted countries, with an external debt burden exceeding $2 billion (U.S.) in 1995, equivalent to more than three times its official GDP.[2]

The increasing awareness among developed countries of the unsustainability of third world debt levels led the G7 group of countries to launch in 1996, at the initiative of the World Bank and the IMF, the HIPC Initiative to provide a comprehensive solution to the high debt levels in many of the world's developing countries.[3] Under the terms of the HIPC initiative, all creditors are required to provide debt relief based on an equitable burden-sharing approach. Possibly even more important than the debt relief itself, however, is the requirement that HIPC countries carry out important economic, political, and social reforms aimed at improving the development framework as a prerequisite for the delivery of debt relief.

Guyana, which had already benefited from substantial debt relief from its Paris Club bilateral creditors in 1996, became the first country to qualify for debt relief under the so-called "fiscal window" of the HIPC initiative when it reached its decision point in December 1997. Under the "fiscal window," Guyana's debt was judged to be unsustainable due to the fiscal burden of its external debt with the net present value (NPV) of external debt to central

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[2] Bank of Guyana, External Public Debt, *available at* http://www.bankofguyana.org.gy/Sb7-5.htm.

[3] For details about the HIPC initiative, see the World Bank's HIPC website at www. worldbank.org/hipc.

government revenue amounting to more than 450 percent in 1996.[4] After the implementation of key structural reforms and the agreement of a new three-year program with the IMF, Guyana reached the completion point of the HIPC initiative in May 1999, which paved the way for the delivery of NPV $256 million (U.S.) in debt relief from its creditors considered necessary to reduce Guyana's external debt-to-revenue ratio to 280 percent.

Following a major review of the HIPC Initiative in 1999, a new enhanced HIPC framework was launched which, in Guyana's case, aimed to lower the external debt-to-revenue ratio to 250 percent. Guyana qualified for debt relief under the enhanced HIPC initiative in November 2000 and finally reached its completion point on December 18, 2003, after the completion of a full Poverty Reduction Strategy Paper (PRSP) and the implementation of a set of social, structural, and institutional reforms.

Guyana's completion point under the enhanced HIPC initiative paved the way for the delivery of debt relief amounting to $358 million (U.S.) in NPV terms from Guyana's multilateral and bilateral Paris Club creditors. The amount of debt relief granted by Guyana's Paris Club creditors is particularly noteworthy because it exceeded the amount of debt relief that the Paris Club was required to deliver as part of the HIPC initiative by $24 million (U.S.) in NPV terms and effectively meant a cancellation of nearly all Guyana's debt to its bilateral creditors in the Organization for Economic Co-operation and Development (OECD).[5]

III. CREDITOR PARTICIPATION IN THE HIPC INITIATIVE

As noted above, the HIPC initiative is based on a proportional burden-sharing approach whereby debt relief is delivered by creditors in accordance with their share of the outstanding debt. This is consistent with the practice of the Paris Club group of creditors, which requires debtor countries to seek debt relief from all non-participating creditors on terms at least comparable to those granted by the Paris Club. In practice, however, HIPC countries, including Guyana, have found it difficult to convince so-called non-Paris Club creditors, who include non-OECD bilateral creditors and commercial creditors, to deliver debt relief.

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[4] The sustainability of a country's debt is based either on the ratio of external debt to exports or, for very open economies such as Guyana, on the ratio of external debt to government revenue.

[5] See the Paris Club website at www.clubdeparis.org for details.

In essence, the problem of creditor participation arises because creditors that are not signatories to the agreements that form part of the HIPC initiative do not consider themselves bound by the terms of the agreement. The HIPC Status of Implementation document states the following:

> As regards to non-Paris club official bilateral and commercial creditors, the current approach for securing debt relief relies primarily on moral suasion by the Bretton Wood Institutions and by the HIPCs themselves . . . the debtors have the prime responsibility in maintaining a dialogue with their non-Paris Club official bilateral and commercial creditors and seeking debt relief within the framework of the enhanced HIPC Initiative.[6]

At the same time, until a settlement is reached whereby these creditors agree to provide debt relief on comparable terms, Guyana and other HIPC countries are bound by their commitments under the HIPC initiative not to service these debts. As a result, several commercial creditors have resorted to litigation to try to recover their claims in full. A survey by Debt Relief International (DRI) revealed that in 2002, twelve HIPC countries were facing or had lost lawsuits by creditors.[7] At the time, DRI estimated that judgements in favour of the creditor had cost HIPC countries more than $400 million (U.S.), twenty percent more than the total face value of the debt in question.

IV. ARBITRATION PROCEEDINGS BETWEEN GUYANA AND THE BIG FOOD GROUP

The origin of Big Food Group's claim against Guyana dates back to 1976 when Guyana's publicly held sugar company, the Guyana Sugar Corporation (Guysuco) was nationalized, effectively ending the involvement of Booker McConnell in the ownership of Guyana's sugar estates, which dated back to 1815. At the time of the nationalization, compensation to Booker was set at approximately £13 million, to be repaid over twenty years at six percent interest.

The debt was serviced according to schedule until 1989, at which point Booker agreed to a deferral of payment following an agreement with the

[6] International Monetary Fund, Heavily Indebted Poor Countries (HIPC) Initiative: Status of Implementation, September 26, 2001, p. 20.

[7] Debt Relief International: HIPC Debt Strategy, Issue 13, 2002.

administration of the late President Desmond Hoyte that the outstanding amounts would be reinvested in a privatised Guysuco. The decision to privatise Guysuco was reversed, however, by the administration of the late President Cheddi Jagan, who announced plans to seek debt relief on the outstanding amounts within the framework of Guyana's negotiations with the Paris Club group of creditors. This proposal was rejected by Booker, who argued that they were not party to either the general Paris Club agreement or the associated bilateral agreement between Guyana and the United Kingdom and thus not bound by the conditions therein. As a result, Big Food Group, who by this time was the owner of the debt, filed a request for arbitration with the International Court for the Settlement of Investment Disputes (ICSID). However, following a substantial media campaign by the Jubilee Debt Campaign (JDC) and the World Development Movement (WDM), Big Food Group chose to abandon its claim on March 17, 2003.

V. ISSUES RAISED BY THE GUYANA VS. BIG FOOD GROUP LAWSUIT

As in other litigations involving HIPC countries, Guyana was unable to settle its debt with Big Food Group without contravening its agreements with the Bretton Woods institutions and, in particular, the comparability of treatment clause in its agreement with the Paris Club, whereby Guyana committed itself not to grant terms more favourable than those granted by the Paris Club to any of its non-Paris Club bilateral or commercial creditors. Thus, Guyana could not accede to the demands for repayment from the Booker Group without prejudicing its application for debt relief under the HIPC initiative.[8] Conversely, a ruling by ICSID in favour of Big Food Group would have forced Guyana to break its existing agreements with its Paris Club creditors and would have potentially meant that debt relief already granted could have been revoked.

In this particular arbitration, however, the situation was made more interesting by the fact that ICSID, although autonomous, is also part of the World Bank Group, which is, together with the IMF, the main proponent of the HIPC initiative. Big Food Group had chosen to bring the case before ICSID due to ICSID's role as final arbitrator in investment disputes between firms in Guyana, and the United Kingdom under the terms of the 1989 Bilateral Investment Treaty between the two countries. Thus, there was a very real

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[8] Susanna Mitchell, Contradictions Within HIPC—ICSID Arbitration Sought Against Guyana 2002, *available at* www.globalpolicy.org.

possibility that the Government of Guyana would be forced by one of the institutions in the World Bank into a settlement with Big Food Group, which would contravene the equal burden-sharing approach of the World Bank's HIPC initiative. This clearly constituted an unacceptable paradox within the World Bank's operations.[9]

The arbitration between the Government of Guyana and Booker also raised the more general issue about the enforceability of international agreements such as those between Guyana and its Paris Club creditors. Within the current framework, the only incentives for commercial creditors to share in the burden of delivering debt relief is the potential adverse impact on their public relations, as demonstrated by the successful campaign by pressure groups towards Big Food Group. However, the aforementioned data collected by DRI on lawsuits against HIPC countries by creditors indicates that, more often than not, litigations against HIPC countries are resolved in favour of the creditor.

Thus far, there has been no talk of multilateral creditors and the Paris Club withholding debt relief from developing countries that have been forced, through lawsuits, to pay off their debts to commercial creditors in full. Nevertheless, it is clear that the rationale for widespread debt relief is no longer as compelling if this debt relief will be used to repay "rogue" commercial creditors as a result of lawsuits.

VI. CONCLUDING COMMENTS AND FUTURE OUTLOOK

This Comment does not intend to pass a negative judgement on the HIPC initiative. In fact, to anybody that has actually observed the economic situation in Guyana at close hand, it is clear that debt relief from the HIPC initiative has been of vital importance for the country's public finances and, more importantly, for the incentives for the government to undertake often difficult, but necessary, structural reforms. However, it is clear that the concerns about creditor participation that have been discussed in this Comment, raise important questions about how to design future comprehensive debt relief operations.

In this regard, a number of organizations have tabled proposals for how to restructure sovereign debt. These include, in particular, the Sovereign Debt Restructuring Mechanism (SDRM) proposed by the IMF (but rejected at the 2003 IMF Spring Meeting by the United States) and the Jubilee Framework based on the United States Chapter 9 model of municipal insolvency. In

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[9] *Id.*

addition, various collective action clauses (CACs) and contractual provisions have been proposed that would facilitate collective action by creditors.

Common to both the proposal by the IMF and the Jubilee Movement are a stay on lawsuits by creditors during insolvency procedures and obligatory participation by (at least private) creditors in the arbitration proceedings. Several issues remain, however, including the role of the IMF in the process and the extent to which multilateral and bilateral creditors should be subject to arbitration in the same way as private creditors. Hence, work to create a satisfactory sovereign debt restructuring mechanism continues but raises hope that in the future, efforts to ensure the sustainability of developing country debt cannot be hijacked by "rogue" creditors.