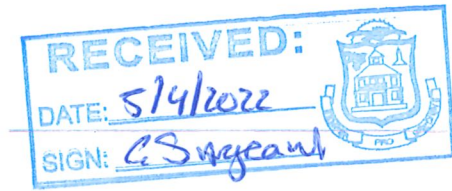




Sociaal Economische Raad
Social Economic Council

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LETTER OF ADVICE

The Honorable Minister of General Affairs/ Prime Minister of St. Maarten
Honorable Prime Minister Ms. Silveria E. Jacobs
Government administration building
Soualiga Road # 1
Philipsburg, Sint Maarten

May 4th, 2022

Our reference: SER/2022/CB/08

Subject: Letter of advice requesting the SER to provide input on several questions posed by Parliament in relation to the implementation of the draft Consensus Kingdom Law Caribbean Reform Entity also referred to as "COHO".

Honorable Prime Minister Ms. Jacobs,

On Wednesday April 13th, 2022, the Social Economic Council (hereafter: SER) received a solicited advice request, reference DIV no. 1736B from the Minister of General Affairs/Prime Minister, Ms. S. Jacobs. The advice request originated from the Parliament from the Committee of Kingdom Affairs and Interparliamentary Relations (hereafter: CKAIR) and was submitted by the Honorable Vice President of Parliament and Member of Parliament (hereafter MP), MP. S.M. Bijlani.

The solicited advice request requests the SER to provide input on the questions posed by the MPs in relation to the implementation of the draft Consensus Kingdom Law Caribbean Reform Entity.¹ The SER kindly request the Government to provide Vice President of Parliament of the CKAIR, MP. S.M. Bijlani with a copy of the advice.

The SER received the following questions from Parliament in relation to the implementation of the draft Consensus Kingdom Law Caribbean Reform Entity:

1. What can be considered the social and economic impacts c.q. consequences of the consensus Kingdom Law COHO?
2. How will the COHO potentially affect the debt situation of the country?
3. How can fair business practices be guaranteed with COHO's unilateral authority to assist, subsidize etc. businesses etc.?
4. What has the Social Economic Council identified as risks to Dutch side business practices, in relation to our French side counterparts, regarding COHO's unilateral authority to assist, subsidize etc. businesses etc.?

¹ Advice request from CKAIR submitted through the Honorable Prime Minister/Minister of General Affairs on the Draft Kingdom COHO Law. DIV no. 1736B on April 13th, 2022.



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The request to the SER only focuses on providing input to questions posed by Parliament in relation to the implementation of the draft Consensus Kingdom COHO Law, however, the following must be taken into consideration: the SER was not provided with supporting documentation; the proposed reforms are undetermined; the SER was not provided with any context for the questions posed by Parliament; and finally, the SER was not provided with data on the business of our French counterparts or it was not available.

Consequently, the SER has made a significant attempt to provide answers to the proposed questions. The SER notes that the scope of the questions does not provide for an adequate elucidation of the SER's position on the COHO entity. Based on the limited available data combined with the urgency of the request, the SER's position has been added as a supplement to this advice.

We trust to have informed you sufficiently herewith. Should you require any additional information after reading the above, please feel free to contact us at your earliest convenience.

Respectfully,

Ir. Damien D.E. Richardson
Chairman

Gerard M.C. Richardson
Secretary General

Cc: The Honorable Vice President of Parliament and Member of Parliament, MP. S.M. Bijlani.



1. What can be considered the social and economic impacts c.q. consequences of the consensus Kingdom Law COHO?

Interpreting consequences of the draft Kingdom COHO Law

The SER has determined that an analysis of the social and economic consequences of the consensus Kingdom COHO Law should include both an analysis of the implementation of the COHO entity and the execution of the reforms provided in the “country packages.” As the country packages cover a vast majority of reforms, including but not limited to public financial management, tax reform, financial sector reforms, economic reforms, healthcare reforms, education reforms and the reinforcement of the Rule of Law, the SER notes that due to the limited amount of context, data and supporting documentation that was provided in relation to the development and execution of the proposed reforms, the SER could not adequately review the social and economic impact of the Draft Kingdom COHO Law. Nevertheless, the SER would like to bring forth the following social and economic effects the SER has observed as it relates to the implementation of the COHO entity.

Social and economic consequences

The SER has been made aware that the reforms are to be implemented with the support and under the supervision of the COHO entity.² Although, the SER understands the need for county St. Maarten to implement measures to revitalize and strengthen the country’s economy, through structural reforms, the SER questions the form and manner in which the Kingdom has opted to include various governing bodies to carry out decisions to implement social and economic reforms on St. Maarten. The SER understands that including multiple governing bodies will allow for an increased system of checks and balances in order to ensure a proper and timely implementation of the reforms. However, these checks and balances may sometimes require the approval of multiple entities such as the COHO entity, the Kingdom Council of Ministers, the Minister of Kingdom and Kingdom relations (hereinafter: “Minister of Kingdom Relations”), and the views of the College Financieel Toezicht (hereinafter: “CFT”) along with the Prime Minister of country St. Maarten’s approval. The SER notes that by including these various checks and balances, the numerous layers of conditional approval may at times subject St. Maarten’s economic activities to a political halt, which could hamper businesses and residents from for example obtaining subsidies, as is mentioned in article 25 of the draft Kingdom COHO Law. The SER would like to recommend, implementing a timeframe of 6 – 8 weeks to allow for a swift and consistent decision-making model to prevent the COHO entity from delaying St. Maarten’s business activities and allowing for a consistent flow of economic activities on St. Maarten.

The SER has observed that the implementation of reforms without an overview of the long-term effects can have a harmful effect on the social and economic realities of the population of St. Maarten, while coping with the effects of a dynamic economic environment. The SER has determined that such long-lasting effects can be exhibited through the implementation of temporary reforms such as the 12.5% personnel benefits cut, implemented as a condition to receive the 2nd Tranche of liquidity support in 2020.³ A personnel benefits cut measure that continues to limit a substantial portion of the population of

² Explanatory notes Draft Kingdom COHO Law, paragraph 3.3.1 Supporting Reforms through the COHO, p. 15. Kamerstukken II, 2020/21, 36031 (R2161), nr. 3, p. 1 (MvT).

³ Kamerstukken II, 2019/2020, 35420, nr.37.



St. Maarten, as the lasting effects of the COVID-19 pandemic and the ongoing war between Russia and Ukraine, have caused the inflation on prices for consumer goods and services to rise significantly which reduced the purchasing power of the population. Persons who have endured the 12.5% personnel benefits cut measures in addition to the already existing inflation increases the disparity amongst the population. As such the SER has observed that when implementing such reforms, insufficient consideration is provided towards the long-term effects of such reforms and their local implications. The SER notes that the Kingdom Council of Ministers recently decided against the phasing out of the temporary measure⁴, which was set to be phased out in 2022. Taking into consideration the aforementioned and those new reforms to be established in accordance with article 38 paragraph 2 Kingdom Charter, through consensus Kingdom laws, limited flexibility is provided to the Dutch Caribbean islands to deviate from these reforms after these laws have been established.

2. How will the COHO potentially affect the debt situation of the country?

Interpreting “debt situation” of Country St. Maarten

The SER notes, that due to the limited context and definition of the term “debt situation” of country St. Maarten, the SER has limited its interpretation to the following three interpretations. Firstly, the obligation of the Netherlands to provide financial assistance. Secondly the “debt situation” of country St. Maarten can be defined as the national debt St. Maarten has established since becoming a country on 10-10-10, in which the analysis of such is carried out by the CFT. Finally, the “debt situation” of country St. Maarten can be interpreted to include the total amount of liquidity support the country has received from the Netherlands due to the financial constraints Hurricane Irma and the COVID-19 pandemic placed on country St. Maarten in 2020 and 2021.

Obligation to provide financial assistance

The SER has determined that based on the draft Kingdom COHO Law, the Netherlands can provide financial assistance in two instances, when St. Maarten has met the obligations imposed by draft Kingdom COHO Law, reference is made to article 22, to aid in carrying out the agreed upon reforms, reference is made to article 27. The SER notes that the Netherlands is obligated to provide financial assistance, in the event the Minister of Kingdom Relations determines based on the execution reports compiled by the COHO that St. Maarten has met its obligations as is laid down in draft Kingdom law. However, as the terms and scope of providing financial assistance is yet to be determined, reference is made to article 22 paragraph 3⁵, it cannot be determined to what extent the financial commitments of the Netherlands will impact the “debt situation” of Country St. Maarten.

⁴ Kamerstukken II, 2021/2022, 35420, nr. 469.

⁵ Explanatory notes Draft Kingdom COHO Law, p. 19.
Kamerstukken II, 2020/21, 36031 (R2161), nr. 3, p. 19 (MvT).



The table below provides an overview of the liquidity support provided in 2020 and 2021.

St. Maarten*	ANG	EUR	Dates
Liquidity Support 2019**	50.2	25.6	
1st Tranche	20	10.3	Q1
2nd Tranche	43.3	21.6	Q2
3rd Tranche	61.2	28.2	Q3 and Q4
4th Tranche	8.7	4	Q1
5th Tranche	39	18.4	Q2
6th Tranche	48	22.9	Q3
7th Tranche	22	10.7	Q4
8th Tranche	-	-	
Total outstanding	292.4	141.7	
*All amounts are in millions and rounded to 1 decimal. The Euro amounts are calculated based on the national budget rates for the relevant budget years. The Euro amounts for the 1st to the 7th tranche are based on the "realisatiekoers".			
** Delayed liquidity support provided to St. Maarten in 2020 due to Hurricane Irma. The liquidity support has the same end date as the remaining liquidity support loans provided.			

Liquidity support

The SER has established that between 2020 and 2021, country St. Maarten received ANG 292.4 million in liquidity support.⁶ Article 22 paragraph 1 of the draft Kingdom COHO law, only provides for liquidity support⁷ as a loan, which must be repaid in a time span of 2 years. Therefore, the SER concludes that liquidity support will only have a negative impact on the "debt situation" of the country. In addition, the SER has determined that the draft COHO law does not provide any financial obligations for the Netherlands to forgive outstanding liquidity support provided to country St. Maarten prior to or after the implementation of the draft COHO law.

Liquidity Support vs implementation of reforms

The SER understands that in analyzing the draft Kingdom COHO law, the Netherlands is obligated to provide financial assistance through liquidity support, directly or indirectly through the COHO entity.⁸ However, the SER notes that as the terms dictating the scope, nature and amount of the liquidity support are still to be established by contract, the right to financial assistance to St. Maarten becomes unclear. Furthermore, the SER notes that liquidity support, in times of need, should solely be considered funds necessary to cover expenses arising due to national emergencies, such as a COVID-19 pandemic or a severe hurricane, granted to keep government operational. The SER has observed that currently a request for liquidity support can be honored dependent on the implementation of reforms to the satisfaction of

⁶ See table from annex to Letter to the Second Chamber of April 4th, 2022, in relation to the decisions taken by the Kingdom Council of Ministers on March 25th, 2022, regarding the liquidity support offered to the Dutch Caribbean Islands. Annex: "Toetsingskader Risicoregelingen Rijksoverheid: Herfinanciering van de liquiditeitsleningen met einddatum 10 april 2022 aan Sint Maarten."

⁷ Liquidity support is financial aid provided by the Dutch government allowing Country St. Maarten to cover operational costs of a governments regular operational costs reflected in the annual budget, due to unforeseen circumstances such as the Covid-19 pandemic. Explanatory notes, Draft COHO law, paragraph 3.4 Financial consequences. P.20-21. Kamerstukken II, 2020/21, 36031 (R2161), nr. 3, p. 20-21 (MVT).

⁸ Article 22 of the draft Kingdom COHO Law. Kamerstukken II, 2020/21, 36031 (R2161), nr. 2, artikel 22.



the Minister of Kingdom Relations.⁹ Therefore, the SER questions to what extent, considering the nature and purpose of liquidity support, article 22 of the draft Kingdom COHO Law, is compatible with article 36 of the Kingdom Charter stating that countries within the Kingdom shall provide aid and support to one another. Therefore, the SER would like to suggest separating a request for liquidity support and the requirement to implement reforms or incorporating additional guarantees protecting against the arbitrary use of article 22 of the draft Kingdom COHO law.

National debt

The draft COHO law does not provide any legal basis obligating either country to amend existing financial agreements as it pertains to existing loans. Therefore, the pending draft COHO law will not affect the existing “debt situation” regarding the national budget of Country St. Maarten insofar no additional liquidity support is provided.

3. How can fair business practices be guaranteed with COHO’s unilateral authority to assist, subsidize etc. businesses etc.?

Unilateral authority of the COHO entity

The SER has determined that the COHO entity, in its role, has been tasked with various powers to allow the COHO entity to carry out reforms. As such, the COHO entity is authorized to provide financial support directly and indirectly to government entities, provide expertise and the capabilities to execute, to screening of government and government owned companies and provide grants to residents, and privately and government owned businesses that possess legal personality.¹⁰ The SER notes that these powers are to be interpreted in a restrictive manner¹¹ and can only be used insofar as the use of such power's forms part of an execution agenda or plan of approach¹², for which the prior approval of country St. Maarten is required, through the Prime Minister or respectively the government entity or company involved. The execution of such power is also limited to a specific concrete situation and the COHO must engage in a discussion with the involved government entity prior to making use of such powers.¹³ However, the SER must note that once approval has been provided, the COHO entity may use the power at its discretion. The SER notes that in times of changing circumstances, approvals cannot be retracted.

Warranting fair business practices

The SER notes that as these are in fact far-reaching powers, the direct impact that may potentially undermine fair business practices on St, Maarten, is limited to providing subsidies, to hire experts and to increase the capabilities to execute reforms in the event country St. Maarten does not have the capacity to do so.¹⁴ The remaining powers focus on government entities.

⁹ Article 22 paragraph 2 of the draft Kingdom COHO Law. Kamerstukken II, 2020/21, 36031 (R2161), nr. 2, artikel 22 lid 2.

¹⁰ Article 25 (Powers) paragraph a – d. Draft Kingdom COHO Law. Kamerstukken II, 2020/21, 36031 (R2161), nr. 2, artikel 25.

¹¹ Explanatory notes Draft Kingdom COHO Law, paragraph 3.3.1 Supporting Reforms through the COHO, p. 15. Kamerstukken II, 2020/21, 36031 (R2161), nr. 3, p. 15(MvT).

¹² Ibid.

¹³ Ibid.

¹⁴ An example mentioned is employing legislative lawyers to aid in drafting laws. Explanatory notes Draft Kingdom COHO Law, paragraph 3.3.1, p. 16. Kamerstukken II, 2020/21, 36031 (R2161), nr. 3, p. 16(MvT).



In the context of providing subsidies, the SER notes, that unfair business practices may arise due to possible language barrier in terms of local businesses applying for subsidies which are subjected to a Dutch subsidy policy in the form of a Dutch Ministerial regulation. The subsidy policy shall dictate the scope in which a subsidy is granted making it difficult for non-Dutch speaking business owners to apply for the same subsidies. However, the SER notes that the aforementioned policy is established in consultation and approval of the Prime Minister¹⁵ and businesses whose application are denied can file an appeal against the decision, imposed by the COHO entity, providing judicial protection against any further legal violations.¹⁶ The appeal is then handled by the Joint Court of Justice of Aruba, Curaçao, Sint Maarten, and of Bonaire, Sint Eustatius and Saba.¹⁷ To further warrant fair business practices, a fair distribution of subsidies amongst businesses may further be guaranteed, as the subsidy policy shall be applied in accordance with the Dutch General Administrative Law Act, an act aiming to uphold administrative legal norms, such as the general principles of good governance¹⁸.

Warranting fair business principles as it pertains to the power of the COHO entity to hire external expertise and additional execution capacity can unintentionally undermine the necessity to fill positions locally. Although this power is only exercised in the event St. Maarten cannot provide the expertise or capacity to execute a reform, incorporating a proper recruitment policy obligating the COHO entity, for example to place ads locally can provide additional warranties. Warranties that allow the local labor market to be considered first thus increasing their opportunities.

4. What has the Social Economic Council identified as risks to Dutch side business practices, in relation to our French side counterparts, regarding COHO's unilateral authority to assist, subsidize etc. businesses etc.?

Unilateral Authority of the COHO entity

The SER has determined, that as previously mentioned, the COHO entity shares the responsibility to exercise the power to subsidize businesses, as the ability to exercise powers bestowed upon the COHO, jointly falls within the purview of the Prime Minister, through the establishment of execution agendas and plans of approach to implement the reforms reflected in the country packages.¹⁹ However, again the SER notes that in times of changing circumstances, approvals cannot be retracted.

Dutch St. Maarten business practices in relation to French St. Martin

As stipulated by article 25 of the Draft Kingdom COHO Law, the SER has determined that the COHO entity will be provided with the powers to provide businesses with subsidies. However, as policy dictating the provision of subsidies distributed by the COHO entity, has not yet been established and the current draft Kingdom COHO law makes no distinction between the established location of the applicant, the SER cannot foresee any risks harmful to local business practices at this time, as all businesses are treated equally and provided equal opportunities.

¹⁵ Explanatory notes Draft Kingdom COHO Law, article 29 subsidies, p. 37. Kamerstukken II, 2020/21, 36031 (R2161), nr. 3, p. 37(MvT).

¹⁶ Article 32 (Judicial protection), draft Kingdom COHO Law. Kamerstukken II, 2020/21, 36031 (R2161), nr. 2, artikel 32.

¹⁷ Ibid.

¹⁸ Algemene Beginselen van Behoorlijk Bestuur.

¹⁹ Article 25 of the draft Kingdom COHO Law. Kamerstukken II, 2020/21, 36031 (R2161), nr. 2, artikel 25.



Kingdom COHO law makes no distinction between the established location of the applicant, the SER cannot foresee any risks harmful to local business practices at this time, as all businesses are treated equally and provided equal opportunities.

²⁰However, due to the lack of data and context available regarding the business practices of the French counterparts, the SER is unable to provide an adequate analysis in the timeframe allotted.

Other observations and concerns made by the SER

Implementation of other foreign Supervisory bodies

The SER would like to draw attention to the various events which have transpired leading up to the proposal of the COHO entity. In 1995, the Island Territory of St. Maarten was placed under high supervision, with the intention to bring balance between the revenues and expenses. A multiannual policy plan followed. However, due to the lack of implementation capacity, it did not materialize.

In 2010, following a referendum, St. Maarten implemented a change in constitutional status becoming a constituent territory with the Kingdom of the Netherlands. The constitutional structure implemented mirrors the structure of the Netherlands and includes checks and balances such as, the *Trias Politicas*, High Councils of State, and independent advisory bodies. Through USONA and AMFO, financial means were dispersed to facilitate the implementation capacity. In addition, the constitutional change in 2010 came with the implementation of the CFT, which has financial control authority in relation to the national budget.

Following the liquidity support needed from the Netherlands due to the COVID-19 pandemic, St. Maarten is now faced with the possible implementation of the COHO entity. The COHO entity combines all of the above in an imposing framework. However, the SER also recognizes the need for self-reflection and areas for improvement of the Government of St. Maarten to identify an alternative structure in the place of the COHO entity. The SER emphasizes that this alternative structure should better account for the political, social, economic, and financial development of St. Maarten.

Balance of Powers

Through the institution of the COHO entity, the SER has observed that an unproportioned number of discretionary powers has been attributed to the COHO entity. Discretionary powers that originally should remain attributed to the government and/or Parliament of a country. Reference is made to article 22, 25 and 27 in which powers attributed to the COHO entity as described are vague and/or broad. Although the governing bodies of St. Maarten are included in the process: the drafted legislation offers limited flexibility in relation to the implementation of the reforms in times of changing or unforeseen circumstances. Ultimately, specifying or limiting discretionary powers should provide such additional flexibility. For example, reference is made to article 15, replacing “in consultation with”, with “in agreement with” the Prime Minister. Furthermore, the SER would like to note that as the draft law²¹ mentions that local

²¹ Article 6 paragraph 3 of the draft Kingdom COHO Law. Kamerstukken II, 2020/21, 36031 (R2161), nr. 2, artikel 6 lid 3.



Autonomy

The Autonomy of the Kingdom partners is laid down in article 41 of the Kingdom Charter, which allows countries to dictate their own affairs. As such the SER notes, that allowing for a governing entity, the COHO, to establish far-reaching social and economic policies prior to the legislative branch of a country's involvement, in which Parliament's role is limited to a right to information²², signifies a breach of that autonomy, whilst increasing the democratic deficit imbedded in the procedure used for establishing Kingdom (consensus) laws. The limited role also depicts a lack of trust and equality amongst partners of the Dutch Kingdom.

The SER notes, that in the explanatory notes of the drafted Kingdom COHO Law²³, it is mentioned that the role of the Parliaments will be increased in comparison to the traditional method of constituting consensus Kingdom laws, however the SER would recommend defining and including the increased role amongst the articles of the Draft Kingdom COHO Law, as the SER has not established the details of this increase included. Furthermore, the SER would like to advise strengthening St. Maarten's own advisory bodies as opposed to the implementation of the COHO entity. However, in the event Parliament decides to move forward with the implementation of the COHO entity, the SER would like to advise instituting the COHO entity based on a National Ordinance as opposed to a Consensus Kingdom Law as the realms in which the COHO operates will remain within the discretion of the local governing bodies.

Democratic Deficit.

The right to determine which laws apply to a society within the Kingdom of the Netherlands is upheld through the Principle of Democracy. The SER notes, that by limiting the role of Parliament to a request for information four times a year, undermines the right the people of St. Maarten have in determining which laws apply to them. Although, the SER is aware that ultimately the legislative power will remain with the Government and the Parliament of St. Maarten, the SER refers to article 22, in which liquidity support can be suspended in the event the reforms established by the Kingdom Council of Ministers is not carried out to the satisfaction of the Minister of Kingdom Relations. The aforementioned undermines the right of the people of St. Maarten to determine their own economic realities. An infringement which the SER considers in contravention of the fundamental Principle of Democracy.

Conclusion.

The SER notes, that as it made a significant attempt to provide answers to the questions posed by Parliament, the lack of context of the questions, supporting documentation, undetermined concrete reform policies and data have allowed for a limited handling of the questions posed by the Parliament of St. Maarten. As such, the SER expects to be provided with the opportunity to carry out its advisory role as the draft laws on the COHO reforms are submitted to the SER.

²² Article 7 of the draft Kingdom COHO Law. Kamerstukken II, 2020/21, 36031 (R2161), nr. 2, artikel 7.

²³ Explanatory notes Draft Kingdom COHO Law, paragraph 3.3.1 Supporting Reforms through the COHO, p. 5. Kamerstukken II, 2020/21, 36031 (R2161), nr. 3, p. 5(MvT).



Although, the SER understands the need for country St. Maarten to implement measures to revitalize and strengthen the country's economy, through structural reforms, the SER questions the form and manner in which the Kingdom has opted to implement a governing entity that supersedes the constitution of St. Maarten, unevenly divides the discretionary powers between the COHO entity and the governing bodies of St. Maarten and further reduces the role of the Government, Parliament, the High Councils of State, advisory bodies and by extension the voice of the people of St. Maarten. As the goal of a consensus law drafted in accordance with article 38 paragraph 2 of the Kingdom Charter should reflect equality of partners, the implementation of the current proposed COHO structure does not address equality sufficiently and disregards the organic laws of the constituent countries within the Kingdom. Therefore, in conclusion the SER advises the following:

Advice

1. Strengthen the advisory bodies (Council of Advice, Ombudsman, the General Audit Chamber, SER, the Integrity Chamber, Law Enforcement Council, Corporate Governance Council (CGC), and the Committee of Civil Servants Unions (CCSU) of St. Maarten as opposed to implementing the COHO entity;
2. To consider instead, an alternative, sustainable structure to oversee the management of the reforms, with a local structure that emphasizes building local capacity, based on proper self-reflection and correction;
3. Instituting the COHO entity based on a National Ordinance as opposed to a Consensus Kingdom Law;
4. Define and incorporate the increased role Parliaments will be granted in comparison to the initial consensus Kingdom law making procedure, in the draft law;
5. Allow for the further specification of the discretionary powers of the COHO entity for reasons of transparency, such as defining "timely manner". Reference is made to article 27 of the Draft Kingdom COHO Law.
6. Allow for the further limitation of the discretionary powers of the COHO entity for reasons of transparency, such as replacing "in consultation with", with "in agreement with" the Prime Minister. Reference is made to article 15 of the Draft Kingdom COHO Law;
7. Implementing a timeframe of 6 – 8 weeks to allow for a swift and consistent decision-making model to prevent the COHO entity from delaying St. Maarten's economic activities; and
8. Implement the obligation to analyze long term effects in combination with proper data collection of the proposed country packages prior to establishing the reforms.