11 SOVEREIGN DEBT RESTRUCTURING IN ZAMBIA: A UNITED NATIONS PRINCIPLES-BASED APPROACH?

Sangwani Patrick Ng'ambi

11.1 Introduction

Zambia's debt has risen dramatically over the past decade.[1] Whereas Zambia's total debt stood at US $3,5 billion in 2011, it rose considerably to US $14,4 billion in March 2018. These alarming debt levels led to a declaration by the International Monetary Fund (IMF) to the effect that Zambia was at high risk of debt distress.[2]

Zambia had previously benefited from the heavily indebted poor countries (HIPC) debt relief in 2005, which cancelled virtually all external debt.[3] For a time, debt remained low and government spending was relatively conservative. However, it has borrowed heavily since 2012 for important infrastructure in roads, energy, railways and telecommunications.[4] It also used other loans to cover budget deficits.[5] Although some of the loans for infrastructure had significant socio-economic benefits, others generated very few.[6]

China is the single biggest creditor.[7] However, Zambia has borrowed from others. These include development banks and the commercial Eurobond market. The loans obtained for projects from China are

1 See PA Ayinla & SF Folarin 'The politics of foreign aid: A study of China-Zambia economic relations' (2019) 7 *Covenant University Journal of Politics and International Affair* 76.

2 2019 Article IV Consultation – Press release; staff report; and statement by the executive director for Zambia (August 2019) IMF Country Report 19/263.

3 T Saungweme & NM Odhiambo 'The dynamics of public debt in Zambia: A critical review' (2018) 3 *Euro Economics* 47.

4 JC Servant 'China steps in as Zambia runs out of loan options' *The Guardian* (11 December 2019).

5 As above.

6 L Daka et al 'The impact of external debt on Zambia's economic growth: An ARDL approach' (2017) 8 *Journal of Economics and Sustainable Development* 55.

7 W Orr 'The curse of the white elephant: The pitfalls of Zambia's dependence on China' global risk insights' (1 December 2020), https://globalriskinsights.com/2020/12/the-curse-of-the-white-elephant-the-pitfalls-of-zambias-dependence-on-china/ (accessed 28 November 2021).

typically on a build-operate-transfer (BOT) basis. This essentially means that there is Chinese or joint management on specific models for specific projects. Examples of these include hydropower projects for the Zambia Electricity Supply Company (ZESCO), the digitalisation of the Zambia National Broadcasting Company (ZNBC) and two airports.[8]

The difficulty with this debt is that it has become a burden on the economy, with interest payments alone consuming a significant proportion of the national budget.[9] To contextualise this assertion, total domestic government revenue from taxes, fees and levies amounted to K39,2 billion in 2017. The interest payments rendered that year amounted to K9,8 billion.[10] Therefore, interest payments amounted to 25 per cent of the government's revenue.

Because there is limited transparency in Chinese lending and financial flows to Zambia, there is very little accurate data on the loan conditions as such. This is further compounded by the fact that the Chinese approach to finance creates incentives for kickbacks and inflated project costs, in turn leading to rent-seeking and cronyism. As pointed out by Foreign Policy Magazine: 'Opaque deals, reports of large-scale corruption and mismanagement, doubts about project feasibility, and a stark trade imbalance raise serious questions about how well African leaders are managing the opportunities they receive.'[11]

Zambia must take full responsibility for this debt crisis. This is owing to the fact that the Zambian government received ample warnings against the increasing debt burden from its own economists, the opposition and the external actors, such as the IMF and the World Bank.[12]

There are concerns about the levels of debt that Zambia has accumulated. Thus, it comes as no surprise that there is increasing attention on debt sustainability. The aim of this chapter is to give an overview of

8 A Ofstad & E Tjønneland 'Zambia's looming debt crisis – Is China to blame?' (2019) 1 *CMI Insight* 6-7.

9 See eg 2021 Budget Address by Dr Bwalya KE Ng'andu, MP, Minister of Finance, delivered to the National Assembly on Friday 25 September 2020 22, http://www.parliament.gov.zm/sites/default/files/images/publication_docs/2021_National_Budget_Speech.pdf (accessed 28 November 2021).

10 CUTS International *#DebtConcernsMe: Understanding the impact of Zambia's growing debt on different stakeholders* (2019) 5.

11 S Solomon & C Frechette 'Corruption is wasting Chinese money in Africa, foreign policy', https://foreignpolicy.com/2018/09/13/corruption-is-wasting-chinese-money-in-africa/ (accessed 28 November 2021).

12 See generally Ofstad & Tjønneland (n 8) 5.

the debt acquired by the Republic of Zambia and its impact. It advocates the restructuring of Zambian debt and examines the principles upon which such debt restructuring would be based. Part two of the chapter looks at the impact of the debt crisis on the Republic of Zambia. It is against this backdrop that debt restructuring would be necessitated. Part three then looks at the principles to be observed in accordance with the Basic Principles on Sovereign Debt Restructuring Processes, should the government of the Republic of Zambia elect to have its debt restructured.[13]

11.2 The impact of Zambia's debt crisis

Zambia's macro-economic position was a relatively healthy one in 2011. This was as a consequence of the high economic growth it had enjoyed since 2002 and a sound government budget. Regrettably, this economic growth did not translate to alleviating poverty and changing the lives of the majority. The Patriotic Front (PF) took over power from the Movement for Multiparty Democracy in 2011.[14] Their victory elicited high expectations of broader growth. As such, the PF responded to this by initiating a high number of infrastructure projects, including roads, airports in Lusaka and Ndola and hydropower plants.

Such ambitious plans necessitated the high levels of borrowing from the Eurobond market, multilateral banks and China, as well as other untraditional sources.[15] Cumulatively, the Eurobond amounts to US $3 billion and was borrowed at commercial rates. The government is due to commence with repayments in 2022.[16] The government of Zambia had also borrowed US $1,6 billion from multilateral banks such as the World Bank, the IMF and the African Development Fund.[17] It is estimated by the China Africa Research Initiative (CARI) at Johns Hopkins University that Zambia had accumulated loans totalling US $6,4 billion from China.[18] The Zambian government also borrowed from several non-Chinese sources. These included bilateral government loans, loans from fuel suppliers, the Arab Development Bank, Israeli sources and from commercial banks in the United Kingdom, Nigeria and South Africa. It is highly likely that

13 See United Nations General Assembly Resolution 69/319.

14 M Hinfelaar, O Kaaba & M Wahman 'Electoral turnovers and the disappointment of enduring presidential power: Constitution making in Zambia' (2020) 15 *Journal of Eastern African Studies* 63.

15 Ofstad and Tjønneland (n 8) 5.

16 As above.

17 As above.

18 China Africa Research Initiative (CARI) Loan Data, http://www.sais-cari.org/data (accessed 28 November 2021).

these loans have commercial market conditions attached to them.[19] This essentially means that they have higher interest rates and shorter time frames.[20]

Critics also contend that there may be hidden loans.[21] The lack of transparency around the accumulation of loans in general does little to abate this assertion. What we do know is that the high levels of debt have left Zambia in a rather precarious situation. The aim of this part is to examine some of the challenges emanating from Zambia's debt crisis. It is on this basis that debt restructuring is recommended.

11.2.1 National budget

It is evident that the high levels of debt have had an impact on the national budget. In September 2018 the Minister of Finance announced the national budget. External debt repayments amounted to K14,9 billion, while domestic debt repayment was K8,6 billion. Combined, this amounts to 27 per cent of the national budget. As such, debt repayments took up the largest portion of the national budget. To contextualise it, the amount allocated to debt servicing was equivalent to the total combined amount allocated for health, education and social protection.[22]

Debt repayments have since continued to increase. For example, in the 2020 national budget, external debt repayments increased to K21 billion, while domestic debt repayments amounted to K12,6 billion.[23] Furthermore, in the 2021 national budget it was announced that the government is to spend K18,3 billion on domestic debt interest and K27,7billion on external debt.[24]

Debt servicing has inevitably meant that there has been an attempt to broaden the tax base, introducing compliance initiatives and imposing new taxes. This is in order to ensure that the government increases its revenue

19 Ofstad & Tjønneland (n 8) 5.

20 As above.

21 As above.

22 2019 Budget Address by Margaret D Mwanakatwe, MP, Minister of Finance, delivered to the National Assembly on 28 September 2018 17, http://www.parliament.gov.zm/sites/default/files/images/publication_docs/Budget%20Speech%202019.pdf (accessed 28 November 2021).

23 2020 Budget Address by Dr Bwalya KE Ng'andu, MP, Minister of Finance, delivered to the National Assembly on 27 September 2019 17, http://www.parliament.gov.zm/sites/default/files/images/publication_docs/2020BUDGET-SPEECH.pdf (accessed November 28. 2021)

24 2021 Budget Address (n 9) 22.

to pay for public services and pay back its debt. The new initiatives include innovative ways of raising taxes and also the imposition of fees to raise revenues domestically and reduce its reliance on borrowing.

A number of taxes have been imposed. These include borehole tax and increased toll gate fees. In addition to this, there is also a proposed internet calling tax. Moreover, the government introduced a K0,30 excise duty on non-alcoholic drinks, increased the carbon emission surtax on vehicles and increased the charge on fees and fines. A national health insurance scheme has also been implemented, which is to be deducted as a percentage from citizens' income. This adds considerable financial pressure on Zambians.[25]

Most new fundraising initiatives have been targeted at the corporate sector and the mines in particular. However, it has been seen that taxes have also been targeted at ordinary Zambians. However, the timing could not be worse. This is owing to the fact that Zambians are already experiencing high inflation due to a depreciation of the kwacha. Higher taxes mean an increase in the cost of living. This in turn will push low-income earners further into poverty. Furthermore, aggregate economic growth will be reduced, as individuals will have less money for the consumption of goods and services.

11.2.2 Social spending

The fact that the Zambian government has to spend so much on debt servicing means that there is less money to invest in public services and in poverty-reduction initiatives. For example, education has suffered from a lack of funding. As it is, the teacher to pupil ratio in Zambia remains high. There is one teacher to every 60 pupils. Moreover, there is a lack of access to teaching aids and support infrastructure such as desks. In 2018, 29 per cent of domestic revenues went towards debt servicing, 42 per cent went to wages and salaries, while only 30 per cent of government revenues were spent on programmes that drive the country's development, such as health, education and agriculture.[26]

The health sector suffers from a lack of resources. For example, most rural clinics do not have medical doctors or support staff such as technologists, laboratory technicians and midwives. Moreover, support for farmers has fallen. This is due to a lack of extension officers. In some

25 CUTS International (n 10) 11.

26 CUTS International (n 10) 9.

areas the ratio of extension officers to farmers is as high as 1 to 1 200. This is three times the ideal ratio, which should be 1 to 400.[27]

A lack of investment in these areas consequently hinders development. This is owing to the fact that if Zambia is to prosper, the country needs a well-educated, healthy and productive populace. Without a good education system and quality health care, it means that the work force needed to develop the country will be less productive. It is thus evident that the lack of investment in these areas, caused by high debt servicing, is having an adverse effect on the development of the country.[28]

Consumers and businesses

The accumulation of debt has also had an adverse effect on the average Zambian consumer. Prices in Zambia are impacted by a plethora of factors. These include the cost of labour, the exchange rate and, indeed, taxes. There have been increases in the price of fuel and food. Although the country's debt levels are not the only driver behind these price increases, they certainly are a factor.[29]

There is a correlation between high debt levels and the stability of the Zambian kwacha.[30] As such, this will have an impact on the lives of consumers, through aspects such as inflation. Over the past few years the Zambian government has been issuing bonds. This essentially means that the government has been accepting loans in order to finance certain activities; while foreign investors expect to profit from this investment through interest repayments. Such investors base their decision to invest in a country upon several factors, including the host state's likelihood of defaulting on debt repayments. As such, foreign investors will look at the economy's immediate and long-term performance. Thus, they will look at the state's financial position, plans for managing debt and 'prospects for growth through documents such as the medium-term expenditure framework and budget'.[31]

Zambia's unsustainable debt levels have certainly been of concern to investors. This is evinced in the fact that Zambia's debt carries high interest rates and the fact that in September 2018 there was a drastic

27 As above.

28 As above.

29 CUTS International (n 10) 5.

30 See generally C Cheelo & T Banda 'A tightening balancing act: Economic implications of Zambia's balance of payments performance' Working Paper 24 (June 2017) 2.

31 CUTS International (n 10) 13.

reduction in investment in Zambian government bonds. The purchase of bonds by foreign investors typically involves converting foreign currency into Zambian kwacha. A drastic decrease in the purchase of bonds meant a decrease in demand for Zambian kwacha. Thus, it contributed to a depreciation of the kwacha by 20 per cent from K9 to K12 per dollar in the month of September 2018.[32]

Zambia relies rather heavily on imported goods. With a weakened currency, this meant that importing goods became expensive. Given this fact, all imported goods became more expensive. Moreover, the increase in the price of fuel, driven primarily by an increase in world oil prices, was further exacerbated by the weakened currency. The fact that there have been tax increases, and a weakened currency, means that businesses will have to pass on any additional costs of doing business to the consumer. As such, it is evident that Zambia's debt situation has had an adverse impact on the everyday lives of consumers.

This is further compounded by the fact that the debt levels have created a difficult environment for business to operate in. The depreciation of the kwacha means that businesses suffer from higher costs of inputs such as fuel and other imported goods. This means that running a business becomes more expensive. In addition to this, inflation reduces the demand for goods and services, in an economy where the incomes of ordinary Zambian citizens are already strained. This is further compounded by a generally weak economy, which leads to reduced profits. Consequently, this could lead to job losses. This could lead to disastrous consequences as 90 per cent of employment in Zambia is generated by the private sector.[33]

It has been seen that Zambia's high accumulation of debt is not only unsustainable, but also has a huge impact on the growth of the economy in the immediate term. Debt servicing takes up a large part of the national budget. This essentially means that there is no money left for spending on sectors that contribute to the development of the country, including education, health care and agriculture. In addition to this, it has been seen that debt servicing has an impact on the national currency, which in turn leads to inflation. Such inflation also means that doing business in Zambia is rendered more onerous, which in turn leads to job losses. This is exacerbated by the fact that the government has to raise taxes not only to service debts but also to finance public services. These circumstances necessitate drastic measures on the part of the Zambian government. Such measures include debt restructuring. This is discussed in the next part.

32 As above.

33 As above.

11.3 The Basic Principles of Sovereign Debt Restructuring

The purpose behind sovereign debt restructuring is to 'restore the sustainability of public debt with high probability'.[34] During the nineteenth and early twentieth centuries sovereign debt restructuring relied mainly on consent-based negotiations.[35] Indeed, this was also the era of gunboat diplomacy.

At present there is no international mechanism on how sovereign debt restructuring is conducted *per se*. There were attempts by the IMF to establish a sovereign debt restructuring mechanism (SDRM).[36] However, this was opposed by the United States. It was also opposed by emerging market nations such as Turkey, Mexico and Brazil on the basis that it may raise interest rates on sovereign bonds.[37] There have since been further calls for some form of sovereign debt restructuring mechanism through various frameworks.[38] An example of this is the Basic Principles on Sovereign Debt Restructuring Processes propounded in General Assembly Resolution 69/319, adopted on 10 September 2015.[39] Indeed, even a model law has been proposed.[40]

Thus, for the time being at least, a multilateral statutory framework for the resolution of debt crises is not feasible. However, the United Nations Basic Principles of Sovereign Debt Restructuring may provide a valuable basis for the stages of the debt-restructuring process.[41] This part looks at

34 M Guzman & JE Stiglitz *A soft law mechanism of sovereign debt restructuring: Based on the UN Principles* (2015) 3.

35 M Goldman 'Public and private authority in a global setting: The example of sovereign debt restructuring' (2019) 25 *Indiana Journal of Global Legal Studies* 341.

36 SL Schwarcz 'Sovereign debt restructuring: A model-law approach' (2016) *Journal of Globalization and Development* 9, https://scholarship.law.duke.edu/faculty_scholarship/3492 (accessed November 28. 2021)

37 As above.

38 M Guzman & JE Stiglitz 'Creating a framework for sovereign debt restructuring that works' in M Guzman, JA Ocampo & JE Stiglitz (eds) *Too little, too late: The quest to resolve sovereign debt crises* (2016) 3. See also SL Schwarcz, '"Idiot's guide" to sovereign debt restructuring' (2004) 53 *Emory Law Journal* 1215.

39 A/69/L.84.

40 See eg SL Schwarcz 'Sovereign debt restructuring and English governing law' (2017) 12 *Brooklyn Journal of Corporate, Financial and Commercial Law* 73.

41 See also J Rossi 'Sovereign debt restructuring, national development and human rights' (2016) 13 *SUR* 192, https://ssrn.com/abstract=2838329 (accessed 28 November 2021)..

these principles and their status under international law. Thereafter, we look at their potential application in the case of Zambia.

11.3.1 The Basic Principles of Sovereign Debt Restructuring

The Basic Principles on Sovereign Debt Restructuring processes consist of nine principles by which sovereign debt restructurings should be guided.[42] These are sovereignty; good faith; transparency; impartiality; equitable treatment; sovereign immunity; legitimacy; sustainability; and majority restructuring. These are looked at in turn below and can certainly be the basis of a Zambian debt restructuring.

Sovereignty

One of the first principles espoused under the Basic Principles on Sovereign Debt Restructuring processes is that of sovereignty. As such, GA Resolution 69/319 provides that a state has the right to design its macro-economic policy. This includes the qualified right to restructure its sovereign debt.[43] Such a right should not be frustrated or impeded by any abusive measures. It further provides that restructuring 'should be done as the last resort and preserving at the outset creditors' rights'. Therefore, it is to be a measure of last resort and states must conduct the restructuring process, with an eye to preserving creditors' rights.

Good faith

The second principle is that of good faith. Therefore, good faith must be observed by both the sovereign state and all its creditors. Debtors who initiate the negotiation process have a duty to do so in good faith. A question that may arise is whether the repudiation of a debt or debt payment suspension would violate the good faith principle. The Resolution provides:

> Good faith by both the sovereign debtor and all its creditors would entail their engagement in constructive sovereign debt restructuring workout negotiations and other stages of the process with the aim of a prompt and durable re-establishment of debt sustainability and debt servicing, as well as achieving

42 V Paliouras 'The right to restructure sovereign debt' (2017) 20 *Journal of International Economic Law* 120.

43 See generally Paliouras (n 42) 115-136.

the support of a critical mass of creditors through a constructive dialogue regarding the restructuring terms.

The conclusion of Argentina's 15-year stand-off with the majority of its holdout creditors in April 2015 has largely been attributed to the fact that negotiations were conducted in good faith.[44] Negotiations conducted in good faith by both the Zambian government and its creditors can certainly be a factor that will contribute to the steady conclusion of a potential debt restructuring process.

Transparency

The Resolution further provides that transparency between the debtor, creditor and other stakeholders should be promoted. This is in order to enhance the accountability of the actors concerned. The Resolution provides that this can be accomplished through the timely sharing of information related to the process of sovereign debt restructuring with interested stakeholders, including the public at large. This is particularly critical for a country such as Zambia, where the process of debt acquisition has sometimes been criticised as opaque. It thus is important that the process of debt restructuring is undertaken in a manner that ensures that the public is kept well informed.

Impartiality

Yet another principle espoused under the GA Resolution is that of impartiality. In general terms impartiality is defined as 'a way of thinking, decision-making or acting that is free of bias or preference and that is grounded in independence and objectivity'.[45] Not only should actors conduct themselves in a manner that is objective and independent, but they should also be seen to do so.[46]

All institutions and actors involved in the sovereign debt restructuring process are to 'enjoy independence and refrain from exercising any undue influence over the process and other stakeholder'. They should further refrain from engaging in actions that would lead to a conflict of interest or corruption, or indeed both.

44 K Erichsen & A Wilkinson 'Sovereign debt restructuring: What can we learn from Argentina, Greece and Ukraine?' (2016) 7 *Journal of International Banking and Financial Law* 1.

45 O Lienau 'Legitimacy and impartiality as basic principles for debt restructuring' (2016) 41 *Yale Journal of International Law Online* 107.

46 Lienau (n 45) 108.

Thus, in order to maximise institutional impartiality, actors must allow institutional independence. This is even more important, given the fact that debtors and creditors are clearly interested parties. Therefore, organisations and mechanisms involved must minimise their affiliation with groups or actors that might be affected by the process of restructuring. As such, there must be attentiveness to financial independence, personnel independence and physical independence, which can be accomplished through geographic location in a neutral setting.[47] Decision makers must also remain independent of the negotiating parties

Equitable treatment

States are also required to observe the tenets of equitable treatment. Therefore, states must refrain from arbitrarily discriminating against creditors. The only exception to this rule is if different treatment is justified under the law, is reasonable and is 'correlated to the characteristics of the credit, guaranteeing inter-creditor equality, discussed among creditors'. Under this principle, creditors have the right to receive treatment that is commensurate to their credit and its characteristics. Moreover, it provides that no creditors are to be excluded *ex ante* from the sovereign debt restructuring process.

Sovereign immunity

One of the most critical principles espoused is that of sovereign immunity. This implies that the validity of any sovereign debt contract is subject to the very fundamental principle under international law, namely, that no nation can renounce its sovereign immunity.[48] The principles provide that sovereign immunity from jurisdiction and execution regarding sovereign debt restructuring is a right of states. Any exceptions to this rule are to be applied restrictively.

Under the principle of sovereign immunity, there is also a limit as to the extent to which a democratic government can bind its successors.[49] Although the principle does not rule out the possibility of the issuing of debt under foreign law, there is a limit on the reach of foreign law. This limits the reach of foreign jurisdictions during the process of restructuring sovereign debt.[50] Therefore, it reaffirms the limitations of foreign jurisdictions in the process of debt restructuring.

47 As above.

48 Guzman and Stiglitz (n 34) 6.

49 As above.

50 As above.

Legitimacy

Legitimacy is also important. This is due to the fact that if a rule or mechanism is perceived as legitimate, then parties are more likely to approve or comply with it on that basis, rather than other reasons such as coercion or self-interest.[51] The principles thus provide that

> [l]egitimacy entails that the establishment of institutions and the operations related to sovereign debt restructuring workouts respect requirements of inclusiveness and the rule of law, at all levels. The terms and conditions of the original contracts should remain valid until such time as they are modified by a restructuring agreement.

There are circumstances under which a debt restructuring will lack legitimacy. For example, a debt restructuring under force of arms would lack legitimacy. So would one conducted under the threat of economic sanctions. It is argued, for example, that Argentina's 2016 debt restructuring arguably lacks legitimacy, because of Judge Griesa's ruling which effectively precluded Argentina from accessing international credit markets.[52] Furthermore, any debt restructuring that results in a country violating its own constitution or the UN Declaration of Human Rights would also lack legitimacy.[53] Thus, any economic or military threats on Zambia may negate the debt restructuring process. This may also apply in the event that Zambia violates its own Constitution. Therefore, the government would have an obligation to engage the national assembly in any debt-restructuring process, as it is their constitutional prerogative to oversee executive functions in this respect.[54]

Sustainability

Sustainability is another principle emanating from GA Resolution 69/319. This entails that the process of sovereign debt restructuring is completed in a timely and efficient manner. It should also lead to a stable debt situation in the debtor state. There must also be a balance between preserving creditors' rights, while promoting sustained and economic growth and development. Furthermore, sustainability entails 'minimising economic and social costs, warranting the stability of the international

51 CA Thomas 'The uses and abuses of legitimacy in international law' (2014) 34 *Oxford Journal of Legal Studies* 729.

52 Guzman & Stiglitz (n 34) 7.

53 As above.

54 See art 63(2) of the Constitution of Zambia (as amended by Act 2 of 2016).

financial system and respecting human rights'. Indeed, this is easy to assert but difficult to apply.

Sustainability is one of the most emphasised principles of these resolutions.[55] Not only is this Resolution concerned with debt sustainability but with issues such as inclusive economic growth, sustainable development and respect for human rights. In this sense, the Resolution is holistic and considers the long-term impact on social and economic welfare of those in the debtor state.[56]

The IMF's definition of sustainability certainly is compatible with this provision of the Basic Principles, even though it has been described as being 'in purely financial terms'.[57] The IMF defines debt sustainability as 'a situation in which the borrower is expected to be able to continue servicing its debts without unrealistically large future correction to the balance of income and expenditure'.[58] The IMF has also developed a formal framework for conducting public and external debt sustainability analyses (DSAs) as a means through which to detect, prevent, and resolve potential crises.[59]

The IMF's definition of sustainability has two components. The first is that a debtor state cannot indefinitely accumulate debts faster than its capacity to service them.[60] A state should thus be prevented from accumulating more debt than it is able to pay. The second element is that the servicing of debts should not be contingent upon an 'unrealistically large future correction to the balance of income and expenditure'.[61] This would imply that there are indeed social and political limits to debt adjustments.[62] Given the fact that the IMF recognises the social

55 See also Rossi (n 41) 192.

56 MPT Sison 'Sustainability in indebtedness: A proposal for a treaty-based framework in sovereign debt restructuring, accounting and finance – New perspectives on banking, financial statements and reporting, Reza Gharoie Ahangar & Can Öztürk, IntechOpen, DOI: 10.5772/intechopen.82470.

57 JP Bohoslavsky & M Goldmann 'An incremental approach to sovereign debt restructuring: Sovereign debt sustainability as a principle of public international law' (2016) 41 *Yale Journal of International Law Online* 25.

58 IMF 'Assessing sustainability' IMF Policy Paper (28 May 2002).

59 Debt Sustainability Analysis, https://www.imf.org/external/pubs/ft/dsa/ (accessed 28 November 2021).

60 U Das, M Papaioannou M & C Trebesch 'Sovereign debt restructurings: Concepts, literature survey, and stylised facts' IMF Working Paper WP/12/203 (August 2012) 71.

61 IMF (n 58).

62 Das et al (n 60) 71.

and political limits to adjustment policies, it could be argued that this definition is congruous with that of the UN Basic Principles, in that the latter emphasises economic growth and sustainable development.

Sustainability will be a key principle to be observed in the event that Zambia elects to restructure its debt. Not only is it a key feature of the UN Basic Principles, but it is also compatible with the IMF's definition, in that the latter certainly acknowledges that there are social and political limits to debt adjustment. Thus, debt restructuring will have to be conducted with an eye to its impact on socio-economic and human rights aspects while, of course, balancing that with the rights of creditors.

Majority structuring

Another principle espoused under the UN Basic Principles is that of majority structuring. This is one of the elementary principles of any insolvency or bankruptcy procedure, which entails that if the results of a sovereign debt renegotiation is approved by 'a qualified majority', the rest of the bondholders must acquiesce.[63] As such, the UN Basic Principles state:

> Majority restructuring implies that sovereign debt restructuring agreements that are approved by a qualified majority of the creditors of a state are not to be affected, jeopardised or otherwise impeded by other states or a non-representative minority of creditors, who must respect the decisions adopted by the majority of the creditors. States should be encouraged to include collective action clauses in their sovereign debt to be issued.

This principle will be advantageous to a country such as the Republic of Zambia, as it effectively operates as a shield against hold-out strategies, such as those that have been successfully pursued by vulture funds. Once there is a qualified majority that has made a decision, minority creditors will be bound by it.

11.3.2 Status of General Assembly Resolutions

The Basic Principles on Sovereign Debt Restructuring processes stem from a General Assembly resolution. Therefore, there may be questions as to whether the principles espoused therein are binding. On the one hand, it is contended that General Assembly resolutions are not binding and are simply a form of soft law that expresses the view of the majority of UN

63 See also Rossi (n 41) 192.

member states.[64] Under this school of thought, it certainly is recognised that the General Assembly of the UN possesses quasi-legislative functions.[65] Despite this fact, the General Assembly is not actually a legislative organ.[66] This is so, first, because there is an objection to a two-thirds majority binding the minority. Second, binding states under General Assembly resolutions may circumvent the traditional treaty-making process which requires ratification in order for the state to be bound, under some national constitutions.[67]

However, completely disregarding the principles espoused under General Assembly resolutions would be erroneous. This is due to the fact that there are general procedures that lead to the vote and adoption of a resolution, which in turn constitute evidence of customary international law.[68] A customary rule 'comes into existence only where there are acts of state in conformity with it, coupled with the belief that those acts are required by international law'.[69]

The General Assembly itself is a vehicle through which states form and express the practice of international law. As such, the resolutions emanating therefrom become customary norms.[70] Resolutions are drafted in a manner that ensures that they can win the support of the majority of the Assembly. Prior to a vote being called, more than a bare majority must typically be ensured.[71] Such a resolution will typically represent a harmonisation of the conflicting views that might have been expressed, before the vote is called.[72] Thus, by the time a General Assembly resolution is adopted, it represents an expression of the views of the general consensus. This in turn may be construed as the formulation of a norm under customary international law.[73]

64 See generally J Crawford *The creation of states in international law* (2006) 113; A Boyle & C Chinkin *The making of international law* (2007) 116; GJ Kerwin 'The role of United Nations General Assembly resolutions in determining principles of international law in United States courts' (1983) 4 *Duke Law Journal* 876.

65 P Sands & P Klein *Bowett's law of international institutions* (2009) 28.

66 As above.

67 As above.

68 Sands & Klein (n 65) 27-28.

69 SA Bleicher 'The legal significance of re-citation of General Assembly resolutions' (1969) 63 *American Journal of International Law* 449.

70 M Sornarajah *The international law on foreign investment* (2010) 446.

71 Bleicher (n 69) 451.

72 As above..

73 As above.

As such, this chapter advances that the Basic Principles on Sovereign Debt Restructuring processes is an expression of the general consensus. This is due to the process involved in drafting the resolution, and the harmonisation of conflicting views that might be expressed before the vote is called. Given this fact, it is contended that the Basic Principles on Sovereign Debt Restructuring processes, just like previous United Nations General Assembly resolutions, may be construed as part of customary international law.

11.4 Conclusion

It could thus be concluded that Zambia's debt has indeed radically increased in the past ten years. The failure to sustain this debt has inevitably had an adverse effect on the Zambian economy. This is particularly evident in the areas of social spending, the national budget, the rise in prices, and business and employment. This chapter has advocated that sovereign debt restructuring be the avenue adopted by the government of Zambia.

One key international instrument governing sovereign debt restructuring is the Basic Principles on Sovereign Debt Restructuring processes, which emanate from General Assembly Resolution 69/319. There is debate surrounding the binding nature of a General Assembly resolution under international law. This chapter advances the view that General Assembly resolutions are evidence of state practice. For this reason, General Assembly Resolution 69 becomes a part of customary international law. As such, these principles are legitimate principles under international law and, therefore, are principles to be observed, in the event that the Republic of Zambia chooses to exercise its sovereign right to restructure its debt.

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