6 Assessing the legal options of managing and restructuring sovereign debt in the SADC region in the context of the COVID-19 pandemic

*Murikuki Muriungi**

6.1 Introduction

The COVID-19 pandemic has only exacerbated what already was a disturbing debt treadmill in the Southern African Development Community (SADC) region. Six of the 16 SADC member states, including Zimbabwe and Angola, had exceeded the public debt to gross national income (GNI) ratio target of 60 per cent in 2019 with some of the countries declared to be in danger of debt distress by the International Monetary Fund (IMF) and the World Bank,[1] Zambia and Mozambique registering a debt to GNI ratio of 119,3 per cent and 135,7 per cent respectively.[2] Further research indicates that the SADC region spends up to US $21,1 billion annually in external public debt repayments, thereby compromising the ability of countries to provide essential public goods such as health care.[3]

A slump in the global economy, low but rising commodity prices,[4] declining exports, increasing public expenditure on social infrastructure, such as health care, and the need to support the vulnerable in the face of a

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1 IMF *World economic and financial surveys: Regional economic outlook: Sub-Saharan Africa domestic revenue mobilisation and private investment* (2018) 12.

2 AFRODAD 'Assessment of national financing and investment policies in the East Africa Community (EAC) and Southern Africa Development Community (SADC) countries against regional protocols' (2019) 17 24-26. Also see World Bank 'International debt statistics' (2021), https://datatopics.worldbank.org/debt/ids/country/mus/counterpartarea/wld (accessed 18 June 2021).

3 ACTSA 'The money drain: How trade misinvoicing and unjust debt undermine economic and social rights in Southern Africa' (2019), https://actsa.org/wp-content/uploads/dlm_uploads/2019/08/ACTSA-The-Money-Drain-FINAL.pdf (accessed 31 October 2020).

4 There has been a marked rise in commodity prices in 2021 which have risen above pre-COVID-19 pandemic levels following an upsurge in economic activity. See AfDB 'African economic outlook 2021: From debt resolution to growth: The road ahead for Africa' (2021).

withering tax base due to the COVID-19 pandemic are sure to increase the public debt burden of SADC countries. This is especially important given the commodity-based nature of a number of economies such as those of Mozambique, Angola, Zambia and South Africa, which are already heavily indebted. There have also been incidences of economic difficulties caused by climate-related disasters among some member states such as Mozambique,[5] which have added to the public debt burden. This impels the need for sovereign debt renegotiation or restructuring that takes care of these considerations.

Unlike in the past under the Heavily-Indebted Poor Countries (HIPC) initiative in which at least three SADC member states were involved,[6] there now is a new creditor landscape with a vastly diversified creditor community comprising official creditors including China as the largest, and private creditors including hedge funds and institutional investors. The different typology of creditors lacking in good communication links, as well as the crisis wrought by the pandemic spanning across all regions will only make debt crisis resolution more difficult to resolve. Yet, there is no overarching international legal framework on sovereign debt restructuring, with most debt restructurings taking place in an *ad hoc* fashion and prompting calls for one suitable to developing economies.[7] Admittedly, however, the G20 countries, at the urging of the IMF and the World Bank, initiated the Debt Service Suspension Initiative (DSSI) which took effect in May 2020 in a bid to temporarily suspend debt repayments for eligible countries. The DSSI has since delivered up to $5 billion in

5 Eg, in 2019 natural disasters claimed more than 1 200 lives in East and Southern Africa with countries such as Mozambique experiencing two severe cyclones in March and April 2019 (Idai and Kenneth) which led to a loss of over US $1 billion in property. There have also been incidences of locust invasions and other climate related disasters including floods and droughts yet most African economic sectors including agriculture are climate-sensitive in nature. See World Meteorological Organisation 'State of the climate in Africa 2019' (2020) 6-8, https://library.wmo.int/doc_num.php?explnum_id=10421 (accessed 4 May 2021).

6 These include Malawi, Mozambique and Zambia, https://www.cadtm.org/Initiative-for-the-heavily?lang=en#:~:text=In per cent201996 per cent20the per cent20IMF per cent20and,of per cent20the per cent20Third per cent20World per cent20Debt (accessed 4 May 2021).

7 M Masamba & F de Bonis 'Towards building a fair and orderly international framework for sovereign debt restructuring: An African perspective' AFRODAD Issues Paper 18, https://media.africaportal.org/documents/SDRM_PAPER_final.pdf (accessed 18 January 2021); also see M Muriungi 'Towards a legal framework on sovereign debt restructuring: A developing countries' perspective' unpublished LLM dissertation, University of Nairobi, 2016, http://erepository.uonbi.ac.ke/bitstream/handle/11295/100281/Muriungi%20Muriuki_Towards%20a%20Legal%20Framework%20on%20Sovereign%20Debt%20Restructuring%20a%20Developing%20Countries%E2%80%99%20Perspective.pdf?sequence=1&isAllo (accessed 18 January 2021).

debt relief to over 40 eligible countries.[8] In November 2020 the G20 also launched the Common Framework for Debt Treatments beyond the Debt Service Suspension initiative aimed at coordinating debt reprofiling and restructuring undertaken by official and private creditors beyond the modest debt relief under the DSSI.[9]

This chapter critically assesses the viability of available legal options for managing and restructuring the SADC region's sovereign debt in the face of the COVID-19 pandemic with a view to exploring the options that SADC countries should consider pursuing. These legal options include arguing that the COVID-19 pandemic is a *force majeure* incident that allows countries to suspend debt repayments; the state of necessity doctrine; debt standstills or moratoriums to stay interest rates and debt repayments from falling due, thus offering relief to debtors; and debt buybacks as well as traditional market-based solutions including collective action clauses and state-contingent debt contracts. The chapter argues that individual SADC debtor countries need to consider making use of the various *ex-ante* contractual mechanisms and *ex-post* legal defences as complements to help manage their debt obligations during the pandemic.

The chapter progresses as follows: Following this introductory part, the second part is a brief summary of the debt situation in the SADC region. The third part considers the legal options for managing and restructuring sovereign debt. In this part, the chapter begins with *ex-ante* contractual mechanisms and *ex-post* mechanisms, beginning with the short-term options and then the long-term options which constitute defences under international law. The final part concludes the chapter.

6.2 Debt situation in the SADC region

Since the year 2012 when debt levels in SADC member countries began to rise following a steady decline in nearly a decade, both the dynamics and composition of sovereign debt in the SADC region have changed significantly.[10] There has been huge borrowing for infrastructural development and to finance budget deficits from both domestic and external sources; a shift from multilateral creditors to bilateral and private creditors; a decline in concessional loans; access to international bond markets and commercial borrowing; and increased external borrowing

8 https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative (accessed 18 June 2021).

9 https://ihsmarkit.com/research-analysis/g20s-common-framework.html (accessed 18 June 2021).

10 AFRODAD (n 2) 9.

from China.[11] This has been on account of many factors, which include the ease in global financing following the 2008 global financial crisis as global capital moved to the Global South in search for yields as the economic recession subsided; the growth of domestic financial markets which enabled increased lending to governments from the domestic market; an increase in lending by non-Paris Club countries such as China;[12] and flexible guidelines on external debt limits set by the IMF and the World Bank.[13] Consequently, the average public debt to gross domestic product (GDP) ratio stood at 47,9 per cent in the year 2017 with the ratio being particularly high for some countries, such as Mozambique and Zambia.[14]

A depreciation in exchange rate following the fall in commodity prices in the year 2015 and the strengthening of the United States dollar contributed to an accumulation of public debt for a number of SADC countries by increasing the foreign currency-denominated external debt

11 AFRODAD (n 2) 8-11. In particular, the loans provided to lower-income economies by China have grown from an average of 4 per cent of total public external debt in 2008 to 17 per cent in 2018; share of bond debt in lower-income economies has been rising by an average of two percentage points of GDP per annum on new entrants and larger issuances with Eurobond issuances almost tripling from an average of $6 billion per annum during 2012 to 2016 to about US $16 billion per annum in 2017 to 2018. See IMF 'IMF policy paper: The evolution of public debt vulnerabilities in lower-income economies' (February 2020) 17. In addition, commercial creditors accounted for 40 per cent of Africa's total external debt at the end of 2019; top five creditors to Africa since 2015 are bondholders accounting for 27 per cent of the continent's external debt at the end of 2019; 21 African countries had issued Eurobond instruments valued at over $155 billion by the end of August 2020, https://www.afdb.org/sites/default/files/2021/03/09/aeo_2021_-_chap2_-_en.pdf (accessed 18 June 2021) 49, 50.

12 China's lending to Africa generally increased tenfold between the years 2012 to 2017 with 40 per cent of Zambia's total debt owing to China. See AL Dahir 'Chinese lending to African countries jumped tenfold in the last five years' *Quartz Africa* (15 November 2018), https://qz.com/africa/1463948/chinese-lending-to-african-countries-jumped-tenfold-in-the-last-five-years/ (accessed 18 January 2021). Also see C van Staden 'China holds all the cards as pandemic pushes African countries to default on loans' *SAIIA* (30 September 2020), https://saiia.org.za/research/china-holds-all-the-cards-as-pandemic-pushes-african-countries-to-default-on-loans/ (accessed 19 January 2021).

13 These Guidelines are the Revised Guidelines on Public Debt Management by the IMF and the World Bank. They have more flexible proposals that allowed for more borrowing by SADC countries, such as excluding debts of state-owned enterprises from the debt sustainability analyses; accounting for remittances when assigning risk ratings of a country; and focusing on lending more for public investment which is key to economic growth. See IMF 'Public information notice: IMF executive board reviews the low-income country debt sustainability framework and adopts a more flexible policy on debt limits in IMF-supported programmes' 09/113 (9 September 2009), https://www.imf.org/en/News/Articles/2015/09/28/04/53/pn09113 (accessed 19 January 2021).

14 AFRODAD (n 2) 9.

when expressed in local currency terms.[15] In particular, external debt in SADC countries rose from 13,7 per cent of the total debt in 2010 to 25,1 per cent in 2018.[16] Further, in terms of debt composition, there has been a shift in borrowing from multilateral creditors toward private creditors and non-Paris Club bilateral creditors such as China as well as a decline in concessional debt. Private debt of SADC countries rose from 3,4 per cent in 2009 to 12 per cent in 2017.[17] In addition, Zambia and Mozambique registered a decline in concessional debt from 80 per cent of total debt in 2009 to 44 per cent in 2017, and 96 per cent of total debt to 76 per cent during the same period, respectively.[18] Basically, the creditor community of the SADC member countries is now significantly diversified comprising multilateral, bilateral and private creditors. This has readily apparent implications in terms of achieving debt workouts given the competing and conflicting interests of these vastly diversified classes of creditors, compared to times past.

Additionally, the COVID-19 pandemic has forced countries to take wide-ranging steps to mitigate the associated social and economic disruptions. Some of these steps have included significant stimulus packages; broad-based tax reliefs; cash transfers to vulnerable groups; increased health expenditures; loans and loan guarantees to businesses; and direct liquidity injections – all of which have had implications on the debt situation of these countries.[19] It is estimated that African countries need an additional US $154 billion in financing for the year 2020/2021 to deal with the pandemic, and this is happening against a withering tax base.[20] While an average debt to GDP ratio had stabilised at around 60 per cent for a number of African countries in 2019, it was estimated that pandemic-related spending had caused increased debt-to-GDP ratio by more than 10 percentage points by the end of 2020.[21] The increasing debt burden as a result of the pandemic thus calls for debt restructuring to offer relief to countries and enable them to deal with the associated consequences.

15 N Mupunga et al 'External debt dynamics and implications for monetary policy in the SADC region' Paper prepared for the SADC Committee of Central Bank Governors (CCBG), RBZ Working Paper Series 1/ 2019 11, 16, https://www.rbz.co.zw/documents/working_papers/External-Debt-SADC-Paper1-Working-Paper-1-2019-.pdf (accessed 19 January 2021).

16 Mupunga et al (n 15) 6.

17 AFRODAD (n 2) 10.

18 As above.

19 https://www.afdb.org/sites/default/files/2021/03/09/aeo_2021_-_chap2_-_en.pdf (accessed 4 May 2021).

20 As above.

21 As above.

6.3 Legal options for managing and restructuring sovereign debt

6.3.1 *Ex ante* contractual mechanisms

Collective action clauses

Collective Action Clauses (CACs) are market-based contractual provisions that enable decision making by a stipulated majority of creditors involved in a debt restructuring process. In the absence of a sovereign bankruptcy law, CACs have proved invaluable in enabling the restructuring of sovereign debt. Usually, CACs allow a qualified majority of creditors or bondholders (say 75 per cent) to change the terms and conditions of the debt contract including a debt standstill and to impose new terms and conditions that apply to all creditors. CACs help prevent holdout creditors, such as vulture funds, from preventing a restructuring by refusing to participate and then suing for their full value of the debt, thus undermining the restructuring process.

CACs are usually contained in various bond contracts. The share of international sovereign bonds incorporating enhanced CACs grew from 27 per cent of total outstanding stock in September 2017 to 39 per cent as of October 2018.[22] Between 2014 and 2018 there have been around 510 sovereign bond issuances for a nominal principal amount of US $620 billion, with 88 per cent of these issuances incorporating enhanced CACs.[23] The uptake of enhanced CACs[24] under New York law and English law have stood at 89 per cent and 90 per cent respectively, with only those issued under Chinese and Japanese law not having enhanced CACs.[25] With respect to sovereign bond issuances in the SADC region, several member countries, including Angola, Mozambique and Zambia,

22 IMF 'Fourth progress report on inclusion of enhanced contractual provisions in international sovereign bond contracts' (March 2019) 4-7.

23 IMF (n 22) 4.

24 Enhanced CACs were introduced by the International Capital Markets Association (ICMA) in 2014 as an improvement to the regular CACs developed in 2003. In the case of enhanced CACs, sovereigns are able to make a single offer to all bondholders subject to the condition that all bondholders receive a uniform offer with a perfect restructuring occurring if there is a 75 per cent threshold of the vote. Accordingly, in enhanced CACs, as opposed to regular CACs, a single vote has the power to bind a sovereign's several series of bonds into a debt restructuring on similar terms. See M Sobel 'Strengthening collective action clauses: Catalysing change – The back story' (2016) 11*Capital Markets Law Journal* 3.

25 IMF (n 22) 4.

have had enhanced CACs in the bond contracts.[26] Consequently, CACs as market-based solution may be useful where they are incorporated in various sovereign debt contracts and this should be complemented with comprehensive debt restructuring (of both official and private class of debt) required for SADC countries and developing economies more generally.

State-contingent debt contracts

Given the inherent uncertainty of life generally, it is usually prudent to provide for any eventualities that may occur. Especially now, with the pandemic that has had enormous impacts on the economic well-being of individuals and sovereigns alike, it would be appropriate if SADC countries' debt contracts were to provide for flexibility that accords with the situations that obtain. State-contingent debt contracts, such as GDP-linked bonds, usually link contractual debt service obligations to a predefined variable state by providing that a sovereign will only pay what it is able to pay in the obtaining circumstances and this may turn out to be smaller or larger payments depending on the variable to which the bonds are linked.[27] Such contracts are usually a recognition of the fact that a sovereign's ability to meet its debt obligations can change significantly almost immediately, as has happened with the pandemic.

The difficulty with crafting a state-contingent debt contract is anticipating the state of the world that would trigger a contingency. SADC countries can predicate their debt agreements on, say, particular commodity prices (for commodity-based economies), export earnings, or the rate of economic growth of a particular sovereign, or even now with the occurrence of a pandemic. Such contracts would also be acceptable to creditors as they would stand to benefit more where the 'state of the world' that obtains turns out better than imagined. Put differently, these state-contingent debt contracts ensure high pay-outs in good states of the world and low pay-outs in bad states of the world, based on the value of a state variable, which variable is linked to the debt-servicing capacity of the particularly sovereign. Accordingly, SADC countries can seek to negotiate state-contingent debt agreements so as to reduce the debt distress that potentially arises when various situations obtain. However, this is an *ex-ante* mechanism that is most useful in contract design when contracting debts. Some of instances where GDP-linked warrants have been featured as part of financial packages issued to creditors in four major debt restructuring cases include Argentina (2005 and 2010); Greece

26 IMF (n 22) 11.

27 ML Anthony et al 'What history tells us about state-contingent debt instruments' *Voxeu* (6 June 2017).

(2012); and Ukraine (2015).[28] In addition, the occurrence of climate events such as hurricanes and floods may found and trigger state-contingent debt contracts especially for SADC countries that frequently experience climate disasters such as Mozambique, as has been the case in the Bahamas.[29]

6.3.2 *Ex-post* mechanisms

Debt Standstills/Moratoriums

The pandemic has had an immediate economic impact on the public finances of SADC member countries with the consequence that these countries are unable or are struggling to meet their obligations. Sovereigns face significant healthcare costs, a withering tax base, frozen debt markets, capital flight, falling export revenues, and a global recession as a consequence of the pandemic.[30] Given the ravages of the pandemic on the economic and social health of member countries, it has become imperative as a matter of urgency for governments to redirect their limited public funds toward alleviation measures of the pandemic as well as to cushion the most vulnerable.[31] For instance, early evidence indicates that up to 113 000 women have died as a result of the cutback in maternal care during the COVID-19 pandemic in low and middle-income nations in sub-Saharan Africa.[32] Governments are reallocating funds that had earlier been earmarked for other purposes, including discharging external debt obligations toward dealing with the pandemic. It is estimated that Africa as a continent requires at least $100 billion in order to resource its health and safety net response as well as a similar amount for economic stimulus.[33] Yet, partly owing to pressure to make debt repayments, SADC countries have limited fiscal space to undertake these important measures. For instance, in 2019 up to 25 countries globally and five SADC member countries (Zimbabwe, Zambia, Congo, Madagascar and Angola) had high

28 C Cohen et al 'IMF staff discussion note: The role of state-contingent debt instruments in sovereign debt restructurings' (November 2020) 9.

29 https://www.iadb.org/en/project/BH-O0003 (accessed 19 June 2021).

30 P Bolton et al 'Born out of necessity: A debt standstill for COVID-19' (2020) *CEPR Policy Insight* 103, https://cepr.org/active/publications/policy_insights/viewpi.php?pino=103 (accessed 31 October 2020).

31 As above.

32 M Gates 'The pandemic's toll on women: COVID-19 is gender-blind, but not gender-neutral' *Foreign Affairs* (15 July 2020).

33 M Sallent 'External debt complicates Africa's COVID-19 recovery, debt relief needed' *Africa Renewal* (30 July 2020), https://www.un.org/africarenewal/magazine/july-2020/external-debt-complicates-africas-post-covid-19-recovery-mitigating-efforts (accessed 20 January 2021).

debt service relative to social spending ratios.[34] As of end of December 2020, the IMF had already categorised three SADC countries, namely, Mozambique, Republic of Congo and Zimbabwe, as being in debt distress and at the same level of risk as they were before the onset of the COVID-19 pandemic.[35]

The immediate challenge, therefore, for countries particularly in the SADC region, nine of which are least-developed countries (LDC),[36] is to assist them in dealing with the significant costs of the pandemic. Besides the official assistance that the SADC countries may have obtained from other countries and international organisations, they still need to suspend their debt repayment obligations in order to redirect these scarce funds to dealing with the pandemic. This will certainly require a co-option of creditors, including private sector creditors, who must commit to such an arrangement, otherwise these sovereigns would be in default, attracting further consequences. In the medium to the long term, however, SADC countries will have to confront the issues that have contributed to their economic situation such as the need to finance budget deficits, finance infrastructural development, and provide essential services in the midst of falling revenues, among other factors,[37] as well as focus on economic recovery and deal with the aftermath of the pandemic so as to repay the debts that may have been suspended.

A debt standstill, at its core, is an agreement among creditors and a debtor that seeks a temporary pause on debt repayments.[38] Therefore, debt standstills are transient in nature and thus more of a short-term remedy as opposed to a long-term option. A temporary debt standstill or moratorium is particularly useful for SADC countries in the midst of the pandemic as it will enable them to finance urgent pandemic responses. It is critical that all creditors, whether official or non-official, agree to a debt standstill to avoid instances where debt repayment reliefs offered by some creditors

34 UNICEF 'Protecting and transforming social spending for inclusive recoveries*:* COVID-19 and the looming debt crisis' (April 2021) 16.

35 UNICEF (n 34) 9.

36 These are Angola, Comoros, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mozambique, Tanzania and Zambia, https://unctad.org/topic/least-developed-countries/list (accessed 4 May 2021).

37 AFRODAD 'An overview of domestic debt in SADC: A synthesis of trends, structure and development impacts' (2014), https://media.africaportal.org/documents/SADC_Debt_Synthesis_Paper_web.pdf (accessed 4 May 2021).

38 A Gelpern et al 'Debt standstills can help vulnerable governments manage the COVID-19 crisis' PIIE Covid-19 Series (7 April 2020), https://www.piie.com/blogs/realtime-economic-issues-watch/debt-standstills-can-help-vulnerable-governments-manage-covid (accessed 31 October 2020).

are applied toward repaying other creditors that have refused a standstill instead of being applied toward crisis response.

Consequently, there would be a need for coordination of the vastly-diversified creditor community, with their varying priorities and constraints, in implementing a standstill. Only such a coordinated mechanism can dissuade creditors from exploitative behaviour where they seek to benefit from concessions made by others or acting in ways that undermine the standstill, such as seeking preferential treatment or seizing assets of the debtor. Yet, it is difficult to have such a mechanism, its lack of legal authority notwithstanding, owing to the lack of any sovereign bankruptcy law or mechanism at the global level. Much would therefore depend on entities such as the G20, the IMF or the World Bank organising creditors so that they can act in a manner that avoids the collective action problem.

Consistent with this view, the G20 established the Debt Service Suspension Initiative (DSSI) in April 2020, which initiative is supported by the World Bank and the IMF.[39] It effectively suspends both principal and interest repayments to official creditors while committing debtors to spending the freed-up resources in social, health and economic spending so as to deal with the pandemic. Under the DSSI, debtors are also required to commit to more debt transparency by disclosing all their public sector financial commitments, which is a useful step in as far as it helps countries to make informed decisions on borrowing and investments and manage debt risks. The DSSI has since been extended in October 2020 to June 2021 and then through to December 2021.[40] Indeed, a number of SADC countries have already benefited from the DSSI, including Angola, Zambia, Comoros, Mozambique, Madagascar, Malawi, Lesotho, Tanzania, Republic of Congo and Democratic Republic of the Congo.[41]

However, the DSSI as currently framed suffers from a number of limitations: Only 47 of the 73 eligible countries have benefited as at the

39 G20 Communiqué by G20 Finance Ministers and Central Bank Governors Meeting (15 April 2020), https://g20.org/en/media/Documents/G20_FMCBG_Communiqu%C3%A9_EN%20(2).pdf (accessed 31 October 2020).

40 Reuters Staff 'Factbox: How the G20's Debt Service Suspension Initiative works' *Reuters* (15 October 2020), https://in.reuters.com/article/us-imf-worldbank-emerging-debtrelief-fac/factbox-how-the-g20s-debt-service-suspension-initiative-works-idUSKBN27021V (accessed 31 October 2020); https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative (accessed 11 November 2021)

41 https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative (accessed 4 May 2021).

time of writing; it has covered only 1,66 per cent of debt payments that fall due in 2020 on the part of developing countries; it has limited impact since multilateral and private creditors are not participants, which means that only 24 per cent of debt payments are subject to potential debt suspension; and it was projected that the extension until June 2021 would only cover 44 per cent of debt payments.[42] In addition, middle-income countries which are also facing the pandemic are not covered by the initiative. The net effect of this is that the DSSI may turn out to be too little to help these SADC countries deal with the pandemic and the funds saved through the debt relief offered under the initiative may actually be expended in repaying other debt payments. A far much more comprehensive debt workout or moratorium that encompasses all creditors is important if the SADC countries are to recover from the pandemic crisis and the resultant economic downturn.

Some countries, such as Kenya, had earlier expressed its intention not to participate in the DSSI for various reasons including the impact on their sovereign ratings and ability to access international financial markets.[43] A downgrade of ratings adds up to the financing costs of a sovereign and also creates barriers to additional financing, yet securing additional financing to retire maturing debt (rolling over debt) is the business model of sovereign borrowing. In effect, initiatives such as the DSSI may not significantly be beneficial to SADC countries as it may have the perverse effect of further increasing their debt vulnerabilities.[44]

42 Eurodad 'The G20 Debt Service Suspension Initiative: Draining out the Titanic with a bucket? Eurodad's shadow report on the limitations of the G20 Debt Service Suspension Initiative (October 2020), https://d3n8a8pro7vhmx.cloudfront.net/eurodad/pages/768/attachments/original/1603714501/DSSIShadowReport_14Oct_%281%29.pdf?1603714501 (accessed 31 October 2020).

43 N Mwangi 'Kenya rejects G20 debt relief initiative over restrictive terms' *CGTN Africa* (16 May 2020), https://africa.cgtn.com/2020/05/16/kenya-rejects-g20-debt-relief-initiative-over-restrictive-terms/ (accessed 31 October 2020). However, the country has since agreed to participate in the DSSI owing to financial difficulties and has been offered a debt repayment reprieve until June 2021 including by its principal lender, China. See D Omondi 'Relief as China grants debt repayment holiday' *The Standard* (20 January 2021), https://www.standardmedia.co.ke/the-standard-insider/article/2001400663/relief-as-china-grants-debt-repayment-holiday (accessed 20 January 2021).

44 M Mutize 'Why African countries are reluctant to take up COVID-19 debt relief' *Quartz Africa* (30 July 2020), https://qz.com/africa/1886916/african-countries-are-reluctant-to-take-up-covid-19-debt-relief/ accessed 31 October 2020.

COVID-19 pandemic as **force majeure**

SADC debtor countries may consider invoking the *force majeure* doctrine[45] as a result of the COVID-19 pandemic that has led to a shrinking of the global economy and a weakening of exports, particularly for commodity-based economies.[46] The economic impacts of the COVID-19 pandemic have seriously jeopardised the ability of SADC member countries to fund essential social and public services as well as to honour their debt repayment obligations with some such as Zambia recently defaulting on its debt repayment.[47] Accordingly, these sovereigns may be at liberty to invoke the *force majeure* doctrine, certainly dependent on the wording of the particular *force majeure* clause, so as to enable them to break their debt repayment obligations. The *force majeure* doctrine usually gives a right to a party to a contract to be relieved from honouring their part of the contractual bargain where unforeseen circumstances arise, which are beyond the control of contracting parties.

The *force majeure* doctrine originated in Roman law and operates to excuse the performance of particular obligations where unforeseen, unforeseeable or uncontrollable extenuating events arise.[48] The doctrine also covers acts of God, frustration, impossibility or impracticability. For the doctrine to be applicable, the occurrence of events must have been beyond the control of the parties.[49] It should be noted, however, that it is not mere difficulties in performing a contractual bargain that suffice in the invocation of the doctrine, but rather, there must have arisen a form of impossibility or impracticability caused by factors beyond the control of the parties.[50] Applying these principles, the COVID-19 pandemic and the associated economic consequences can arguably be said to have been unforeseen and unprecedented and beyond the control of SADC countries

45 *Force majeure* refers to the 'occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves (a) that such impediment is beyond its reasonable control; (b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and (c) that the effects of the impediment could not reasonably have been avoided or overcome by the affected party'. See JA Trenor & H-S Lim 'Navigating *force majeure* clauses and related doctrines in light of the COVID-19 pandemic' (2020) 13 *Young Arbitration Review* 15.

46 World Bank Group *Global economic prospects* (2021) 3.

47 SADC 'The impact of COVID-19 pandemic on SADC economy' (May 2020) 3, 103, https://www.sadc.int/files/8015/8988/3255/COVID-19_SADC_Economy_Report.pdf (accessed 19 January 2021).

48 FI Paddeu 'A genealogy of *force majeure* in international law' (2012) 82 *British Yearbook of International Law* 381, 386.

49 Trenor & Lim (n 45) 13, 14-15.

50 As above.

so as to found a basis for the invocation of *force majeure*. In particular, the nature and extent of increased healthcare costs, increased expenditure in social welfare, an increase in unemployment, border closures and falling remittances and exports associated with the pandemic could arguably not have been foreseeable, even where it can be claimed that a pandemic was foreseeable. In addition, the doctrine may be invoked especially because various countries, including those in the SADC region, actually declared states of emergency and imposed extensive lockdowns that significantly affected their economic output.[51] Once these measures came into force and these supervening circumstances obtained, the various SADC debtor countries could have sought to invoke the doctrine.

A number of sovereign debt contracts contain *force majeure* clauses that can be invoked in light of the pandemic. However, some debt contracts contain no such *force majeure* clauses. However, this does not mean that the COVID-19 pandemic cannot qualify as a *force majeure* even in the absence of such a contractual provision. Article 23 of International Law Commission's Articles on the Responsibility of States for Internationally Wrong Acts avails sovereigns of the defence even where there was no such contractual clause. Further, jurisprudence from international tribunals has appeared to chip away at the argument that the *force majeure* doctrine may only be invoked with respect to states or where it is contained in a contract. In an arbitration decision by the Permanent Court of Arbitration in The Hague issued on 11 November 1912 in the 'RIAA, Case of the Russian compensation', the tribunal accepted the defence of *force majeure* as well founded where the Turkish government had gone through a severe financial crisis which made it impossible for it to service its debt owed to Tsarist Russia. The tribunal was emphatic that *force majeure* may apply both in public international law as well as private international law, the latter of which involves a non-state actor as a party. The *force majeure* doctrine is recognised in public international law which regulates relations between states *inter se,* and between states and individuals, especially where the latter happens to be the creditor and the former the debtor.[52]

Accordingly, the *force majeure* doctrine may be invoked in the context of debt owed not only to states, but also to international financial institutions or foreign private sector lenders. This is especially the case when it is considered that article 103 of the United Nations Charter provides for

51 For an overview of global responses to the pandemic, see http://globalresponsescovid19.com/ (accessed 19 January 2021).

52 M Dellinger 'Rethinking *force majeure* in public international law' (2017) 37 *Pace Law Review* 455, 458, https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1944&context=plr (accessed 19 January 2021).

the supremacy of the Charter in the event of a conflict between the obligations of members of the United Nations (UN) under the Charter and their obligations under any other international agreement.

The state of necessity doctrine

Sovereigns can also invoke the doctrine of necessity to exempt them from their state responsibility so as to suspend its debt repayments as an emergency response to the pandemic.[53] The state of necessity under public international law is an international customary rule that justifies the breach of an international obligation by a sovereign on the basis that complying with the obligation would be inimical to the essential interests of such sovereign in light of grave circumstances or situations.[54] Economic collapse and the associated potential social and political instability as well as monumental health crisis arguably count as situations of extreme and grave peril that found a basis for the invocation of the doctrine.[55]

By making use of this state of necessity doctrine, sovereigns may suspend currency and capital account convertibility so as to apply to external flows including debt repayments. A temporary moratorium on account of the necessity doctrine would afford the SADC countries an opportunity to reduce the global demand for foreign currency such as the dollar, thereby helping to lower their overall local currency cost of external debt. Restrictions on capital flows subject to article 6 section 3 of the IMF Articles of Agreement may be employed as a matter of necessity, thereby offering a reprieve to distressed sovereigns. In this sense, debt repayments would then be barred from leaving the debtor country owing to the imposed exchange restrictions. Where this counts as an event of default forcing the creditor to seek to enforce the debt contract in court, the sovereign borrower may find a defence under article VIII section 2(b) of the IMF Articles of Agreement which establishes a legally-binding debt standstill mechanism, especially among private creditors who may not be willing to agree to a standstill. The relevant provision

53 For more on the doctrine of state of necessity, see MCH Thjoernelund 'State of necessity as an exemption from state responsibility for investments' in A von Bogdandy & R Wolfrum (eds) *Max Planck yearbook of international law* (2009) 423-480, https://www.mpil.de/files/pdf2/mpunyb_11_llm_thesis.pdf (accessed 31 October 2020).

54 Art 25 of Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) by the International Law Commission (ILC).

55 AO Sykes 'Economic "necessity" in international law' (2015) 109 *American Journal of International Law* 296, 314. The author argues that a public health crisis, say, due to a deadly tropical disease in a developing country, which forces governments to reallocate funds to contain the crisis or to deal with such an emergency, would give rise to the necessity doctrine under international law.

allows the IMF to render certain debt contracts unenforceable in domestic courts of member countries if such contracts violate the exchange control regulations of another IMF member country. The standstill mechanism in effect enables a temporary suspension of enforceability of debt contracts within domestic courts of the 189 IMF member countries and may be invoked by any member country without necessitating a modification of the Articles of Agreement.[56]

The International Centre for Settlement of Investment Disputes (ICSID) has set out circumstances when a country may avail itself of the necessity doctrine. In *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*[57] a suit was lodged at the ICSID tribunal by three investors who owned local gas distribution companies in Argentina claiming multiple violations of a treaty and sought damages. Argentina had passed a law that guaranteed that tariffs for gas distribution would be calculated in US dollars, besides providing other guarantees under the tariff regime. However, as a result of the economic crisis that the country faced in the 1990s, it abrogated the guarantees given under the law which led to significant reductions of returns for the companies owned by the investors. While the tribunal found that Argentina had breached the standard of fair and equitable treatment by abrogating the guarantees and that the same was discriminatory,[58] it dismissed the claims of expropriation and arbitrariness. Significantly, the tribunal held that Argentina was in a state of necessity between December 2001 and April 2003 and, therefore, was absolved from its international responsibilities during the period under review.[59] Importantly, the tribunal rejected the investors' claims that a state of necessity would only arise in case of military invasion or war, holding that 'when a state's economic foundation is under siege, the severity of the problem can equal that of any military invasion'.[60] Further, while acknowledging that the action of Argentina was not the only means available to them in responding to the economic crisis, the tribunal found that the measures were necessary to maintain public order and protect Argentina's essential security interests under the applicable treaty and under public international law.[61]

56 D Munevar & G Pustovit 'Back to the future: A sovereign debt standstill mechanism IMF Article VIII, Section 2(b)' (2020) SAFE Working Paper 282, Leibniz Institute for Financial Research SAFE, Frankfurt.

57 ICSID Case ARB/02/1; https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf (accessed 31 October 2020).

58 Paras 133-139.

59 Paras 226-261.

60 Para 238.

61 Paras 239, 257.

Consistent with the decision of the ICSID Arbitral Tribunal above, the necessity doctrine as a result of the COVID-19 pandemic may be applied by SADC countries to delay or suspend debt repayments. This is especially the case given that the pandemic has led to stringent lockdown policies that are more extensive than those imposed during World War II; the global economy is facing its worst slump since the Great Depression of the 1930s; and various economies have adopted unprecedented fiscal and monetary policies to ensure economic recovery.

The above notwithstanding, invoking necessity as a doctrine may be difficult for SADC countries since debtor countries must demonstrate that they have not contributed to the debt default.[62] When considered in light of the economic (mis)management of a number of countries, it arguably is difficult to argue that the pandemic is the sole cause of economic difficulties.[63] The pandemic-related elements that may constitute a ground for invocation of the necessity doctrine include the restrictive measures taken to deal with the pandemic, such as social distancing, quarantines, lockdowns, fiscal stimulus packages, the reallocation of funds into public health to deal with the pandemic, among others.

In addition, the necessity doctrine only serves to delay rather than extinguish debt repayment obligations as debtor countries are required to make debt repayments once they regain their financial health.[64] However, even then the necessity doctrine helps debtor countries to subsidise the pandemic crisis response. In addition, the invocation of the doctrine may not accord with the interests of creditors and the objectives of debt restructuring. It, therefore, is not surprising that the necessity doctrine has not yet been invoked successfully by any debtor country in light of the COVID-19 pandemic, given the inherent difficulties. Nonetheless, the doctrine may be employed by SADC countries, where they qualify, to obtain temporary reprieve that enables them to prioritise the welfare of their people as opposed to repaying creditors.

Invoking the necessity doctrine by states may potentially be at odds with some of the respective states' treaty obligations with international financial institutions and the wider creditor community. Article 103 of the UN Charter provides that '[i]n the event of a conflict between the obligations of the members of the United Nations under the present

62 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia*) (Merits), ICJ Rep (1997) 7, 46.

63 M Waibel 'Two worlds of necessity in ICSID arbitration: CMS and LG&E' (2007) 20 *Leiden Journal of International Law* 642.

64 WMC Weidemaier & M Gulati 'Necessity and the COVID-19 pandemic' (2020) 15 *Capital Markets Law Journal* 277, 282-283.

Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[65] Accordingly, in light of the provisions of article 103 of the UN Charter, which appear to give pre-eminence to the interests of a state in upholding its citizens' living standards, the obligations arising from the respective treaties and agreements with the creditor community may arguably yield to invocation of the necessity doctrine. In addition, given that the UN Charter provides for protection of human rights and the objective of improving peoples' living standards, it may be employed to justify the suspension of debt repayments and moratorium on repayment on the grounds that being forced to repay debts in the context of a pandemic goes against the foregoing rights under the UN Charter.

Debt buy-backs

A sovereign debt buy-back can be useful in overcoming collective action and hold out problems among creditors, thereby avoiding punitive terms associated with debt swaps. A debt buy-back programme essentially is where a sovereign borrower repurchases its own debt from creditors at a discount or at par/face value. Debt buybacks have been employed by various sovereigns in times past, including Bolivia and Greece. For instance, donor countries gave Bolivia a total of $34 million which enabled the country to buy back its debt which were trading for 6 cents on the dollar in the secondary market. Bolivia was able to buy back $302 million of its debt for $40,2 million.[66] The success of the Bolivian experience led other Latin American countries to pursue a similar strategy.

Notably, however, developing countries, including those in the SADC region, are yet to make use of this strategy of debt buy-back, which can be a useful tool of averting a debt crisis. It is indeed the case that debt buy-backs tend to increase the price of the remaining debt by artificially inflating the market price of bonds. However, this concern would be disconcerting in normal times and if credit markets were efficient. This is not usually the case during times of crisis since, for one, credit markets are rarely efficient. Bond prices are not always a reflection of underlying fundamentals as irrationality that characterises financial markets sometimes leads to panic sales that distort market prices.[67] Second, market prices of bonds are also

65 https://legal.un.org/repertory/art103.shtml (accessed 18 June 2021).

66 J Bulow & K Rogoff 'The buyback boondogle' (1988) 2 *Brookings Papers on Economic Activity* 675, https://www.brookings.edu/wp-content/uploads/1988/06/1988b_bpea_bulow_rogoff_dornbusch.pdf (accessed 31 October 2020).

67 J Stiglitz & H Rashid 'Averting catastrophic debt crises in developing countries: Extraordinary challenges call for extraordinary measures' (July 2020) CEPR Policy Insight No 104 19.

partly a function of the subjective judgment or perception of domestic and global politics based on an assessment of how much pressure may be brought to bear on debtors by creditors and the extent to which debtors are willing to comply as well as the ratings accorded by credit rating agencies.

Potentially, debt buy-backs offer an attractive opportunity for sovereigns to obtain significant debt relief at a low cost where such sovereigns' debt is bought back at a steep discount. In addition, they can potentially improve the bargaining power of sovereign borrowers as against creditors. In order to make it possible for SADC countries to engage in debt buy-backs, it is important to enlist the support of donors who will provide the financing necessary for the debt buy-back. This means that SADC countries need to commit to spending the savings to be made from debt buy-backs in creating and supplying essential social services and other public goods. The IMF can manage and coordinate the debt buy-back programme from creditors on behalf of sovereigns, not least because it has the requisite technical capacity. SADC countries would ideally identify the sovereign bonds they would wish the IMF to buy back on their behalf. Nonetheless, SADC countries will find it challenging to obtaining the necessary financing for buying back its debts, and may have to principally rely on donors whose funds will likely be strained given the competing needs as a result of the pandemic.

6.4 Conclusion

This chapter noted that the international financial architecture still suffers from the missing link, one of a statutory sovereign debt restructuring mechanism, which complicates debt restructuring processes. The market-based solutions relied on in the absence of such a statutory mechanism will continue to ensure that debt restructuring happens in a sub-optimal scale and rather late, thereby hurting both debtors and creditors alike. Until there is a statutory global sovereign debt restructuring mechanism, sovereign borrowers in difficulties of debt repayments may consider availing themselves of the various legal options available to them as described in this chapter to deal with the pandemic while avoiding serious debt crises.

In particular, it is important that SADC countries pay much regard to *ex-ante* contractual mechanisms by embedding collective action clauses and designing state-contingent debt instruments. The chapter considered the importance of debt standstills in offering SADC countries immediate debt relief but noted that the current initiatives are too little to suffice. The chapter also noted that there are difficulties fraught with invoking the *force majeure* and necessity doctrines in international law given the stringent requirements associated with these. It also noted that these twin options, just like the debt standstills, are short term in nature and do not absolve debtor countries from debt repayment obligations. Debt buy-backs offer an attractive option for debtor countries in reducing their debt burden, although this is predicated on their obtaining financing to buy back the debt.

Admittedly, a number of these proposed legal options would be contested by creditors and in courts and may affect relations between the sovereigns and the wider creditor community including international financial institutions. However, it should be noted that such legal options are better taken advantage of, and will not collapse the sovereign debt markets. Creditors usually return to the credit markets almost immediately underlying risks are mitigated. Ultimately, however, the search for a global debt restructuring framework that will enable comprehensive debt workouts must be accelerated.

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