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EMTA Submission

In response to HM Treasury –

Ensuring Effective Debt Relief for Poor Countries: A Consultation on Legislation

October 9, 2009

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Introduction

Formed in 1990 after the first sovereign debt restructuring under the Brady Plan, EMTA is the professional trade association for the Emerging Markets trading and investment community and represents more than 150 institutions world-wide.[1] In recent years, the EM trading and investment industry has expanded beyond the traditional Emerging Markets of South and Central America, Eastern Europe and Russia to include the frontier markets of Sub-Saharan Africa and Southeast Asia. The EM industry has shown a collective interest in promoting development in these countries, and in their integration more effectively into the international financial system. For this to occur, it is generally agreed that private sector investment in these countries must be encouraged and that investment disincentives and barriers should be removed or minimized.[2] The legislation proposed by HM Treasury (HMT), while intended to provide a very limited 'benefit' to certain highly indebted poor countries (HIPCs), would in fact negatively affect market access of all HIPCs, and therefore, limit their long-term prospects for development and economic growth, and jeopardize their further integration into the international financial system.

For this reason, after consulting widely throughout the EM trading and investment community, EMTA is submitting this response to HMT's legislative proposal (the Legislative Proposal) described in the Consultation Paper published in July 2009 entitled *Ensuring Effective Debt Relief for Poor Countries: A Consultation on Legislation* (the *Consultation Paper*). Accordingly, although this response paper does not purport necessarily to reflect the views of any single market participant or EMTA member firm, it does generally represent the collective views of the EM trading and investment community.

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The HMT Legislative Proposal seeks to retroactively (1) change the terms of existing private contracts and (2) possibly limit the enforcement of judgments in the U.K, so that *"holders of existing debts to HIPCs will only be able to reclaim these debts up to a set level, unless the courts consider it just and equitable to order otherwise."*[3]

According to the *Consultation Paper*, this truly radical departure from the rule of law and sanctity of contract is justified by a concern that *"some HIPCs will fail to fully benefit from debt relief, with these benefits instead being gathered by the minority of creditors adopting uncooperative approaches."*[4]

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To make the case for legislative action, the HMT appears to rely on stale data and fails to acknowledge the intrinsic differences between the financial goals of the public

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1 See Appendix 1 for a list of EMTA members and see also, www.emta.org, for more information about EMTA generally.

2 See generally, *EMTA Africa Workshop Report, Financing African Development Post-HIPC: What Role for the Private Sector?,* April 18, 2008 (*EMTA Africa Report*, attached as Appendix 2).

3 *Consultation Paper*, page 20.

4 Id. Section 3.2, page 19.

and private sector in evaluating and extending loans to sovereigns. In addition, the Legislative Proposal seems fundamentally inconsistent with the longstanding U.K. commitment to the rule of law and sanctity of contract and their role in the proper functioning of markets. This is particularly striking given the proposed legislation's *de minimis* benefit and substantial adverse consequences.

Although we understand that HMT's goal is narrowly targeted legislation[5] to address what has become a highly politicized issue, we believe HMT must consider the proposed legislation's adverse effect on investment and potential harm to the intended beneficiaries of the proposed legislation (as well as to the broader Emerging Markets). We believe that this paper will demonstrate that the concerns of the government will not be effectively addressed by this legislation, and, although perhaps politically expedient, that there is no practical way to address these concerns that does not cause proportionately (much) greater and longer-term harm to the investment environment and development of HIPCs and to the broader capital markets, affecting lenders and borrowers alike.

> Section 1 of this paper analyzes the data underpinning the Legislative Proposal as it relates to both commercial creditor participation in debt relief, and commercial creditor litigation against HIPCs, concluding that such data is stale and misleading. In fact, commercial creditor participation rates in HIPC debt relief operations have increased as more countries have engaged the private sector, and instances of litigation against HIPCs are rare and becoming rarer.
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> Section 2 explains why a well-functioning debt market requires that contracts be honored and debts be enforceable and how the Legislative Proposal – in seeking to interfere in private contracts and limit enforcement through a legislative mechanism – would undermine the fundamentals of the broader capital markets. Moreover, the courts are the proper venue for the adjudication of contract claims, and the well-established framework of sovereign immunity already limits creditors' ability to enforce claims. Furthermore, courts have appropriate latitude to limit recoveries when the acts and circumstances warrant such limitation.
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> Section 3 discusses the consequences of Section 2, namely that the potential costs of the Legislative Proposal (including the adverse effects it will have on HIPCs' market access and financing costs) far outweigh its potential benefits. The actions that have been taken to date by the international community to address concerns about litigating creditors, along with judicial discretion mentioned above, are more than adequate to deal with the issue of "uncooperative creditors" and do not cause the unintended consequences of the Legislative Proposal.
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> Section 4 questions the legality and practical enforceability of the Legislative Proposal.

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[5] The *Consultation Paper* states in Section 3.8 (page 20) that *"the Government proposes that legislation is tightly targeted at the existing stock of HIPC debt."* Section 28, page 28, further states *"In addition to the exclusion of lending contracted after legislation comes into effect, lending already contracted post-Decision point should … also be outside the scope of legislation."*

Section 5 raises some additional considerations with respect to debt reduction, the nature of debt, promoting development and comparability of treatment.

Annex A contains EMTA's responses to the 13 questions presented in the *Consultation Paper*.

Section 1 - The Underlying Data Relied Upon by HMT to Make its Case for the Legislative Proposal is Out-of-Date and Misleading

1.1 Underlying Data with Respect to Commercial Creditor Participation in HIPC Debt Relief is Out-of-Date and Misleading.

Much of the data relied upon to make the case that commercial creditors are not providing their share of debt relief is out-of-date and therefore misleading.

In fact, the process of commercial creditor debt renegotiation and debt relief within the HIPC Initiative framework is already functioning effectively without legislative intervention, and as countries advance in the HIPC process and actively seek debt relief from the private sector, private sector participation rates have increased.

HMT (relying on an IMF publication from September 2008[6]), suggests in the *Consultation Paper* that, out of total expected debt relief to be delivered by commercial creditors of U.S.$4.3 billion, only a third (or 33%) has been provided.[7]

However, that percentage of commercial creditor participation does not reflect more recent commercial creditor debt relief operations such as Liberia.[8] Moreover, that percentage does not reflect debt relief provided by the private sector to the Cote d'Ivoire in its first Brady restructuring in 1998[9] because Cote d'Ivoire reached HIPC Decision Point only in March 2009.

In addition, the percentage of commercial creditor participation relied upon by HMT could not reflect additional debt relief to be provided by commercial creditors to the Cote d'Ivoire in its London Club exchange offer launched on September 28, 2009.[10] This deal, which will see €2.2 billion of debt owed to private creditors restructured,

[6] The HMT appears to rely for its data primarily on the *IMF/IDA HIPC Initiative and Multilateral Debt Relief Initiative (MDRI) – Status of Implementation*, dated September 12, 2008 (the *2008 HIPC Status Report*).

[7] The *Consultation Paper* states that *"U.S.$4.3 billion of the debt relief due under the HIPC Initiative (6 per cent of the total) is expected from commercial creditors but, so far, the World Bank and IMF estimate that only around a third of this has been provided*." *Consultation Paper*, Section 2.8, page 13. See also, *2008 HIPC Status Report*, page 24, footnote 31. It should be noted, however, that the 33% of commercial creditor debt relief cited in the *2008 HIPC Status Report* was deemed *"a large increase and a welcome development which confirms the value of a proactive and cooperative approach, including to prevent litigation."* Id., pages i-ii.

[8] In the Liberia operation in April 2009, creditors provided full debt relief under a debt buyback scheme supported by the World Bank's Debt Reduction Facility, which saw U.S.$1.2 billion of commercial debt extinguished at a deep discount (97% of face value). *IMF/IDA HIPC Initiative and MDRI – Status of Implementation*, dated September 15, 2009 (the *2009 HIPC Status Report*), page 19.

[9] As a result of the 1998 rescheduling, commercial creditors had already provided their expected debt relief for Cote d'Ivoire (amounting to approximately NPV U.S.$1 billion). However, this was not reflected in the IMF's commercial creditor debt relief participation rates in the *2008 HIPC Status Report* because Cote d'Ivoire had not yet reached Decision Point. See, http://www.imf.org/external/pubs/ft/scr/2009/cr09190.pdf.

[10] See, Republic of Cote d'Ivoire and Private Creditors Coordination Committee (London Club) Press Release dated September 28, 2009, available on www.emta.org.

reflects a further 20% of commercial creditor debt relief.[11] Encouragingly, it is expected that all of Cote d'Ivoire's commercial creditors will participate in the deal,[12] and we expect that commercial creditor participation rates will certainly have been boosted by Ivoirian Finance Minister Charles Koffi Diby's statement at the signing that *"Cote d'Ivoire <u>will honor its commitments</u> so I invite the holders of the Brady bonds to massively subscribe to the new bond…".*[13]

Accordingly, the *Consultation Paper* does not appear to recognize that private sector debt relief is a continuing process (in which the proactive and cooperative approach of many countries has yielded significant progress[14]), and the data cited tends to understate the debt relief that has been granted to date and that is expected in the near future.[15]

1.2 <u>Underlying Data with Respect to Litigation against HIPCs is also Out-of-Date and Misleading</u>

Litigation against HIPCs is already rare and becoming rarer, and would not appear to pose a significant threat to future debt relief initiatives. On the contrary, as shown over the period 2007 – 2009, instances of litigation have actually declined as the private sector has been engaged in large debt relief/restructuring operations (including those of Republic of Congo, Mozambique, Nicaragua, Liberia, and currently, Cote d'Ivoire).

Contrary to the analysis contained in the Consultation Paper (which was based upon the IMF's *2008 HIPC Status Report*[16]), the information on commercial creditor litigation in the IMF's *2009 HIPC Status Report*,[17] in which the IMF states *"[l]itigation*

11 The additional 20% debt relief accompanying the new deal, which is to close in March 2010, exceeds commercial creditor debt relief expectations. <u>See</u>, *Cote d'Ivoire reaches deal on debt restructure offer,* by Anna Willard and Tamora Vidaillet, Reuters Africa, September 28, 2009 (*Cote d'Ivoire Article*). (http://af.reuters.com/article/investingNews/idAFJOE58R0B220090928).

12 Thierry Desjardins, chairperson of the London Club committee of private creditors for Cote d'Ivoire, said that *"there is always a possibility that some creditors would not participate in the restructuring...[b]ut there are no elements that would allow us to think that."* <u>See</u>, *Cote d'Ivoire Article.*

13 <u>Id</u>. Emphasis supplied.

14 <u>See</u>, footnote 7 of this paper. Interestingly, whereas commercial creditor participation rates have been steadily increasing, participation rates of non-Paris Club bi-lateral creditors which represent about 13% of the total HIPC cost, remain at 2008 levels of around 35-40%. <u>See</u>, *2009 HIPC Status Report*, page 19.

15 We also note that in some cases, the debt relief provided by the private sector has been greater than that provided by the Paris Club. In addition to Cote d'Ivoire, in the case of Russia, the private sector granted billions of dollars of debt relief after 1998, while the public sector granted none at all. In fact, Russia even paid Germany a premium to compensate the German government for future lost revenue as a consequence of Russia's prepayment of its Paris Club obligations.

16 *2008 HIPC Status Report*, Table 16, pages 97-99.

17 *2009 HIPC Status Report*, Table 16, page 62.

by commercial creditors, which had been an impediment to delivery of full debt relief to HIPCs, appears to be less of a problem now,"[18] shows the following:

- The total number of cases and/or judgments outstanding against HIPCs has declined from 54 over the last decade, to just 14 in 2009.
- Only four of the 14 cases/judgments appear to be "new" cases filed in the past year – at least three of which appear to have been brought by original trade creditors or original lenders.[19]
- From what we are able to ascertain, of the creditor-litigants in these 14 cases,
    - seven are original "trade creditors";[20]
    - three are original lenders;[21]
    - one appears to be a non-Paris Club bilateral creditor;[22]
    - one is a secondary creditor;[23] and

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18 Id., page 19.

19 The *2009 HIPC Status Report* (page 20) states that *"[n]ew lawsuits have been initiated last year against DRC, Sierra Leone, Sudan and Zambia."* The four new cases, which did not appear in the 2008 Table 16, are highlighted with an (*) in the relevant footnotes in this paper.

20 Original trade creditors suing HIPCs:
(1) *Commisimpex v. Republic of Congo*
(2) *Groupe Antoine Tabet v. Republic of Congo*
(3) *Berrebi v. Republic of Congo*
(4) *Kintex-Bulgaria v. Ethiopia*
(5) *Bago Laboratories v. Honduras*
(6) *Industria Biscotti v. Sierra Leone**
(7) *Frans Edward Prins Rootman v. DRC**

21 Original lenders suing HIPCs:
(1) *Habib Bank v. Sudan* (Habib Bank provided letter of credit to support Sudan's purchase of petroleum products.)
(2) *Pomgrad Split v. Sudan* (No background details known.)
(3) *ABSA v. Zambia* (ABSA funded Zambian National Oil Company for purchase of feedstock and operations.)*

22 The Iraq Development Fund (suing Uganda) appears to be a non-Paris Club bilateral creditor, so we are not sure that it should be categorized as a commercial creditor.

23 The secondary creditor suing a HIPC is FG Hemisphere (suing DRC). (As background, FG purchased its claim on the secondary market from a Bosnian energy company that had built electrical infrastructure in the DRC and had never received payment.) We are also aware from market sources that additional suits by secondary creditors may have been or may be filed in the U.K. against Liberia and the U.S. against DRC; however, these cases did not appear in Table 16 of the *2009 HIPC Status Report*.

- o we have not been able to identify the plaintiffs in the remaining two cases.[24]

- At least seven of these cases have been brought in local jurisdictions (i.e., not U.K. or other G-8 courts).[25]

- Only one judgment in favor of an original creditor, *Habib Bank v. Sudan*,[26] has any current nexus with the U.K.[27] The total amount of this judgment is U.S.$101.9 million (approximately £64 million).[28]

In addition, it would be difficult to maintain that any one or combination of claims against the affected countries *"constitutes a significant proportion of the total debt relief expected by the HIPC"* or would result in a significant diversion of funds from development.[29] Moreover, making assumptions about the potential 'benefit' of the Legislative Proposal based solely on total amounts claimed by creditors has a tendency to inflate the issue for several reasons: first, claimants routinely claim a higher amount than they reasonably expect to recover; second, courts often award a lesser amount than was originally claimed;[30] and third, creditors regularly face substantial difficulties in enforcing judgments against sovereigns.

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24 We do not have information on the following cases:
(1) *Namco Anstalt v. Sudan*
(2) *Africa Alfa Fund v. Sudan**

25 Cases have been brought in the following jurisdictions: Switzerland/France and France (4); Russia (1); U.K. (1); Honduras (1); Sudan (2); South Africa (1); Dubai (1); unknown (1); Uganda (1); Zambia (1).

26 Sudan is not yet HIPC-eligible, so it is not clear if this judgment will ever be captured by the Legislative Proposal.

27 We are aware from market sources that the case against Liberia has been or is being brought in the U.K. The amount of the claim in that case, *Hamsah Investments Ltd. v. Liberia*, is U.S.$18 million (approximately £11 million).

28 We understand that the legislation is also intended to limit judgment awards that are brought to the U.K. for enforcement, and therefore certain of the listed cases that do not appear to have a nexus with the U.K. at present, could in the future. We are, however, unsure how this will work in practice given the U.K.'s adherence to a number of international treaties and conventions relating to the recognition and enforcement of foreign judgments and international arbitral awards. (See generally, Section 4.)

29 See *Consultation Paper*, Section 3.6, page 20. With one exception (*Commisimpex v. Republic of Congo*), the amounts in dispute in the various cases reported on Table 16 of the *2009 HIPC Status Report* do not appear to be very large. For example, of the 13 remaining cases on the 2009 Table 16, eight claims are for less than U.S.$10 million; three are between U.S.$50 and U.S.$100 million and the remaining two are for just over U.S.$100 million. We also question the assumption in the Legislative Proposal that amounts not paid to litigating creditors would necessarily be devoted to development and poverty reduction. See, *Debt Relief*, by William Easterly, Foreign Policy, November 1, 2001, *"[T]he iron law of public finance states that money is fungible: debt relief goes into the same government account that rains money on good and bad uses alike."*

30 See generally, Section 2 of this paper. See also, the case *Donegal v. Zambia*, which provides a good example of how a court may lower a claim sought by a creditor. In the case, the creditor was seeking approximately US $55 million, but was ultimately only awarded approximately $15 million.

It should also be noted generally that simply listing legal actions without any accompanying information can create misleading implications. For example, from time to time, creditors may be compelled to file legal actions simply to preserve their contractual rights prior to the expiration of applicable statutes of limitations. In other words, these cases are not necessarily brought with the intention of pursuing aggressive recoveries through litigation. The need for such actions has become more pressing as a result of the World Bank/IDA approach to sponsored debt buybacks under the Debt Reduction Facility and was best illustrated in the recent Liberia operation, where IDA clarified that it would only contemplate settling debt that was legally enforceable, and that claims barred by the statute of limitations would be dismissed. (Incidentally, approximately one-fifth of the 54 cases on Table 16 of the *2008 HIPC Status Report* were filed for this purpose.) That these legal actions were brought to preserve legal rights and remedies does not necessarily mean that they will result in further efforts to obtain legal enforcement of the underlying claims.

In light of the updated figures, the nature of the legal actions and their relative size, we do not see how existing litigation could be interpreted to interfere with debt relief initiatives. Moreover, we would argue that the right to enforce a claim, which is every creditor's inherent right, actually contributes to the process of engagement and assists the process of debt renegotiation and debt relief.

Section 2 - A Well-Functioning Debt Market Requires that Contracts be Honored and Debts be Enforceable – The Legislative Proposal Undermines the Fundamentals of a Well-Functioning Debt Market

2.1 The Debt Marketplace – Balancing Debtor and Creditor Rights, and the Enforcement of Claims

The debt marketplace is built upon a soundly established framework of commercial and contract law, which provides that contracts be honored in accordance with their terms and that creditors – be they trade creditors, original creditors or secondary creditors – have the ability to sell, and purchasers have the ability to purchase, debts, secure in the knowledge that each purchaser steps into the shoes of the seller with respect to its rights, including the right to enforce a claim.[31] This legal framework serves the interests of both debtors and creditors. Moreover, the right to enforce a claim (as well as its occasional exercise) is not only an inherent and indispensable aspect of that framework, but it helps balance interests between debtors and creditors and gives value to assets in the secondary market.

Enhancing the operation of the primary market (i.e., the extension of new credits), the secondary market allows lenders to provide finance more cheaply and at longer maturities as they expect to be able to sell these assets if it becomes in their interest to become more liquid or otherwise realize their value.[32]

Setting new limits on the enforceability of even a 'limited' stock of debt would interfere with the proper functioning of the debt markets by upsetting the carefully-crafted balance between debtors and creditors and thereby artificially reducing the potential value of the assets. Applying such limits to existing debt would be contrary to the expectations of lenders who have already extended such credits (or of holders who have already purchased them), and the change in such expectations of existing debtholders (which we believe is unfair) would likely spill over to the primary capital markets (i.e., to prospective lenders), who would be unlikely to provide new sources of financing at current pricing levels.

It should also be kept in mind that every profit made by the purchaser of a claim in the secondary market is necessarily offset by a corresponding loss incurred by an original creditor/supplier that extended the credit to the debtor that later defaulted. In this respect, when that original creditor sells its claim in the secondary market, the market price is the only effective clearing mechanism and provides a backstop recovery of a sort. Limiting the rights of holders in due course would, among other things, merely increase the loss incurred by the original creditor by reducing its

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31 A basic pillar of the capital markets, as well as of English commercial law generally, is the concept of a holder in due course who steps into the shoes of the party from whom a traded instrument is acquired. To distinguish between the original holder and subsequent holders dramatically lowers the recovery value of a problem loan, since there will be a much lower secondary market bid. As a result, original holders will face greater loss in the event of a problem credit and hence demand a higher return on any financing extended to poor countries. Accordingly, this initiative will likely damage the broad market for English law commercial paper. If the basic tenets of the market can be varied in this instance, particularly for public policy reasons that are so insubstantial, creditors generally must wonder when and where the next erosion of longstanding commercial law and custom will occur.

32 The *Consultation Paper* acknowledges this role of the secondary market in Section 2.13, page 15.

backstop recovery. Significantly, the price at which the credit changes hands has no relevance whatsoever to its legal status, enforceability or the morality of the claim, which is a matter of commercial law and the underlying contractual provisions of the claim.

For these reasons, building contingent HIPC relief provisions into future debt contracts (which is the practical effect of the Legislative Proposal) would, we believe, unduly upset the appropriate balance between sovereign HIPC debtors and their creditors, and have a significant adverse effect on the price of sovereign debt in the secondary market (and therefore on the current value of such debt in the hands of all holders), and also on the availability and cost of future financing (as there would, in addition, be an inevitable perception that similar provisions might be imposed on new debt going forward).[33]

2.2 <u>Balancing Debtor and Creditor Rights when the Debtor is a Sovereign: Framework of Sovereign Immunity</u>

The *Consultation Paper* discusses the challenges associated with lending to sovereigns and recites that the *"last century saw a gradual move to a system where sovereign borrowers are subject to legal action if they default on their debts."*[34] However, it does not appear to consider that, in the area of sovereign credits, this "gradual move" was a well-considered legislative effort to establish an appropriate balance between sovereign debtors and their creditors through a formal framework of limited sovereign immunity, which recognizes the unique position of sovereigns by placing substantial limitations on the ability of private creditors to enforce claims against sovereign debtors. Though there are diverse opinions on minor aspects of this topic, this effort to find the appropriate balance has generally been successful, certainly to the extent that the resulting framework has anchored the expectations of creditors and governments and underpinned commercial credit and global trade, during a time of rapid expansion, for well over a quarter century.

Nevertheless, partly as a result of the Argentine experience of the past few years (but also due to the experiences of some other creditors that have tried to enforce claims against other debtor countries[35]), there is a general perception within the

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[33] Clearly, many original loans were extended to countries before the HIPC Initiative came into existence. Many original loans were extended to poor countries in the expectation that they would reasonably and rationally husband their resources and repay their debts. By retroactively making these credits unenforceable, HMT is injecting great uncertainty. Creditors will fear to extend credit to poor countries that might someday qualify for the HIPC Initiative (and the terms and scope of HIPC Initiative might someday be expanded, after all.) What happens to a country that graduates from poor country status, and what happens to its creditors under this legislation? Do such credits become enforceable? What happens to credits to countries that are poor middle income countries? The line between HIPC and non-HIPC is a gray area, not an obvious bright line, as even GDP and GDP data, which appear to be hard numbers, are rarely accurate and in many cases the exchange rate which is used to calculate GDP differs from the real effective exchange rate.

[34] *Consultation Paper*, Section 2.15, page 16.

[35] <u>See</u> Appendix 3, *EMTA Preliminary Analysis of Creditor Litigation in the Non-HIPC Sovereign Debt Restructuring Context,* and accompanying case summaries, which concludes that *"[d]espite [favorable] judgments, actual recoveries appear to have been challenging in many cases. The time lag between obtaining favourable judgment and recovering on the judgment (usually through settlement) has varied from less than one year, to several years, but all cases involved numerous*

creditor community that it has recently become unduly difficult for private creditors to collect judgments obtained against sovereign debtors, which has contributed to a general reluctance to litigate. Following this logic, there is also a general perception in the creditor community that this difficulty creates some leverage for sovereign debtors that has occasionally been exerted unfairly in the context of some debtor's restructuring operations.[36]

Obviously, market participants are presented with a more or less constant series of choices of how to respond to sovereign defaults and restructurings. Under normal circumstances where creditors have a general sense that a debt restructuring is proceeding in a reasonable manner (e.g., where in the context of a demonstrated need for debt relief, there are good faith negotiations or meaningful consultations), there is little incentive for a creditor to litigate, and the vast majority of creditors in such situations routinely either participate in the restructuring or sell their credit in the secondary market to another market participant that elects to do so.

In the absence of the expectation of a reasonable debt restructuring process, some creditors may elect to sell their credit; others may hold the credit (as well as their nose) and participate in a restructuring that they perceive is not reasonable; and occasionally a creditor may seek to enforce its claim through legal action. Those few instances where a creditor has been successful in litigating against a sovereign (meaning that a judgment has been obtained and it has been satisfied) do not signify so much that the market has failed, or that the creditor has succeeded in free-riding on the backs of creditors that participated in a restructuring, but rather help ensure that the balance is maintained in other or future situations. All of this creates factors that are considered by the market as risks are priced in the continuing process of new credit decisions. Too much of a policy tilt toward creditors might result in some of the concerns indicated by the *Consultation Paper*, but too much of a tilt toward debtors would end up reflected in a reduced supply of credit, or the higher pricing for the credits of all debtors. (See Section 3).

The Legislative Proposal is also unnecessary because the courts are the proper venue to adjudicate commercial claims based on contract, and courts have some latitude to limit awards if the facts and circumstances surrounding a specific claim warrant such limitation.[37]

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additional attachment and enforcement actions in various jurisdictions. This review did not attempt to ascertain the related costs of enforcing any of these claims and was unable to make any assessment of the "profitability" of the use of litigation as an investment strategy." Presumably, however, if litigation against sovereigns was a particularly profitable business strategy, it would be more prevalent; that there is so little of it suggests that it is not. Moreover, if this was a profitable business it would also likely be reflected in the secondary market for this debt, which of course, it is not.

[36] Ecuador's recent apparently successful repudiation of much of its external debt is an example of this trend.

[37] The case of *Donegal v. Zambia* has been raised as an example of what is wrong with the current system and as a justification for the Legislative Proposal. On the contrary, this case tends more to demonstrate that the current system works as the amount of the claim was considerably reduced through judicial discretion.

Furthermore, the Legislative Proposal is unnecessary because the official sector has already taken action to *"limit creditor non-cooperation in the HIPC initiative"*, as spelled out in the *Consultation Paper*,[38] by encouraging bilateral creditors to stop selling their HIPC claims in the secondary market, and through mechanisms such as the World Bank's Debt Reduction Facility and the African Development Bank's Legal Support Facility.[39]

2.3 Narrowly Targeting the Legislative Proposal Will Not Limit its Harmful Effects - The Debt Marketplace Must be Viewed as a Whole.

The capital markets are a seamless whole and cannot be arbitrarily sliced up into separate HIPC markets or case studies. What happens in one segment will inevitably affect all others. Similarly, what happens with respect to a single credit has a potential effect on all others. This is part of what makes up the "invisible hand" that underpins the functioning of the marketplace.

The debt marketplace (and in fact the broader capital marketplace) is composed of many different facts and circumstances, all of which are interrelated. Accordingly, there are many obligors with many different kinds of debts, and there are a corresponding number of techniques for providing debt relief. Each debtor country, with its differing circumstances, may employ different ones.

Notwithstanding these differences, no one instance of debt relief can be detached from the others, because they all tend to affect one another, as debtors and other market participants learn by experience what works (and how) and what doesn't. And, in these instances as well, there must be a balance between the interests of debtors and those of creditors in which the right to enforce a claim (not necessarily the exercise of that right) plays a useful and legitimate part, not only in the initial decision of a lender to extend a credit, or a market participant to purchase a credit in the secondary market, but also in the process of reaching a negotiated (or at least a commercially acceptable) result, should a debt restructuring become necessary. Without such a right (and the credible possibility of its being exercised), there may be little expectation of repayment upon which a lender can base its decision to lend, or little reason for a debtor to negotiate a restructuring reasonably.

Therefore, limiting enforceability of even a narrowly defined stock of debt will disrupt the foundations of the entire debt marketplace and result in numerous unintended costs and consequences.

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38 *Consultation Paper*, Sections 2.19-2.23, pages 16-17.

39 We would note that legal aid subsidies impose costs upon commercial creditors and have the capacity to distort debtor incentives. We hope, therefore, that the legal aid to be provided in this Facility will be transparent and targeted specifically to HIPC eligible countries-only who are confronted by litigation from private creditors seeking unequal recovery from commercial claims. To subsidize legal aid under any other circumstances would do a great disservice to the U.K. financial services industry and to private creditor groups more generally. We also understand, anecdotally, that the Legal Aid Facility has been slow to attract interest among countries, as did a similar Commonwealth facility, which might indicate that creditor litigation is not as problematic as is being suggested.

Section 3 - The Potential Costs Resulting from the Legislative Proposal Far Outweigh its Benefits

The Consultation Paper estimates that the Legislative Proposal's annual 'potential benefit' would be roughly U.S.$0-33 to $0-44 million,[40] a number that (given the large indicated range of error) is more or less statistically irrelevant at a macroeconomic level. Annual GDP across the population of relevant HIPC countries is approximately U.S.$200 billion. The only costs that appear to have been considered to measure its impact – aside from losses to creditors *"not participating in debt relief who would otherwise be able to extract this level of payment above HIPC terms"* relate to expected increased litigation costs.[41] The Legislative Proposal does not appear to analyze any costs associated with the disruption it will cause to the debt marketplace, or to the HIPCs themselves.

Despite HMT's attempts to tightly target this legislation, far-reaching implications to the wider market are inevitable. As stated previously, the capital markets cannot be arbitrarily sliced up into separate HIPC markets or case studies. What happens in one segment will inevitably affect all others. Therefore, it is naïve to suggest that simply by stating that the legislation will only apply to contracts that pre-date a given sovereign's HIPC Decision Point, it will not affect pricing on other loans or new business.[42]

We expect that implications to the broader market despite attempts to narrowly target legislation will include (i) a dramatic reduction of liquidity and price in the secondary market for defaulted claims, (ii) a corresponding reduction in the supply of credit and/or increased cost of financing for HIPC borrowers (whether having 'benefitted' from the Legislative Proposal or not), and (iii) potential increased cost of financing across the wider Emerging Markets, as creditors interpret this Legislative Proposal as hostile to creditors rights and the first step to further intervention. It could also affect the U.K. financial and legal markets as it will lead investors to question the U.K.'s commitment to the rule of law and sanctity of contract.

3.1 The Curtailment of the Secondary Debt Market Will Spill Over to the Primary Market (cutting off sources of finance for low-income countries) and to the Broader Emerging Markets.

As described in Section 2 of this paper, we would expect that the Legislative Proposal will result in a dramatic reduction of liquidity and price in the secondary

[40] *Consultation Paper* Impact Assessment, pages 2-3. The Impact Assessment also lists a number of key non-monetized benefits, which we do not necessarily see will result from the Legislative Proposal.

[41] Id.

[42] For example, existing creditors and new lenders and insurers will of course note that the Legislative Proposal represents a conscious legislative decision that it is appropriate as a policy matter, under these circumstances, to retroactively modify contract obligations and limit contract enforcement; they may legitimately become concerned that future legislation could expand the reach of such measures to other circumstances, such as new credits or to the debt of middle-income countries, or possibly into the domestic markets. Moreover, legislation by such an influential government as the U.K. may encourage HIPC or other debtor countries to enact comparable or related types of legislation, which could have unpredictable consequences.

market for defaulted claims, as the balance between debtors and creditors is distorted, and expectations of participants are modified to factor in that HMT's actions are no longer foreseeable or predictable. This is ironic as the events of 2008/2009 have so vividly highlighted that it is critical that an active and efficient market exists for defaulted claims. In recent months, there have been a significant number of situations in which the monetization of positions in defaulted government bonds (including those issued by HIPC countries), obtained either through the primary or secondary markets, has become essential to the financial sustainability of investment institutions. In these circumstances, the ability to monetize is dictated solely by the presence of willing buyers, who demand a variable (potential) rate of return in order to purchase assets.

The lack of willing buyers in the secondary market will be reflected in the pricing of new loans and credit insurance contracts, and it seems reasonable to assume that this price shift will occur in the market for all HIPC issuers, not simply those that are targeted by this Legislative Proposal. So what is the cost to each of the HIPC countries if interest rates on publicly owed or guaranteed trade finance and bank loan agreements increases by even a small fraction of a percentage point? These calculations were not evident in the HMT cost/benefit analysis for the Legislative Proposal, but should be factored into any analysis of costs of this initiative.

3.2 Impact of the Legislative Proposal on Future Market Access of Low-Income Borrowers (HIPC or Potential HIPC)

One need only look to Ghana for evidence of the rewards that voluntary debt relief from all creditors, and re-accessing international capital markets, brings to HIPC countries: the issuance of a U.S.$750 million Eurobond, the issuance of a U.S.$200 million corporate bond and of U.S.$1 billion-equivalent of local government bonds and the U.S.$900 million disposition of a strategic state-owned company. Incidentally, if the sale prices of those bonds and companies is compared with the achievable market prices in today's market, the NPV transfer from private creditors to Ghana on these transactions amounts to several hundred million dollars. These transactions, and their resulting benefits, would not have been feasible without a consensual process of debt relief and due respect for rule of law and property rights.

The concept of recovery value is fundamental to both bond markets and credit derivatives markets. To argue that the price of a claim which is subject to international law should command the same price as a claim that can be superseded or adjusted by legislative actions (undertaken for political reasons) ignores reality. All of the scenarios outlined in the *Consultation Paper*, in which existing claims are subject to arbitrary legislative ceilings or subject to discrimination according to the purchase timing/price, demand a re-pricing of all low-income country risk – present and future. There can be no exceptions: today's HIPC could be tomorrow's "Caribbean Recovery Programme" or "Africa HIPC II". It is a basic economic reality that all claims in low-income countries would have to reflect a risk premium for the risk that the legal underpinnings of recovery value could become subject to unpredictable political trends and resulting exogenous constraints.

Thus restricting market access of low-income countries will condemn them to permanent dependency on concessional aid and cripple their economic growth and development.

3.3 Impact of the Legislative Proposal on the U.K. Financial Services Industry

Historically, the new issues market for Eurobonds, and Emerging Markets bonds in particular, has been split between New York and London, with Emerging Markets issuers playing a leading role. At various times (such as in the mid-1970's), there has been considerable competition between the two jurisdictions based upon perceived advantages and disadvantages of various factors such as governing law (e.g., differences in sovereign immunity legislation). While this cannot be predicted with certainty, the Legislative Proposal, if implemented, could very well lead to a perception among investors that N.Y. governing law was generally preferable to English law, with a resulting shift in some or possibly all of the Eurobond new issues business for Emerging Markets credits from London to New York. Of course, many bond issues arranged in London already are governed by N.Y. law (whereas very few arranged in N.Y. are governed by English law), but perceived differences in governing law can have a subtle, but significant, effect on the decisions of bond practitioners regarding the locus of bond origination. Of course, bond origination is a very significant business in London, and in a very competitive global marketplace, the effect of changes in governing law should not be underestimated.

More generally, the sanctity of contractual rights and obligations is an irreplaceable necessity for the proper functioning of financial markets. The *Consultation Paper* acknowledges that the *"UK's status as a country with legal protection for creditors underpins its reputation as a jurisdiction of choice for investors, bringing consequential benefits to the domestic economy."*[43] In countenancing the retrospective alteration of property rights (to further a political agenda), HMT puts at risk the U.K.'s reputation as a country with legal protection for creditors. Given the importance of English law in the preparation of contracts involving a huge number of foreign parties and the beneficial impact that has the U.K. economy, it would seem unwise to implement this Legislative Proposal, which may cause such parties to reconsider their choice of law.

[43] *Consultation Paper*, Section 2.12, page 15.

Section 4 - The Legislative Proposal is Questionable in its Legality and Not Practicably Enforceable

4.1 Unlawful under The Human Rights Act 1998

As more fully developed in other submissions,[44] the Legislative Proposal would not be compliant with Section 6(1) of the Human Rights Act 1998, and accordingly, would be unlawful.

4.2 Contrary to International Treaties and Conventions

The *Consultation Paper* states, *"[i]n principle, and subject to its international obligations, the Government's preference is for this policy to apply to cross border enforcement of debts."*[45] As may be more fully developed in other submissions, the Legislative Proposal, as drafted, would appear to put the U.K. in contravention of a number of international treaties and conventions relating to the recognition of foreign judgments; the recognition and enforcement of international arbitral awards, as well as international treaties and conventions that provide individuals with actionable property rights, such as the European Convention on Human Rights, and any one of the numerous Bilateral Investment Treaties (IPPAs) adhered to by the U.K.

4.3 Not Practicably Enforceable

Regardless of how the HMT deals with the "design" points of the Legislative Proposal, the outcome will be inequitable and practicably unenforceable for the following reasons:

- *The Legislative Proposal seeks to limit, but doesn't guarantee, recoveries.* Although the Legislative Proposal interferes with the creditor's rights, it does not appear to address in any way the debtor's obligations. While attempting to limit recoveries, it ignores the fact that often creditors are unable to obtain any recovery from a sovereign without instituting a number of additional lawsuits.

- *Discriminating between original and secondary holders.* The concept of distinguishing between original and secondary holders of claims is misguided and inequitable and ignores the valuable function that secondary market participants play in providing liquidity to original holders. Creating a false distinction in the law between original and secondary creditors would result, among other things, in a legal minefield in respect of existing loan participations sub-participated from original loan holders. Trading of cash instruments in the secondary market would seize up, and over time presumably be replaced by derivatives transactions which could be more complex, less transparent and less efficient.

- *Capping recoveries at purchase price plus specified rate of interest.* Setting a legal recovery ceiling for commercial creditors at the

[44] See, response submitted by Decherts, LLP.

[45] *Consultation Paper*, Section 5.5, page. 30.

purchase price (plus a specified rate of return) does not take into account how financial markets work, and is therefore not practical. The required rate of return on a financial asset is not a constant and is, moreover, subjectively determined, incorporating, among other things, the moving targets of illiquidity risk, credit risk, capital outlay and deal risk. Under this proposal, the purchaser of a defaulted claim is effectively expected to assume a large chunk of these risks for free, and accept some pre-determined interest rate. The result would be to sharply reduce the number of willing purchasers, possibly to the point of market cessation.

- *Capping recoveries at the Common Reduction Factor.* Any legal remedy that caps commercial creditors' recovery at the Common Reduction Factor (CRF) opens up a Pandora's Box of complications in cases where the debt restructuring takes the form of anything other than a cash repayment (for example, if it is a bond exchange). The CRF is not a set number that can be applied easily across creditors. Rather, it is a net present value (NPV) concept, and it, and by association NPV forgiveness (and 'comparability of treatment' between various creditor groups), is achieved as a complex and subjective blend of three main considerations – notional debt forgiveness, duration extension and a discount rate. While notional haircuts and maturity extensions may be easily observable from a comparability of treatment standpoint, discount rates are not. Just as private sector claims are subject to very different risks than public sector claims, likewise, the discount rates applied to bilateral and Paris Club credits necessarily differs from those applied to private sector credits (whose discount rates are market determined). Presumably, under this provision of the Legislative Proposal, courts would need to form a judgment in each case, on the appropriate discount rate to apply to the NPV calculation used to determine the CRF ceiling for each private sector claim. We are not at all sure how this would work in practice.

<u>Section 5 - Additional Considerations with Respect to Debt Reduction and the Real Nature of Debt, Promoting Development and Comparability of Treatment</u>

5.1 <u>Debt Reduction and the Real Nature of Debt</u>

In part due to the efforts of groups such as the Jubilee Debt Campaign[46] that have raised the visibility of the debt forgiveness issue – which actually dates back several decades – to the broader population, the G-8 governments committed in 1999 to cancel U.S.$100 billion in bilateral loans to poor countries.[47] Governments, perhaps recognizing the non-financial motivations of their lending in the 1970's and 1980's, permitted the cancellation of what, in many cases, were politically motivated 'grants' extended in the form of loans. As a result of this debt cancellation, in conjunction with IMF/IBRD-sponsored reform programs under the HIPC Initiative and MDRI, many beneficiaries of official debt relief are now on their way to integrating more fully into the global economy.

The debt-forgiveness lobby now represents a large and diverse coalition of religious groups, human rights groups, and development agencies. In recent years, this coalition has broadened its focus from official creditor debt forgiveness to private creditor debt forgiveness. Most recently, it has obtained support for legislative initiatives to 'spread debt relief' to private creditors and 'stop vulture funds' in the U.K., U.S., France and Belgium, and has put the issue of commercial creditor litigation on the agendas of the European Union and other multilateral bodies.

Not only has the campaign broadened its focus from official to private creditors, it has also broadened its focus to include middle-income countries (as well as low income ones), and in doing so, has seemingly ignored the difference between 'willingness' to pay and 'ability' to pay, and promoted, frankly, shockingly spurious theories of 'illegitimate debt'.[48]

We are concerned that in many cases (whatever their intentions and whatever good may have come from them), this coalition does not appear to understand fully the consequences of its actions to the very countries and populations that it is intending to assist. For example, two consequences of the 'illegitimate debt' campaign in Ecuador (and this Legislative Proposal, <u>see</u> Section 3) will be to increase the cost of

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46 <u>See generally</u>, websites such as http://www.jubileedebtcampaign.org.uk/.

47 Debt relief is not new, but dates back at least to 1967 when the U.N. Conference on Trade and Development argued that debt service payments by many poor countries had reached "critical situations," which led to the commencement of multiple debt write-offs and renegotiations over the following decades. See, *Debt Relief.*

48 This same political lobby was involved in providing highly questionable 'justifications' for Ecuador's 2008 repudiation of its Eurobonds. (See, *"Ecuador's Sovereign Bond Default, The Coroner's Inquest",* Lee Bucheit and Mitu Gulati, IFLR, September 2009 and http://www.jubileedebtcampaign.org.uk/Ecuador%20instigates%20debt%20audit+3635.twl, where the Jubilee campaign headline reads***, "****The launch of the world's first government-backed debt audit, in Ecuador, is a significant step forward in the illegitimate debt campaign."*

financing for both low and middle-income countries generally, and further decrease trust between sovereigns and their private creditors.[49]

Moreover, we must reject any implication that the enforcement of a valid contractual claim against a sovereign by a private creditor, in accordance with its contractual rights and well-established legal principles, is in any way contrary to public policy unless such enforcement meets with the approval of the self-appointed debt forgiveness lobby.

5.2 Debt Serves a Vital Function

Each developed country, indeed, virtually all economic activity throughout the world, depends upon the availability of financing, and lenders and suppliers are not exploiters but partners in economic development. Moreover, many lenders today have detailed and proactive policies to support development in their client countries or social responsibility policies which have a genuinely significant input into lenders' actions. While it is true that these policies have become more prevalent in recent years, it is not true to suggest that all lenders at the time that these debts were incurred were uniformly and exclusively driven by 'greed'.[50]

Countries that have not had the benefit of debt relief efforts often benefit from the investment flows which are naturally attracted to a country that has established a reputation for dealing responsibly with its creditors. India, a middle-income country, albeit one with a very large poor population, provides an excellent example of a country that has acquired the confidence of its creditors and investors, and as a result has been able to develop its infrastructure and export base rapidly in recent years. Indeed, many other formerly very poor countries have made considerable progress in the last 50 years (South Korea, Taiwan, Botswana, much of Asia generally etc) due to their constructive engagement with the private sector and participation in the process of globalization.

5.3 Promoting Development

Promoting development in the Emerging Markets, and particularly in the HIPC countries, is a laudable goal, and the most direct route toward that goal would be legislation and policies that address trade policies that limit these countries' access to world markets through a combination of trade restrictions (i.e., quotas, anti-dumping legislation) and anti-competitive assistance to domestic producers (i.e., export subsidies).

On the other hand, the Legislative Proposal will not promote development because it will further hamper these countries' access to the private capital they need to build

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[49] Debt relief has served a purpose, but with its recent change of focus, many market participants are left to wonder if the overall goal of this campaign is to increase financing costs for developing countries so much that they can only be financed by the public purse.

[50] On the contrary, in many cases, the unpaid creditor is as much a victim as the populace that has been ill-served by its Government. But see, http://www.jubileedebtcampaign.org.uk/?lid=98, where Jubilee states that *"[m]uch of the debt of poor countries is left over from the 1970s - and often arose through reckless or self-interested lending by the rich world."*

infrastructure and develop.[51] The development financing needs of the HIPCs are large and immediate, and it is not clear that increases in official development assistance will be sufficient to meet these needs.[52] In order to harness private capital to assist the critical needs of development, we would encourage governments to implement legislation to facilitate and promote private investment in these countries, not reduce or inhibit it.[53]

5.4 Comparability of Treatment

Many market participants have observed that the Legislative Proposal would, in effect, transform the principle of comparable treatment from a voluntary convention into a legal requirement. As such, it would enshrine in law the seniority of official sector claims on the HIPC public sector, a topic that raises broader issues that are generally beyond the scope of this submission. However, this does not make sense, inasmuch as it would be unfair to commercial creditors, which extend credit to sovereigns exclusively on commercial terms for commercial reasons (with the expectation that these loans are governed by regimes of commercial and contract laws with an established framework of sovereign immunity), in contrast to the multifaceted motivations behind official lending (and therefore correspondingly complex and legitimately non-commercial motivations behind official debt forgiveness), which include objectives such as spurring domestic exports, attaining diplomatic goals, furthering humanitarian concerns, and so forth.[54]

Beyond its unfairness, pushing the concept of comparability of treatment too far erodes the private sector's one bargaining tool with recalcitrant sovereign debtors: the risk of non-participation, which is currently the only incentive to encourage an equitable and negotiated debt settlement and promote maximum participation.

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[51] See also, footnote 27 of this paper.

[52] It is estimated that the achievement of the Millennium Development Goals (MDG) will require over U.S.$70 billion annually in external financing. While it has been suggested that G-8 commitments to increase official development assistance, and other donor monies may be sufficient to meet these requirements, a recent U.N meeting on Africa's development needs reported that G-8 commitments are incomplete and the lack of adequate external financing is a *"key constraint on the achievement of the MDGs in Africa."* U.N. High Level Meeting on Africa's Development Needs: State of Implementation of Various Commitments, Challenges and the Way Forward, *Summary Report,* September 22, 2008.

[53] See generally, *EMTA Africa Report*.

[54] Moreover, the majority of private sector participants have actually been reasonably acquiescent in their acceptance of comparability of treatment of these two very different classes of obligations. (See Section 1).

Conclusion

For the reasons referred to above, many of which we believe have not been adequately considered, implementing the Legislative Proposal is likely to have various adverse consequences for HIPCs generally, including harming their long-term prospects for development and economic growth, and their further integration into the international financial system. Sanctity of contract and the rule of law, as cornerstones of the commercial marketplace, and indeed of English law generally, are far too important to the functioning of the capital markets to be set aside in this context for the reasons set forth in the *Consultation Paper*. As a result, the Emerging Markets trading and investment community strongly believes that the Legislative Proposal needs to be completely rethought, if not abandoned altogether. How best to promote development in HIPCs is an important question that raises broader issues. We do not believe that the Legislative Proposal contributes to this goal.

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For questions or comments on this paper, please contact Michael M. Chamberlin (mchamberlin@emta.org) or Starla Griffin (sgriffin@emta.org).

ANNEX A

Purpose and Scope

Question 1: Do you agree that there is a need for further action to tackle non-cooperative creditor litigation against Heavily Indebted Poor Countries?

Answer: *No. For specific reasons, please see entirety of submission.*

Question 2: Do you agree that any legislation should be targeted at the public debts of Heavily Indebted Poor Countries?

Answer: *We do not believe that the legislation is necessary even for HIPCs for the reasons set forth in the entirety of this submission; we are also aware, however, that non-HIPC countries (moving into the middle-income area, for example Ecuador) could be susceptible to this type of legislation, and for that reason, our concerns about this proposal being but a first step towards greater intervention are heightened.*

Question 3: Do you agree that any legislation should only apply to debts contracted before the legislation takes effect?

Answer: *We do not believe that the legislation should be implemented for the reasons presented in the entirety of this submission. Applying the legislation to new lending would only exacerbate the negative consequences of the legislation discussed in Section 3 of this submission, in particular with respect to increasing the cost of new financing for HIPCs and other Emerging Market countries. We did not discuss the issue of moral hazard that could arise if borrowers are, or think that they may be, shielded from their obligations through this legislation, but applying the legislation to new lending would also create disincentives for lenders to lend, as well as for sovereign debtors to deal appropriately with their lenders.*

Question 4: Do you agree with the costs and benefits of legislating set out in the Impact Assessment?

Answer: *No, as more fully set out in the submission, the Impact Assessment does not appear to have factored in a number of additional costs and has overstated any potential benefit. Moreover, we question the assumption that amounts paid to judgment creditors would otherwise be devoted to development and poverty reduction.*

Question 5: Do you think that there is the possibility for further voluntary initiatives from commercial creditors of Heavily Indebted Poor Countries? If so, how effective would these be in increasing commercial cooperation in the HIPC Initiative?

Answer: *As our submission discusses, we believe that commercial creditors have generally been and continue to be very cooperative in assisting in achieving the goals of the HIPC initiative. We are confident that this will continue to be the case.*

Question 6: Are there other non-legislative measures that can be taken to address the problem?

Answer: *There are a number of forums in which this question is currently being considered.*

Question 7: What do you consider should be used as the reference point in specifying the maximum value that can be reclaimed from a debt covered by the legislation?

Answer: *We believe, as discussed in the submission, that the courts are the proper venue to determine awards when adjudicating contract claims, but we start from the presumption that it is necessary to the proper functioning of the credit markets that contracts normally be enforceable in accordance with their terms..*

Question 8: Do you think that original creditors should be specifically excluded from the scope of new legislation?

Answer: *As described throughout this submission, the markets are interconnected, including the primary and secondary markets; therefore we believe that differentiating between original and secondary creditors creates false distinctions. Limiting or not limiting the legislation will have the same deleterious effects. Please also see Section 4.3 (page 15) of this submission for more details on this point.*

Question 9: Do you agree that legislation should include a provision to value debts above the terms specified, if it is found to be just and equitable to do so?

Answer: *We think that the courts can and do use judicial discretion to limit awards when the facts and circumstances warrant such limitation under current legal standards..*

Question 10: What factors, if any, should be specified to consider in the use of discretion to value debts above the terms specified?

Answer: *Same answer as above.*

Question 11: Do you think that any alternative or complementary legislative approaches would better accomplish the Government's purpose?

Answer: *We do not believe that this is an issue that warrants legislative intervention and that the government's purpose is being accomplished through the proper functioning of the markets and debt relief and renegotiation processes currently in effect.*

<u>Operation and Enforcement</u>

Question 12: Do you agree that legislation should apply to those debts on which judgment has already been obtained?

Answer: *No, for the reasons set forth in this submission, and in particular because sufficient limitations already exist to limit creditors' recoveries against sovereigns under current law.*

Question 13: Do you agree with the Government's proposals relating to international aspects of legislation?

Answer: *We believe that the whole focus on so-called "uncooperative creditors" is not useful and further degrades trust between the private and official sectors, and between the private sector and their current or potential sovereign borrowers. We believe this is an unfortunate result of this initiative. We also respectfully suggest that this initiative is the result of the current political climate and a reflection of the power of certain lobbying groups rather than the outcome of a considered analysis of the more general (and important) question of how best to promote growth and development in HIPC and other low-income countries.*