Legal frameworks and general principles for indicators in sovereign debt restructuring

Paper prepared for the Third Session of the UNCTAD Working Group on a Debt Workout Mechanism

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A. Executive summary and recommendations

This study analyses legal questions raised by the use of indicators in an international Debt Workout Mechanism (DWM). It discusses existing legal contexts of indicators in sovereign debt, develops general principles guiding the use of such indicators in restructurings, and recommends concrete rules on how indicators should be employed in a DWM. The main finding is that indicators should be used as normative benchmarks among others, but subject to an appropriate legal and institutional framework that ensures their effectiveness, legitimacy and acceptance. The paper develops four general principles that guide such a normative framework and provide evaluative standards for a principled and transparent discussion of design choices for a DWM. These principles are also building blocks of an emerging global administrative law of knowledge and information.

The paper proceeds in three main steps. Part C. takes stock of existing legal contexts for indicators in sovereign debt. It primarily contrasts the IMF's approach with that of the European Union and also considers national law and private actors. It finds that the formal decision to restructure remains with governments, but is constrained by mechanisms that use debt indicators to triggers sanctions, to condition official lending and to affect market participant behavior. Lessons learned indicate that indicators can potentially contribute to evidence-based decision making, coordination, transparency and increased attention to social concerns. Whether this potential is realized however depends on the quality of indicators, their enforceability, impartial application, legitimacy and acceptance. Besides, there are major pitfalls of using indicators, such as technocratic obscuring of value choices and uncertainty, deceptive precision, the misguiding of attention and incentives ("gaming the indicators"), and unchecked exercises of governance by information. On balance, section C. concludes that indicators should be used as benchmarks in a DWM, but should be governed by an adequate legal framework that helps realize their potential and mitigates their risks.

Part D. reconstructs general principles inductively and deductively from existing international and domestic legal sources. The principles serve to evaluate, interpret and develop existing rules and provide standards for assessing the legitimacy of a DWM and its indicators. Four pairs of principles are developed:

- The principles of economy and sustainability require debt to be managed efficiently on the basis of reliable data and call for organizational and procedural measures that ensure availability, impartiality and quality of statistics and indicators.
- The principles of transparency and reason giving require disclosure in the restructuring process and justification of its outcome, also by means of statistics, but also call for indicators themselves to be transparent and reasoned.
- The principles of ownership and collective autonomy require a measure of (individual or collective) state control over the restructuring process and over indicators, namely where they entail value choices, uncertainty and exercises of International Public Authority.
- The principle of human rights and social protection obligates states and international institutions to monitor human impact and social rights fulfilment by means of statistics and indicators. These must be taken into account by all parties in restructuring decisions and negotiations in order to mitigate human impact.

Based on the lessons learned and the general principles, Part E. makes proposals for the legal design of the required indicator DWM framework. It recommends tentative solutions for three main questions: How should indicators be used in a DWM? Should they namely signal the need for a restructuring? What should be their sources and who should design them? And how should indicators be applied?

The recommendations are as follows:

1. A restructuring under the DWM should require
   a) a formal request by the debtor state, and
   b) the substantive finding by a competent international institution that debt is unsustainable
2. Debt sustainability should be assessed by a set of indicators in conjunction with a reasoned and transparent qualitative assessment
3. Debt assessments and indicators should be used to render restructuring negotiations and dispute settlement more efficient, coordinated and transparent
4. Human rights indicators should be used to monitor and mitigate the social and human impact of restructurings
5. A United Nations General Assembly resolution on a DWM should recognize general principles governing debt assessments and indicators
6. Sources and competences for indicators should be designed as follows:
   a) If the DWM is based on a new treaty, that treaty should
      a. provide for a competence of the political organ to regulate basic features of debt sustainability assessments and indicators in secondary legislation
      b. lay down general principles for debt assessments and indicators, including that their basic political orientation should be defined by secondary regulation
      c. define competences and procedures for the implementation of these principles and for the application of the indicators by an expert organ

   b) If the DWM is based on the enhanced the role of existing institutions, those institution should enact formal secondary legislation that
      a. lays down general principles for debt assessments and indicators
      b. specifies the mandate for sustainability assessments and indicators and defines their basic political orientation
      c. defines competences and procedures for the implementation of the mandate and for the application of the indicators by an expert organ

   c) If the DWM is not accompanied by institutional change, a set of soft law principles should
      a. lay down general principles for sustainability assessments and indicators and specify rules for their design and application
      b. encourage relevant actors to implement these rules and principles in their internal regulations and practice
7. Assessment criteria and indicators should be applied by independent expert organs of a competent international institution whose impartiality is guaranteed by organizational safeguards
8. The procedure in which assessment criteria and indicators are applied should involve a mandatory government response, be transparent and subject to reason giving, and provide an opportunity for public comment
9. Indicator use should be accompanied by measures ensuring data quality and good statistical governance
10. Sustainability assessments and indicators should be subject to periodic external expert review and to political re-evaluation in regular intervals.

B. Introduction: Indicators in international law

The success of an international Debt Workout Mechanism (DWM) depends not only on its financial and economic soundness, but also on its legitimacy and acceptance among relevant stakeholders. International law can make an essential contribution to the effectiveness, legitimacy and acceptance of such a new mechanism. This goes namely for a key element of the DWM: The criteria and indicators that guide the decision on whether to restructure, and how. This study analyses legal questions raised by the use of indicators in a DWM and proposes some tentative solutions. It discusses existing legal contexts of indicators in sovereign debt, develops general principles guiding the use of such indicators in restructurings, and recommends concrete rules on how indicators should be used in a DWM.

The main finding of the study is that indicators should be used as normative benchmarks among others, but subject to an appropriate legal and institutional framework that ensures their effectiveness and legitimacy. The major contribution of this paper to the existing literature is the development of four general principles that govern such a normative framework for indicators in a DWM. These principles guide the evaluation, interpretation and evolution of rules and provide standards for a principled and transparent discussion of design choices for a DWM. In this, they contribute to the effectiveness, legitimacy and acceptance of a new restructuring mechanism and constitute building blocks of an emerging global administrative law of knowledge and information.

The paper proceeds in three steps: Part C. takes stock of existing legal contexts for indicators on the international, regional, national and private level. How are debt indicators used? What is their legal relevance? What lessons can we learn for a DWM? Part D. reconstructs four general principles guiding indicator use from existing sources of international and domestic law: Sustainability, transparency, ownership, and human rights. These principles, and the lessons learned, form the basis for the recommendations in part E. This last part makes proposals for the legal design of the required DWM indicator framework and recommends tentative solutions for three main questions: How should indicators be used in a DWM? Namely, should they signal the need for a restructuring? What should be their sources and who should design them? And how should indicators be applied?

Sovereign debt restructurings, defined broadly as a bundle of measures associated with debt reduction, adjustment and conditional lending[1], currently face three major problems:[2] Procrastination and too-little-too-late solutions[3]; creditor (un)coordination and holdout litigation; and forum fragmentation.[4] Beyond that, restructurings may contribute to economic distress, social decline, poverty, and political instability. Any new DWM must address these challenges. In this, debt thresholds, sustainability indicators and measures of

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[1] Bogdandy and Goldmann, 'Sovereign Debt Restructurings as Exercises of International Public Authority, in Espósito, Li and Bohoslavsky (eds.), *Sovereign financing and international law: The UNCTAD principles on responsible sovereign lending and borrowing* (2013), 49. A narrower definition of restructuring is used in Das, Papaioannou and Trebesch, 'Sovereign Debt Restructurings 1950–2010: Literature Survey, Data, and Stylized Facts' (2012), 7.

[2] For an overview, see only Brookings, 'Revisiting Sovereign Bankruptcy Report' (2013), 5-15; ; Gelpern, 'A Skeptic's Case for Sovereign Bankruptcy' *Houston Law Review* 50 (2013), 1095; Kaiser, 'Resolving Sovereign Debt Crises - Towards a Fair and Transparent International Insolvency Framework' (2013); Das, Papaioannou and Trebesch (n 1). These problems correspond to the ones identified as major challenges for a DWM by UNCTAD, 'Debt Workout Mechanism Framing Paper' (2013), 3.

[3] Brookings (n 2), 10-12; IMF, 'Sovereign Debt Restructurings - Recent Developments and Implications for the Fund's Legal and Policy Framework' (2013), 15 et seq.; Trebesch, 'Delays in Sovereign Debt Restructuring' (2008).

[4] IMF (n 3), 27-30; Tietje, 'Die Argentinien-Krise aus rechtlicher Sicht: Staatsanleihen und Staateninsolvenz' (2005). But see also IMF, Das, Papaioannou and Trebesch (n 1), 28.

over-borrowing are key elements. Indicators might notably mitigate the procrastination problem by signaling when sovereign debt becomes unsustainable and needs restructuring.[5]

Indicators, understood here as aggregate measures of complex social and economic phenomena[6], are not primarily legal concepts, and the validity and reliability of measures such as the debt-to-GDP ratio is properly dealt with by economists and statisticians.[7] However, successful indicators depend not only on their technical quality, but also on enabling institutional contexts and political acceptance among borrowers, lenders, international institutions and affected citizens. These aspects raise genuinely legal questions. It is submitted here that international law's major contribution to a DWM lies in the provision of general principles that structure the proper interplay of economic, political and legal factors in restructurings. International law thus goes beyond facilitating 'managerial' solutions based on technical fixes; it also provides general evaluative standards for assessing the legitimacy of institutional arrangements and provides a normative framework for a principled discussion of design proposals for a DWM. This makes value choices and conflicts transparent and adds deliberative value to the outcomes of the Working Group process.

This study relies on two further bodies of literature, besides existing research on sovereign debt: Firstly, it draws comparative insights from the literature on indicators in other fields, such as development finance, human rights, education policy, new public management, and more generally from the anthropology and sociology of quantitative knowledge.[8] Secondly, it is grounded in recent legal research on global governance and "governance by information", namely in Global Administrative Law and the International Public Authority approach.[9] In this perspective, indicators appear as an overarching "technology of global governance"[10] – helpful instruments of evidence-based policy making, but also potentially misleading and distorting governance tools, functionally comparable to legal regulation and thus in need of their own legitimating normative framework.[11] The present paper combines these literatures and adds to them idea and principles of a global administrative law of knowledge and information.[12]

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[5] Cf. UNCTAD (n 2), 3-4; Brookings (n 2).

[6] The aggregated nature and the specific naming distinguish indicators from simple statistical data. Indicators can become benchmarks or thresholds when target values are defined. Narrower understandings limit the notion of indicator to performance measures or rankings. On terminology see e.g. Kingsbury, Davis and Merry, 'Indicators as a Technology of Global Governance' *Law and Society Review* 46 (2012) 71, 73.

[7] See the accompanying UNCTAD economic paper by Lukkezen and Rojas-Romagosa, 'Early warning indicators in a debt restructuring mechanism' (2014). Overview of debt indicators with IMF, Das, Papaioannou and Trebesch (n 1), 68-71.

[8] Morse, *Indices and indicators in development* (2004); Rittich, 'Governing by Measuring: The Millenium Development Goals in Global Governance', in Fabri, Wolfrum and Gogolin (eds.), *Select proceedings of the ESIL* (2010); Rosga and Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' *Berkeley Journal of International Law* 27 (2008) 253; Salais, 'On the correct (and incorrect) use of indicators in public action' *Comparative Labor Law & Policy Journal* 27 (2006) 237; Kuhlmann, 'Messung und Vergleich von Verwaltungsleistungen' *Die Verwaltung* 44 (2011) 155; Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' *Current Anthropology (Suppl. 3)* (2011) S83–95; Anders, 'The Normativity of Numbers: World Bank and IMF Conditionality' *Political and Legal Anthropology Review* 31 (2008) 187; Porter, *Trust in Numbers* (1995).

[9] Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law' *Law and Contemporary Problems* 68 (2005) 15; Bogdandy, Dann and Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' *German Law Journal* 9 (2008) 1376. On restructurings as exercises of international public authority, see Bogdandy and Goldmann (n 1).

[10] Kingsbury, Davis and Merry (n 6). See also *Ibid.* and Fisher (eds.), *Governance by Indicators* (2012).

[11] Cassese and Casini, 'Public Regulation of Global Indicators', in Davis, Fisher, Kingsbury and Merry (eds.), (n 10), 465; Bogdandy and Goldmann, 'The Exercise of International Public Authority Through National Policy Assessment' *International Organizations Law Review* 5 (2008) 241.

[12] On this concept see Riegner, 'Entwicklungsmessung und Recht', in Dann, Kadelbach and Kaltenborn (eds.), *Handbuch Entwicklung und Recht* (2013); Riegner, 'Measuring the Good Governance State' IRPA working paper (2012).

C. Lessons learned from existing legal contexts of indicators in sovereign debt

This section reviews existing institutional and legal contexts for sovereign debt indicators. It primarily contrasts the IMF's approach with that of the European Union (subsections I. and II.). It then goes on to consider insights from domestic public law and from private actors and litigation (III. and IV.). It closes with a summary of lessons learned and, on this basis, concludes that indicators should indeed be used in a DWM, subject to an adequate legal framework (V.). The analysis in this part sets out the *status quo* to which any reform must be compared, and it builds the foundation for the reconstruction of general principles in part D. and for the concrete recommendations in part E.[13]

I. International law: The IMF's debt sustainability framework

At the international level, a number of formal international organizations and informal institutions contribute in more or less direct ways to debt restructuring processes. The World Bank is involved in lending as well as debt data and policy analysis, the Paris and London Clubs conduct restructuring negotiations, and the OECD also provides debt statistics.[14] The present analysis focuses on the IMF, which is directly involved in restructurings and conducts influential indicator-based debt sustainability assessments.

The Fund does not have an explicit legal mandate for debt restructurings and cannot legally compel a member to initiate a restructuring. However, Articles of Agreement empower it to "oversee the international monetary system" and member state compliance (Art. IV Sec. 3). Based on this competence and on its lending functions, the Fund plays several important roles in restructuring processes

- It provides analysis and policy advice to countries on debt sustainability;
- It provides lending to countries in debt distress under its Exceptional Access Policy;
- It acts as analyst and advisor in restructuring negotiations and agreements, namely in the Paris Club;
- It acts as information provider for markets and the general public.[15]

In exercising these roles, the Fund IMF relies on a formal "Debt Sustainability Framework" (DSF), last overhauled in 2013. The DSF is not explicitly regulated in the IMF Articles of Agreement or formal secondary law, but based on an internal 2013 Policy Paper and a 2013 Staff Guidance Note.[16] These are issued by Fund management based on its general competence to conduct the "ordinary business of the Fund."[17] They are not directly binding on member states, but must be observed internally by management staff. Neither the general rules of the DSF nor their application are subject to formalized participation rights by member states, CSOs, or the general public.

The DSF documents detail the process and criteria for "Debt Sustainability Assessments" (DSA). These DSAs employ indicators for three distinct but related purposes:

[13] For a brief comparative overview of *private* insolvency law, which are less relevant for the purposes of this paper, see Goldmann, 'Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions' (2012), 38-9.
[14] Ibid., 30.
[15] Das, Papaioannou and Trebesch (n 1), 15; Erce, 'Sovereign Debt Restructurings and the IMF: Implications for Future Official Interventions' (2013), 4, 13, 17.
[16] IMF (n 3); IMF, 'Staff Guidance Note for Public Debt Sustainability Analysis in Market-Access Countries' (2013); IMF, 'The Joint World Bank–IMF Debt Sustainability Framework for Low-Income Countries Factsheet' (2013).
[17] Art. 12 Sec. 4 b) IMF Articles of Agreement.

- Surveillance: IMF staff conduct periodic DSAs as part of the Fund's surveillance mandate and raise possible concerns about debt sustainability in Article IV consultations.[18] Indicators serve monitoring and policy advice functions. Their consequence is the publication of a more or less favorable assessment. A finding of irresponsible borrowing might also inform ordinary IDA lending decisions.
- Lending: When a country applies for additional lending under the Exceptional Access Policy because it has lost market access, IMF staff conduct a DSA with a view to determining debt sustainability. Exceptional lending is conditional upon the restoration of debt sustainability, which can require a restructuring and budgetary adjustment. The DSA feeds into restructuring advice and negotiations, namely within the Paris and London Clubs. The DSAs often play a role in determining the size of haircuts, but this role is not legally formalized, and losses are not apportioned according to a pre-determined formula.[19]
- Disbursement monitoring: Distinct performance indicators are included in lending agreements as legal triggers for disbursement, and they play a particular role in Heavily Indebted Poor Country (HIPC) debt relief.[20]

The content of the DSA indicators is analyzed in detail in the accompanying economic paper.[21] The key feature is a two-step analysis that calibrates the intensity of scrutiny and applicable indicators to the risk of a debt crisis in the respective country. For developed and emerging economies (so-called "market-access countries), these steps are as follows:

- Firstly, countries are classified as high risk or low risk, mainly on the basis of quantitative indicators. Higher risk is present if aggregate public debt exceeds 50% of GDP in case of emerging markets and 60% of GDP in case of advanced economies; or alternatively, if public gross financing needs exceed 10% of GDP in case of emerging markets and 15% in case of advanced economies.[22]
- In the second step, a country receives additional scrutiny that can be higher or lower, depending on the initial classification. Higher scrutiny countries are subjected to additional vulnerability indicators and more elaborate baseline scenarios and stress tests.[23]

DSAs for developing countries without market access use a structurally similar assessment based on indicator thresholds.[24] The indicators and respective thresholds are reflect evolving economic analysis and practical experience, e.g. on the inter-relationship of debt levels and

[18] IMF (n 3), 15.
[19] An indicator-based performance-based distribution formula is practiced in the allocation of concessional IDA funds, see Riegner (n 12).
[20] This function of indicators is related to the issue of lending conditionality, which is beyond the scope of this paper, for further reference see Bogdandy and Goldmann (n 1), 50; Anders (n 8). On HIPC, see Das, Papaioannou and Trebesch (n 1), 29; Guder, *The administration of debt relief by the international financial institutions* (2009).
[21] Lukkezen and Rojas-Romagosa (n 7).
[22] IMF (n 16), 5-6. In addition, countries receive higher scrutiny if they currently have access to IMF funds under the Exceptional Access Policy.
[23] Ibid., 6 et seq. This involves a whole set of further indicators relating to economic context (e.g. coefficient of growth variation), debt profile (e.g. external financing needs), contingent liabilities (e.g. risks in the banking sector) and other factors.
[24] See IMF (n 16); Lukkezen and Rojas-Romagosa (n 7). The initial classification for non-market access countries is based on the World Bank's Country Policy and Institutional Assessment, a governance index produced annually by Bank staff, cf. Riegner, Measuring the Good Governance State (n 12).

growth. The framework leaves staff discretion in applying and weighing the indicators, and the final sustainability verdict is thus ultimately subject to expert judgment.[25]

An evaluation of the DSF indicates the following strengths and problems that hold lessons learned for a DWM:

- Performance: In practice, DSAs have indicated unsustainable debt in cases that did in fact lead to a later restructuring; in other cases, predictions were less accurate.[26] The Fund itself admits that its projections may at times have been "too sanguine"[27], and the critical literature points to instances where overoptimistic DSAs for restructurings led to undersized haircuts and thus failed to restore debt sustainability.[28] These difficulties partly lie in the nature of projections about the future, which are always subject to uncertainty; it remains to be seen how the new framework in place since 2013 will perform. Ultimately, indicators can ascertain vulnerability, but the triggering event for a crisis is often not foreseeable. Another problem is that states may lack the willingness, the incentives or the capacity to provide reliable data as needed to make accurate predictions.
- Flexibility and sources: The DSF is flexible due to its soft sources and relatively context-sensitive application. This enables the DSF to be adapted to evolving economic research and country experience. At the same time, the soft DSF is not backed by legal obligations or sanctions, and accurate predictions of debt crises were thus not always sufficient to convince states to restructure early enough. In addition, the flexibility gives rise to the criticism that the DSF is ultimately indeterminate and thus judgmental in nature and arbitrary in application.[29]
- Impartiality: Expert analysis by IMF staff is likely to be less self-interested than assessments by the debtor state or private lenders. However, the IMF itself conflates the role as a provider of analysis and advice, which requires objectivity and impartiality, with the role as a major lender, whose chief interest is to get repaid. Commentators criticize that this may create conflicts of interest and compromise the impartiality of analysis; some thus propose to entrust assessments to a non-lending UN agency.[30] While there is no empirical evidence that this problem has actually materialized, the mere appearance of conflicts of interest (as well as arbitrariness) can be a risk for the credibility of indicator-based assessments and thus compromise their acceptance.
- Limited scope: Finally, the Fund's approach to debt assessment is criticized for not sufficiently taking into account social standards and distributional consequences of restructurings and adjustment.[31] These critiques have at least two legal dimensions: Do institutions involved in restructurings have the legal mandate, and if so, even a legal obligation, to consider non-financial factors? And to what extent must economic, social and cultural rights be factored into restructuring assessments and processes?

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[25] IMF (n 16), 7-8; Lukkezen and Rojas-Romagosa (n 7), 6-7.
[26] On strengths and weaknesses of the DSF, see Ibid., 7.
[27] IMF (n 3), 24.
[28] Brookings (n 2), 12; Bretton Woods Project, 'IMF's Greek mea culpa' (2013), http://www.brettonwoodsproject.org/2013/06/art-572642/.
[29] Erce (n 15), 2-3; Schadler, 'Unsustainable debt and the political economy of lending: Constraining the IMF's role in sovereign debt crises' (2013); Simpson, 'The Role of the IMF in Debt Restructurings: Lending into Arrears, Moral Hazard and Sustainability Concerns' (2006).
[30] Erce (n 15), 2; Lienau, 'Extending the European Debt Discussion to Broader International Governance' *ASIL Proceedings* (2011) 141, 142; Eurodad, 'A fair and transparent debt work-out procedure: 10 core civil society principles' (2009), 4, 6.
[31] See e.g. New Economics Foundation, 'Debt relief as if justice mattered' (2008); Bretton Woods Project (n 28).

II. Regional arrangements: European Union fiscal governance

Regional organizations have also developed mechanisms for budgetary discipline in member states. These mechanisms often rely on formal debt and deficit thresholds, measured as percentage to GDP. Three major examples are:

- The European Union established a binding ceiling of 3% of GDP for annual deficit and a threshold of 60% of GDP for aggregate debt in 1998.
- Mercosur agreed on numerical convergence targets of 3% of GDP for deficit and 40% of GDP for debt in 2000.
- The Andean Community followed in 2001 with targets of 3% and 50% respectively.[32]

Among these regional arrangements, the EU's common economic and monetary policy has evolved into the most integrated and legally formalized context for debt indicators. The EU does not have a comprehensive sovereign debt restructuring mechanism, but debt thresholds and indicators are used for three important purposes:

- Since 1998, EU law imposes legally binding ceilings on all member states for annual budget deficits (3% of GDP) and for aggregate debt (60% of GDP), unless exceptions apply. If surpassed, these benchmarks trigger an "Excessive Debt Procedure" conducted independently by the European Commission, which may ultimately impose financial sanctions on Eurozone members (Art. 121 and 126 TFEU).[33]
- Since 2010, Eurozone members in debt distress can receive lending from a new treaty-based lending mechanism (now made permanent as the "European Stability Mechanism"). Such lending is conditional upon 1) compliance with the EU deficit and debt framework, and 2) debt sustainability, as determined by the European Commission in cooperation with the IMF and based on a indicator-based assessment modelled upon the Fund's DSAs.[34]
- Since 2011, economic and fiscal policies in all but two EU member states are subject to enhanced surveillance by the European Commission, relying *inter alia* on budget monitoring against fiscal targets, medium-term budgetary objectives, a macroeconomic imbalances procedure and intensified coordination procedures.[35]

The EU's framework for indicators displays some similarity to the IMF: Like the IMF, the EU cannot legally force member states to default and to restructure, based on indicator triggers or otherwise. Similarly, decisions about lending to distressed countries rely on an indicator-based DSA. But there are also major differences: EU debt discipline relies on a single threshold of 60% of GDP, and not on a multiplicity of indicators. The debt-to-GDP ratio is specified as an indicator in primary treaty law (Art. 126 TFEU), and the 60% reference value is laid down in separate treaty law and secondary legislation.[36] This threshold is directly

[32] Cf. Goldmann (n 13), 26-27.

[33] For a detailed analysis of this aspect and the following, see Antpöhler, 'Emergenz der europäischen Wirtschaftsregierung: Das Six Pack als Zeichen supranationaler Leistungsfähigkeit' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 72 (2012) 353, Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' *European Law Review* 37 (2012) 231. Debt exceeding the 60% threshold must be reduced at a pre-determined average rate. If a Eurozone member fails to decrease deficit and debt as required, the Commission may, *inter alia*, fine the state 0.1-0.5% of its GDP. When deciding about sanctions, the Commission takes into account multiple factors and retains a measure of discretion. Initially, sanctions required political approval from the Council, but since 2012 a Commission decision can only be reversed by a negative, qualified majority of 2/3 in the Council.

[34] See Article 13 of the ESM; Erce (n 15), 1, 17. Such DSAs are public. See eg. http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp466_en.pdf .

[35] European Commission, http://ec.europa.eu/economy_finance/economic_governance/index_en.htm.

[36] The 1998 "Stability and Growth Pact", replaced in 2012 by the Treaty on Stability, Coordination and Governance (the "Fiscal Compact"). See Craig (n 33).

binding on member states, and enforcement is delegated to the relatively independent Commission. The indicators were negotiated by governments, and respective treaties were ratified by national parliaments. The 2012 Fiscal Compact, a new treaty, also requires the debt and deficit thresholds to be enacted as domestic law, preferably on a constitutional level.

An evaluation of the EU debt framework raises three major issues:

- Effectiveness of the debt threshold: The 60% of GDP ceiling has not been effective in preventing debt crises in Greece, Portugal, Ireland, and Cyprus.[37] Actual debt levels have exceeded the prescribed level in many member states. In 2012, debt to GDP stood at 81% in Germany, 86% in Spain and 127% in Italy.[38] However, some observers also point out that governments would likely have accumulated even higher debt in the absence of hard-and-fast European thresholds.[39] The European debt crisis also illustrates that gross debt levels to GDP are poor indicators of long term sustainability: Distress occurs at different levels and for reasons unrelated to debt levels, such as contingent liabilities in the banking sector. Single aggregate indicators thus carry the risk of detracting attention from other relevant, but more complex, statistical raw data and qualitative factors.
- Enforceability and (in)flexibility of thresholds: The ineffectiveness is also related to problems with enforceability. In principle, enshrining thresholds in hard-to-amend treaty law enhances commitment, visibility and credibility. Still, the thresholds proved unenforceable against powerful members like Germany and France: When they were in recession in 2005, there was no political majority (then needed) to impose sanctions recommended by the Commission, and exception clauses and secondary legislation were used to water down the initial commitment. This damaged the normativity of the commitment and has only been remedied partly by increased delegation of authority to the Commission, which now imposes semi-automatic sanctions.[40] Yet these and further developments in the financial crisis also show that it is problematic to cast a single, inflexible debt-to-GDP indicator in stone irrespective of country context and changing economic circumstances.
- "Gaming the indicators": A general problem with fixed quantitative indicators is that they remain vulnerable to strategic behavior. The more specific numbers matter, the more opportunity and incentive there is to "game indicators", either by merely superficial "mock compliance" or by outright statistical manipulation.[41] In the EU context, this took the form of "creative" accounting practices used by member states to fulfil Euro entry requirements.[42] This phenomenon is familiar from other contexts like development finance and from research on new public management techniques.[43]

[37] See only Brookings (n 2), 27.
[38] Eurostat, http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=teina225.
[39] Manasse, 'Deficit Limits and Fiscal Rules for Dummies' *IMF Staff Papers* 54 (2007) 455, 469.
[40] Antpöhler (n 33).
[41] Hammergren, 'Indices, Indicators and Statistics: A View from the Project Side as to Their Utility and Pitfalls' *Hague Journal on the Rule of Law* 3 (2011) 305; Salais (n 8). On superficial "mock compliance" with soft law, see Gelpern, 'Hard, Soft, and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing' (2012), 15.
[42] Manasse (n 39), 469.
[43] Davis, Fisher et al. (n 10); Kuhlmann (n 8).

III. National law

In democratic nation states, budget decisions are first and foremost the prerogative of democratically elected parliaments, which decide annually about expenditures and revenues, including debt. At the same time, many domestic legal orders regulate sovereign debt beyond the annual budget law, be it on a constitutional or legislative level. A (necessarily cursory and incomplete) review[44] of these rules reveals that procedures for public debt *restructurings* are legally regulated only for subnational governments in some jurisdictions. Domestic legal orders do not foresee formal insolvency procedures for central government debt, even though ad-hoc legislation may accompany restructurings. Numerous states have rules for ex-ante budget discipline and debt reduction.

A related but often overlooked domestic aspect that pre-determines the functioning of any indicator-based debt system is that any indicator depends on the accuracy of national fiscal and economic statistics. Domestic legislation generally provides for relevant financial and economic data to be provided by nominally independent statistical offices and makes them publicly available. In practice, however, data quality and transparency varies greatly from country to country. Statistical offices namely, but not exclusively, in developing countries may lack the capacity or impartiality to provide adequate statistics. Large informal sectors may distort economic indicators, and some contingency remains even when statistics are produced *lege artis*. For instance, when the statistical office of Ghana recently updated the base year for its GDP measurements according to international standards, the country's GDP is reported to have jumped up by roughly 60% from one year to the next.[45] This has to be borne in mind in the analysis of domestic debt indicators and an international DWM.

<u>Subnational debt</u>:

Subnational insolvencies are of interest because they are sometimes proposed as a model for an international DWM.[46] Of the domestic legal orders reviewed here, only few allow sub-state entities to file for bankruptcy. Among them are the US, Brazil, Bulgaria, Hungary, Romania, and South Africa. Most other states covered here do not have explicit legal provisions on insolvency of sub-state entities. In Germany, for instance, there seems to be a preference for ad hoc administrative arrangements, and local government is not subject to the federal insolvency act.[47]

Jurisdictions that do allow for sub-national insolvency provide for two kinds of mechanisms: Administrative procedure or court proceedings. The main difference is the degree of political influence and judicial independence. Both procedures foresee three core elements: The definition of an insolvency trigger for the procedure; fiscal adjustment for the debtor; and egotiations with creditors to restructure. The insolvency trigger consists of qualitative legal definitions. The US and Hungary, for instance, define insolvency as inability to pay and undisputed debt. South Africa uses one set of triggers for serious financial problems and another set for persistent material breach of financial commitments.[48]

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[44] For a more comprehensive comparative overview, see Goldmann (n 13).
[45] On the poorness of such statistics in general and the GDP example in particular, see notably Jerven, *Poor numbers: How we are misled by African development statistics and what to do about it* (2013).
[46] See Raffert, 'Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face' *World Development* 18 (1990) 301.
[47] Liu and Waibel, 'Subnational Borrowing, Insolvency, and Regulation', in Shah (ed.), *Macro Federalism and Local Finance* (2008); Goldmann (n 13), 41.
[48] For detail see Liu and Waibel (n 47), 14.

US law illustrates these elements: Chapter 9 of the US Bankruptcy Code contains a federal debt restructuring mechanism for political subdivisions and agencies of US states. It allows namely municipalities to file for bankruptcy, but subjects them to more stringent requirements compared to regular insolvencies of private entities. For instance, to avoid strategic filings, municipalities must undertake pre-filing efforts to work out debt. In order to preserve state sovereignty and immunity, only debtors may file for Chapter 9, the filing is subject to state consent, and federal courts may not exercise jurisdiction over policy choices and budget priorities of the debtor. In contrast, in South Africa and Hungary, any creditor can trigger the insolvency procedure.[49]

Chapter 9 has been successfully used, for example, to restructure debt in New York City, and it is currently applied to resolve the insolvency of the city of Detroit. It thus indicates that sovereign insolvency procedures are in principle feasible, even though generalizations for the international context must be mindful of differing political and legal contexts. Local defaults and restructurings are embedded in democratic political and judicial processes, and economic indicators do not play a major, legally formalized role. For the concrete question of how indicators should be used for international debt restructurings, Chapter 9 thus offers little guidance.

<u>Central government debt</u>:

Domestic legal orders do not foresee formal insolvency procedures for central government debt, but ad-hoc legislation may accompany restructurings. Such ex-post legislation depends on the law government bonds are issued under and may find some outer limits in constitutional property rights. For example, Greek legislation retroactively inserted Collective Action Clauses in Greek Bonds, and UK legislation reduces private claims against countries participating in the HIPC initiative in proportion to debt relief granted by public creditors.[50] More commonly, central government debt is subject to ex-ante constraints that impose limits on budget deficits and aggregate debt. In the EU, for instance, eighteen domestic debt rules were in operation across member states in 2008, and more have been enacted since the 2012 Fiscal Pact requires member states to enshrine EU deficit and debt ceilings in domestic law. Other states like the US, Brazil, India and Tanzania states have equally enacted statutory debt limits. A comparative overview reveals at least four regulatory models:

- <u>Constitutional deficit limits:</u> Fiscal rules may constrain governments to incur new debt, e.g. by limiting budget deficits to the amount of public investment. A 2011 amendment to the German constitution, enforceable in the Constitutional Court, imposed a debt break that requires reducing the annual structural budget deficit to 0.35% of GDP. A similar statutory rule already in place in India did however not lead to significant reductions of aggregate debt.[51]
- <u>Debt ceilings based on indicators</u>: Fiscal rules can constrain the aggregate debt based on economic indicators. These are often expressed as percentage of GDP, as is the case in the EU, but other indicators exist. Namely developing countries with a large informal sector find GDP not a helpful reference point. For example, Tanzania

[49] Ibid., 14.
[50] Boudreau, 'Restructuring Sovereign Debt Under Local Law: Are Retrofit Collective Action Clauses Expropriatory?' *Harvard Business Law Review Online* (2012). Going even further, a 2011 Spanish Constitutional amendment gives debt service explicit preference over other government expenses and thus restrains domestic restructurings in a rather exceptional way, cf. Abad and Galante, 'Spanish Constitutional Reform - What is seen and not seen' (2011). On the 2010 United Kingdom Debt Relief (Developing Countries) Act, see Bogdandy and Goldmann (n 1), 57.
[51] Articles 109 and 115 of the German Basic Law. Cf. Goldmann (n 13), 26-28.

operates a debt ceiling based on the ratio of the country's foreign exchange earnings and debt service cost. [52]

- Absolute debt ceiling: The US Congress has enacted an aggregate debt ceiling expressed in absolute terms (US $16,699 billion as of May 2013). The aggregate number is arrived at in Congressional negotiations and not directly determined by economic indicators. This ceiling repeatedly brought the federal government at the brink of default and forced it to limit its activities ("government shut down"). [53]

Evaluation:

Four key observations emerge from the comparative analysis:

- Political decisions: Debt decisions in democratic nation states are primarily political decisions, subject to parliamentary budget prerogatives. Restructurings cannot be legally enforced against central governments, and in federal states central government can generally not enforce sub-state insolvencies against the will of the respective state government.
- Legal limits: In many jurisdictions, political discretion on incurring debt is limited by legal constraints. These are mostly statutory, but sometimes also enshrined in constitutions. In many cases these are based on economic indicators related to GDP, but non-GDP indicators and ceilings without indicators also exist.
- Effectiveness: Subnational restructurings are often successful, while research on the overall effectiveness of central budget fiscal rules shows mixed results. Ceilings of all types have failed to prevent debt levels from rising in many states. Absolute ceilings negotiated in a purely political process have brought even the US at the brink of default and disrupted government activities. On the other hand, numerical fiscal rules do influence budgetary outcomes, depending on a number of design features, including the statutory basis of the rule, budgetary monitoring against the fiscal targets, and particularly the strength of corrective mechanisms and enforcement in case of non-compliance.[54]
- Data quality is a crucial and underestimated aspect of any numerical debt framework and can compromise in particular cross-country GDP-based indicators meant to apply globally. This problem deserves particular attention when indicators are made part of an international DWM.

IV. Private actors and litigation

Private actors and market processes are also relevant for debt restructuring:

- Market prices and private indicators: In economics, prices are considered to contain information about market expectations, and interest rates and credit default swap prices are thus sometimes considered indicators of the likelihood of debtor default or used to determine the scope of debt relief. In addition, private credit rating agencies engage in debt sustainability assessments when they determine the creditworthiness

[52] Ibid., 27-28.
[53] On the evolution and current situation, see Austin and Levit, 'The Debt Limit: History and Recent Increases' (2013).
[54] Manasse (n 39); Wagschal, 'Allheilmittel oder Budgetmimikry: Wie wirksam sind Verschuldungsgrenzen zur Haushaltskonsolidierung?' *Journal for Comparative Government and European Policy* 9 (2011) 352; European Commission, 'Analysis of National Fiscal Frameworks' (2010), available at http://ec.europa.eu/economy_finance/db_indicators/fiscal_governance/documents/analysis_national_fiscal_frameworks_pfr_2010.pdf.

of sovereign debtors.[55] While prices and ratings may indicate market expectations, they have however not proved reliable predictors of debt crises e.g. in Iceland. Besides, impartial comparative data and indicators have attributes of a global public good that will remain undersupplied in the market unless public institutions step in.[56]

- Litigation: Courts and arbitral tribunals sometimes face the difficulty of distinguishing inability to pay from unwillingness to pay when they are called upon to determine whether a Collective Action Clause is triggered, or when a sovereign debtor claims the defense of economic necessity. Collective action clauses generally do not contain quantitative indicators or thresholds but are rather triggered by the declaration or actual occurrence of default. Judges and arbitrators tend to use a rather loosely qualitative notion of default and insolvency, even though they may at times refer to IMF assessments.[57]

Conversely, indicators issued by public institutions can impact on market prices and perceptions as well as on litigation. Such "governance by information"[58] with regard to private actors is relevant for a DWM in two ways:

- Ex-post coordination: There is some evidence from the related field of development finance that commonly agreed indicators have the potential to coordinate multiple public and private actors. Namely the Millennium Development Goals have enabled improved donor coordination in many instances, also because they gained wide acceptance thanks to their basis in a consensual UN General Assembly Resolution.[59] Similarly, if the various creditors, institutions and fora involved in sovereign debt restructurings were to refer (possibly in bond terms and CACs) to one single set of indicators or one debt sustainability assessment, this might reduce disagreements and could help coordinate otherwise fragmented negotiation and litigation processes.
- Ex-ante governance by information: Indicators can influence market perceptions and, when they signal debt distress, contribute to trends in (dis)investment decisions. They may also affect the allocation of risks in contracts and their enforcement, as they may make risk levels transparent to drafters and judges. There also is empirical evidence that systematic governance by indicators can impact government policy. For instance, the IFC's Doing Business Ranking has incentivized business regulation reforms in dozens of countries intent on attracting FDI.[60] Unlike the MDGs however, the Doing Business Indicators have met with considerable resistance from states and CSOs, namely because the ranking criteria were accused of violating ILO labor standards, but also because the indicators were simply decreed by World Bank management and

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[55] Das, Papaioannou and Trebesch (n 1), 39-40. On private initiatives and measurements see also Gelpern (n 41) 29-35.

[56] Erce (n 15), 17. Generally Stiglitz, 'Knowledge as a Global Public Good', in Kaul, Grunberg and Stern (eds.), *Global public goods* (1999).

[57] See generally Das, Papaioannou and Trebesch (n 1), 43-45, 50 et seq.; Lienau (n 30), 142. On necessity, see ILC 8th Report on State Responsibility, UN Cov A/CN.4/318/Add. 5.

[58] On this model of governance by information, see Kingsbury, Davis and Merry (n 6).

[59] Adam and Gunning, 'Redesigning the Aid Contract: Donor-Use of Performance Indicators in Uganda' *World Development* 30 (2002) 2045; UN, MDG Gap Task Force Report (2010); Riegner (n 12). But see Wisor, 'After the MDGs: Citizen Deliberation and the Post-2015 Development Framework' *Ethics & International Affairs* 26 (2012) 113 (criticizing the expert-led MDG *indicator* process).

[60] World Bank, *Doing Business* (2006).

not agreed upon by states or even CSOs. [61] This indicates that legal compliance and legitimate sources for indicators matter for their success.[62]

Absent agreement on a DWM, indicators may be used more to coordinate actors, induce state behavior and monitor compliance with benchmarks for responsible borrowing.[63] Such systematic "governance by information" can have functionally equivalent effects to legal regulation and entail the exercise of International Public Authority. Legal doctrine has developed criteria to determine when indicators exceed that threshold. Such indicators in particular require a public legal framework that ensures their sustained legitimacy and effectiveness.[64]

V. Summary and basic conclusions

From the comparison of existing legal contexts, the following key findings, lessons learned and basic conclusions emerge. Firstly, there are three key findings on legal relevance of existing indicators:

- <u>The decision to restructure formally remains with the sovereign debtor</u>: At present, there is no international or domestic mechanism that can legally enforce a restructuring against a national government's will, whether based on indicators or on other economic analysis. International organizations competences are limited to surveillance.
- <u>Debt policy and restructurings are legally constrained by other, indicator-based mechanisms</u>: Official mechanisms exercise some leverage over debt policy and restructurings. They use indicators to trigger sanctions to enforce budget discipline, to condition official lending, and to affect market behavior through governance by information.
- <u>Alternatives to indicators</u> can take the form of qualitative expert assessments or politically negotiated absolute debt ceilings (as in the US). Often indicators are combined with, or used as the basis for, expert judgment or political decisions, e.g. in IMF DSA and EU sanctions.

The lessons learned indicate the potential of indicators and certain determinants for their successful use, but also point out significant pitfalls and risks. These aspects are captured by the general principles developed in section D. below and inform the recommendations in section E. (see the cross references in *italics*). The <u>potential</u> of indicators is fourfold:

- <u>Evidence-based policy</u>: Indicators are an important element in rational, evidence-based policy making and complement more complex statistical raw data and qualitative considerations. They can provide objective grounds for decisions, de-politicize polarized debates and enable decision-making under uncertainty. This is captured by the principle of sustainability, s*ee below, part D.II., E.I.*

[61] Schueth, 'Assembling International Competitiveness: The Republic of Georgia, USAID, and the Doing Business Project' *Economic Geography* 87 (2011) 51; Berg and Cazes, 'The Doing Business indicators: Measurement issues and political implications' (2007); International Labour Office, 'World Bank Doing Business Report: The Employing Workers Indicator' (2007).
[62] Cf. Bogdandy and Goldmann (n 11).
[63] Gelpern (n 41), 36, 38. Such a mechanism might raise the problem of "stigma" associated with the declaration of its debt as non-sustainable, cf. UNCTAD, 'Brainstorming Meeting Summary on a Debt Workout Mechanism' (2013), 2.; this is however also a problem under the present system.
[64] Bogdandy and Goldmann (n 11); Cassese and Casini (n 11); Riegner (n 12).

- Coordination: Quantitative indicators provide a common language and enable communication across national borders, governance levels and institutions. Single aggregate numbers provide a focal point for multiple actors and can potentially serve as common reference point for the coordination of negotiation and dispute resolution. *See D.II., E.I.*
- Transparency and acceptance: Indicators reduce complexity and may be easier to comprehend than complex datasets. They can thus make fiscal policy more understandable and transparent for citizens. This may improve informed collective decision-making and mobilize support for a particular debt policy. *See D.III., IV., E.III.*
- Commensurability of social concerns: As finance and debt are largely dominated by quantitative forms of knowledge and reasoning, indicators provide a vehicle for incorporating human and social considerations into restructurings. Namely indicators for economic, social and cultural rights can make social considerations commensurable with the logic and language of finance. This is captured by the principle of human rights and social protection, *see D.V., E.I.*

Whether these potentials are realized, however, depends on a series of determinants and enabling conditions:

- Quality of indicators: A primary determinant is how valid and reliable and indicator is in predicting debt crises ex-ante. Good indicators require flexibility and context-sensitivity to account for unexpected events and for country context, and they depend on quality data. This is especially relevant with regard to developing countries where statistical capacity and economic structure pose particular measurement challenges. Hence, indicators need to remain open to correction and improvement as research and experience evolve. *See below, D.II., E.III.*
- Independence and impartiality: While national governments retain the prerogative to decide on a restructuring, self-interest and political economy can prevent them from providing and acting upon objective debt data in a timely manner. International organizations can be a source for independent advice and analysis, including indicators. Yet their own incentive structure must be aligned so as to guarantee true impartiality. In order avoid even the appearance of partiality or self-interest, this calls for the inter- or intra-organizational separation of analysis and lending functions as well as procedural safeguards and external review mechanisms. *See D.II., E.II.*
- Acceptance and legitimacy: The effectiveness of indicators in resolving debt crises also depends on their acceptance by the actors involved, including creditors, debtors, international institutions, and affected citizens. Acceptance in turn hinges on transparent explanations of the indicators themselves to the public, on the legitimacy of the institution that authors indicators, and on the process in indicators they are agreed upon and applied. It also depends on the serious inclusion of social concerns widely held to be important, without however reducing social rights to mere numbers. *See D.IV., D.V., E.I., II.*
- Enforceability and delegation: The success of numerical budget rules depends in large part on their enforceability, which would require a "hard" legal source. However, even treaty-based indicators in the EU have not guaranteed compliance. In the present international regime, the effect of indicators depends on the varying leverage of lending and of governance by information, which largely hinges on country dependency on external finance. *See E.II., III.*

Indicators also have pitfalls and present risks that must be avoided if they are used in a DWM:

- Obscuring value choices and uncertainty: Quantification in general and indicators in particular are forms of knowledge that claim objectivity based on expertise. This may obscure value judgments built into indicators and assessment scenarios.[65] Indicators may also obscure uncertainty in predictions, even though the question of how to make decisions in the presence of uncertainty is a normative and political one. Highly aggregated indicators are particularly vulnerable to criticisms of de-politicization, technocracy and illegitimate "rule by experts".[66] Consequently, legal rules are needed to allocate/delegate such political discretion and to determine who is best suited and legitimated to make value choices and to be accountable for them. *See D.V., E.II.*
- Deceptive precision: Indicators may obscure problems with data availability and quality. Estimates and margins of error in raw data disappear in aggregated indicators, which create the impression of precision and accuracy for the lay public and for decision makers not well versed in statistics. At worst, the indicators mask manipulation and conflicts of interest. Consequently, any indicator-based DWM must be accompanied by sound statistical governance, rules on quality assurance and impartiality safeguards. *See D.II., E.III.*
- Misguiding attention and incentives: Narrowly defined indicators may detract attention from other relevant factors and render them less visible. The more debt assessments are based on a single indicator, the more this creates incentives and opportunity for gaming this indicator and for purely superficial compliance. Some critics consider these deficits unavoidable and thus conclude that "[w]hen a measure becomes a target, it ceases to be a good measure."[67] In order to at least mitigate these risks and to incentivize genuine compliance with a DWM, indicators need to be correlated and cross-checked with other quantitative measures and be complemented by qualitative assessments, which must in turn be transparent and be based on public reason-giving, as elaborated below. *See D.II., E.I.*
- Unchecked power: Exceptionally, indicators can become very powerful instruments of "governance by information" and lead to significant policy change and human impact, as is the case with the World Bank Doing Business ranking. If unregulated, such indicators risk exercising unchecked and depoliticized International Public Authority, and they thus need to be re-integrated into a legitimating public law framework based on legal and political control, transparency, reason-giving, participation and review, as elaborated below.[68] *See D.IV., D.V., E.II., E.III.*

The above findings and lessons learned lead to the following basic conclusion: Indicators should be used in a DWM, but only in an adequate legal framework and in conjunction with other factors. This is based on three main considerations:

- Indicators already enter restructuring decisions in a variety of ways, and even qualitative decisions and negotiations about restructurings are informed by and rely

[65] On judgments hidden in IMF DSAs, see Lukkezen and Rojas-Romagosa (n 7), 7.
[66] Cf. Merry (n 8); Salais (n 8); Porter (n 8). See generally Easterly, *The Tyranny of Experts* (2013); Kennedy, 'Challenging expert rule: The politics of global governance' *Sydney Law Review* 27 (2005) 5; Howse, 'From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System' *American Journal of International Law* 96 (2002) 94.
[67] Strathern, 'Improving Ratings: Audit in the British University System' *European Review* 5 (1997) 305, 308. On similar problems with human rights and humanitarian indicators, see Rosga and Satterthwaite (n 8), 285-87; Satterthwaite, 'Indicators in Crisis: Rights-Based Humanitarian Indicators in Post-Earthquake' *NYU Journal of International Law and Politics* 43 (2011) 865, 913.
[68] Dutta (n 11); Cassese and Casini (n 11); Riegner (n 12); Bogdandy and Goldmann (n 11).

on statistics and indicators, at least in informal ways. Not using indicators at all would mean *going back* behind the status quo (and possibly require banning them actively), which is unlikely and undesirable.

- Alternative modes of decision making are not inherently superior. Purely political decision making processes or the informal use of statistics and raw data have not solved existing debt problems, and their effectiveness and legitimacy equally depends on adequate institutional and legal frameworks.
- If indicators are governed by an adequate legal framework, their potential outweighs their weaknesses. Such a framework must ensure that indicators are constructed in a manner that makes them effective and acceptable, that they are embedded in a legitimate process of decision-making, and that their risks are mitigated.

This raises the question of how such a legal framework should look like. Before specific design questions are addressed, the following part develops general principles of such a framework that help make indicators effective, acceptable and legitimate from a legal point of view.

D. General principles of an international legal framework for DWM indicators

This subsection develops general principles governing an international legal framework for a DWM. The first subsection specifies the nature of the principles and the methodological approach (I.). The subsequent parts lay out the four principles (II.-IV.). These principles form a general evaluative framework that enables transparent discussions and value judgments on how indicators should be used in a DWM. They respond to problems experienced in existing debt indicators discussed in section C. above and lay the normative foundation for concrete recommendations for indicator use in a DWM in section E. below.

I. Principles: Nature and methodology

The notion of "principle" employed here is based on a doctrinal reconstruction of applicable law. Such principles can be reconstructed in two methodological ways: Inductively from already existing rules that govern statistics and indicators in various jurisdictions, in as much as these rules converge; or deductively from other general principles as applicable to debt restructurings in general, and to indicators specifically.[69] Depending on their source, they may be binding legal principles, or structural principles that guide interpretation and development of rules *de lege ferenda*. Both types of principles provide a normative standard for assessing the legitimacy of a DWM and its indicators. More generally, they contour the normative foundations of an emerging global administrative law of knowledge and information.[70]

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[69] This notion of principle is closely linked to the method of doctrinal constructivism and in line with its use in the earlier papers of this UNCTAD series by Goldmann, 'Necessity and Feasibility of a Standstill Rule for Sovereign Debt Workouts' (2013), namely at 15-6; Goldmann, 'Good Faith and Transparency in Sovereign Debt Workouts' (2013). On this approach in general Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' *German Law Journal* 9 (2008) 1909; Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (2013), § 12. On principles in international law generally see Koskenniemi, 'General Principles', in Koskenniemi (ed.), *Sources in international law* (2000). The principles used here operate on a different level than, but may at times condense into, principles of "Global Administrative Law" as proposed by Kingsbury, Krisch and Stewart (n 9).

[70] Riegner (n 12). For different approaches, see Tietje, 'Global Information Law: Some Systemic Thoughts' (2011); Ruffert, *The global administrative law of science* (2011).

The principles cut across levels of governance and draw from three types of sources as analyzed above in section C: International law, such as the IMF Articles of Agreement, secondary law, and principles like sovereign equality or good faith; domestic law in national constitutions and legislation (including, for the purposes of this paper, EU law), whose convergence can give rise to structural principles or a general principle of law under Art. 38 (1) c) ICJ Statute; and non-binding "soft law", which often shapes actual behavior and may indicate emerging principles.[71]

For the purposes of this paper, soft law includes internal administrative guidance and rule-based administrative practice of international institutions, as well as four important sets of principles:

- The UNCTAD Principles on Responsible Sovereign Lending and Borrowing (henceforth "UNCTAD Principles");
- The UN Principles for International Statistical Activities (applicable to international organizations) and the UN Principles for Official Statistics (applicable to national statistics)[72], as developed by the UN Statistical Commission and endorsed by ECOSOC (henceforth collectively referred to as "UN Statistical Principles")[73], and stressing that "in order to be effective, the fundamental values and principles that govern statistical work have to be guaranteed by legal and institutional frameworks".
- The UN Guiding principles on foreign debt and human rights, developed under the auspices of the UN Independent Expert on the effects of foreign debt on human rights and endorsed by the UN Human Rights Council.[74]
- Paris Declaration on Aid Effectiveness, agreed on by aid donors and recipients in 2005 ("Paris Declaration"). The Declaration stipulates explicit principles on the use of indicators in development finance, which are relevant in the debt context in as much as they perform a comparable function.

Depending on the degree of determinacy and convergence, principles sometimes require the adoption of a specific rule or interpretation in regard of an indicator. In other instances, principles do not lead to determinate substantive solutions and may conflict with each other. In these cases, they provide an argumentative framework that makes value choices transparent and enables a principled discussion about the relative merits and trade-offs of a proposed DWM rule or interpretation. The following subsections first state the general content of the respective principle(s), then expound their sources, and conclude on the consequences for indicators in a DWM.

II. Economy and sustainability

Sovereign debt restructurings are firstly governed by the principle of economy and sustainability. In terms of content, economy requires public finances in general to be

[71] On the sources in sovereign debt see Gelpern (n 41); Bohoslavsky, Li and Sudreau, 'Emerging customary international law in sovereign debt governance?' *Capital Markets Law Journal* 9 (2014) 55.

[72] Fundamental Principles of Official Statistics, available at http://unstats.un.org/unsd/dnss/gp/fundprinciples.aspx.

[73] Principles Governing International Statistical Activities (PISA), available at http://unstats.un.org/unsd/methods/statorg/Principles_stat_activities/principles_stat_activities.asp.

[74] UN, 'Guiding principles on foreign debt and human rights: Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina' (2011), A/HRC/20/23, 10 April 2011, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/128/80/PDF/G1212880.pdf?OpenElement; UH Human Rights Council, 'Resolution 20/10, A/HRC/RES/20/10' (2012), Resolution 20/10, A/HRC/RES/20/10, 18 July 2012, available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/162/01/PDF/G1216201.pdf?OpenElement.

managed in a way that is purposeful, results-oriented and cost efficient. With regard to sovereign debt, this finds expression in the principle of sustainability: Debt must be managed in a way that uses public resources in a manner that is efficient in the longer term and that prevents avoidable financial burdens. This entails a duty to restructure debt if a restructuring is evidently the only way to avoid excessive burdens on public finances. If a restructuring occurs, it must save public resources wherever possible and aim at restoring debt sustainability. This also means that actors must work towards an amount of debt relief tailored to restore debt sustainability.[75] At the present stage of legal development, the principles do not go so far as to legally define a precise point in time at which a restructuring must definitively take place.

As no actor alone can bring about sustainable results, the principles do not impose obligations of result but rather obligations of means, which jointly bind creditors, debtors and the institutions involved. These obligations of means include a duty to take decisions and conduct negotiations on the basis of impartial and reliable evidence. To satisfy this duty, public actors must use all relevant and practically available evidence, whether qualitative or quantitative, whether simple statistics or aggregated indicators. It may require the production of such evidence where this is necessary for economy and sustainability and does not incur disproportionate cost. In many instances, international law and domestic legislation requires the production and use of specific financial data, statistics and indicators, e.g. the IMF Articles of Agreement (Art. VIII Sec. 5).

The principles of economy and sustainability are based on international and domestic <u>sources</u> and are applicable primarily to international institutions and debtor states, but also extend indirectly to private actors.

- *International organizations* like the IMF and the World Bank are obligated by their Articles of Agreement and secondary law to spend their resources in an economically efficient and sustainable way and to contribute to debt sustainability in their members. In this, they are required to take into account economic analysis and data. *See above, C.I., and below, E.I.*
- *National legal orders* and European Union law impose fiscal obligations of economy and sustainability upon the respective public institutions. These legal orders tend to require impartial official statistics to be produced and used for these purposes. *See C.II., III., E.I., III.*
- *Soft law instruments* restate and concretize the principles of economy and sustainability. The UNCATD Principles specify that restructurings should be undertaken promptly, efficiently and fairly, and Principle 13 requires debt to be monitored and managed on the basis of impartially produced fiscal and economic data. In the related field of development finance, the Paris Declaration calls for lending to be organized in a results-oriented manner and to use "information to improve decision-making"; this explicitly includes a requirement to use "a manageable number of indicators".[76] The UN Statistical Principles recognize statistics as an "indispensable element" in public policy and require them to meet the test of practical utility for public purposes. This entails a requirement of impartiality and scientific quality for official statistics.[77] *See E.I., E.III.*
- *Private lenders* are subject to a standstill rule and to the good faith obligation to participate constructively in restructuring negotiations, which have already been

[75] Das, Papaioannou and Trebesch (n 1), 83.
[76] Paris declaration, paras. 43-4.
[77] Fundamental Principles 1 and 2.

established as part of general principles of a DWM.[78] This is partly codified in UNCTAD Principles 7 and 15, which require them to contribute to restructuring efforts and thus establish a responsibility for restoring debt sustainability on their part. These obligations arguably entail a good faith obligation to accept reliable statistical evidence as a basis for negotiations and dispute settlement. *See E.I.*

The principles of economy and sustainability and their legal sources permit the following conclusions for DWM indicator framework design:

- Economy and sustainability are standards for the output legitimacy of a DWM and its indicators: The more debt assessments and indicators contribute to economic and sustainable restructurings, the more output legitimacy they acquire.[79]
- There is no hard legal principle that requires the use of specific indicators in a DWM. There is however a soft principle to use indicators for those forms of lending that qualify as official development assistance under the Paris Declaration.
- In order to achieve economy and sustainability, debt restructuring negotiations and decisions must be based on impartial and reliable statistical evidence. Specific indicators must be used where required by concrete rules, as elaborated in *part C. See also E.I.*
- In order to ensure availability, impartiality and quality of statistics and indicators, the principles require institutional and organizational measures by states and international institutions. These measures include at a minimum (*see E.II., III*):
    - 1) maintaining sufficient statistical capacity, and where necessary technical assistance to build that capacity
    - 2) rules and procedures ensuring state-of-the-art scientific methods
    - 3) organizational safeguards to ensure integrity; this requires independence of statistical functions and may call for the organizational separation from operational activities.
- When indicators are used for decision making, this must be done in a way that acknowledges uncertainty and possible errors and that remains open to continuous improvement. This entails at a minimum *(see E.III*).
    - 1) communicative duties to make uncertainty visible and flag margins of error
    - 2) periodic review of indicators by an independent body that has no stakes in the existing system. For instance, World Bank indicators have repeatedly been scrutinized by its Independent Evaluation Group and external ad-hoc expert panels. For validity and reliability aspects, evaluation is the functionally adequate review mechanism (rather than judicial review).
    - 3) A formal opportunity to publicly contest individual assessments of debt sustainability in a particular state.
    - 4) Given the present state of knowledge and risks of indicator gaming, there is a prudential requirement not to imbue a single set of untested indicators in isolation with too significant legal and economic consequences. *See further E.I.*

The existing legal and institutional context and practice of debt restructurings do not consistently satisfy these principled requirements. Late restructurings impose avoidable financial cost on public finances and do not always restore debt sustainability. Poor or sugarcoated fiscal and economic data masks the necessity for restructurings and jeopardizes

[78] Goldmann (n 69).
[79] For an overview of output and other types of legitimacy, see only Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'' Political Studies 61 (2013) 2-22.

a sound basis for restructuring negotiations and decisions. There still is an undersupply of good and widely accepted indicators to predict debt crises. A DWM should remedy these deficits in order to better realize the principles of economy and sustainability.

III. Transparency and reason-giving

Transparency and reason-giving are further principles governing debt restructurings that are relevant to indicators. Transparency has been codified as UNCTAD Principle 10 and has already been established as a general principle governing a DWM.[80] Besides, transparency and reason giving are currently debated as a general principle for a wide variety of global governance contexts.[81] They have instrumental value in improving the quality of information upon which market negotiations and restructuring decisions are based, and intrinsic value in improving the inclusiveness of deliberation and enabling informed autonomous decisions. They thus contribute to throughput and input legitimacy and acceptance of a DWM.[82]

The <u>content</u> of transparency and reason-giving takes two forms relevant for restructurings: *Process transparency,* which requires negotiations and procedures of decision making to be transparent; and *outcome transparency,* which calls for publicity of decisions, for reason-giving and for disclosure of evidentiary bases for decisions. In both cases, transparency means publicity to, and access for, negotiating partners as well as the general public. In restructurings, transparency can have two different objects:

- *Restructuring transparency:* The process and the outcome of *restructuring decisions* and negotiations can be more or less transparent. Transparency and reason-giving requirements of this kind are already in place, as elaborated below. These requirements are fulfilled, *inter alia*, by the provision of statistics and indicators. For instance, the IMF's DSA themselves can be seen as ensuring transparency and reason-giving for the Fund's decisions on exceptional access lending.
- *Indicator transparency:* The *statistics and indicators* used in restructuring can themselves be more or less transparent, both in terms of the process in which they are used and in terms of the way in which their outcome is presented and sources are disclosed. This also means indicators must be adequately named, lest misleading labels obscure what they actually measure. Existing rules already require this form of indicator transparency in some instances, and particularly influential indicators are subject further demands and arguably requirements for disclosure and reason giving.

The <u>sources</u> of transparency vary according to the actor and governance level:

- *As for states*, many domestic legal orders have specific legislation on budget transparency and general freedom of information acts. Internationally, transparency and information sharing are already required from defaulting states under existing IMF and Paris Club legal frameworks.[83] This condensates in an international principle of good faith, obliging sovereign debtors to provide accurate

[80] Goldmann (n 69).
[81] Bianchi and Peters, *Transparency in international law* (2013); Grigorescu, 'Transparency of Intergovernmental Organizations' *International Studies Quarterly* 51 (2007) 625; Kingsbury, Krisch and Stewart (n 9), 37-39.
[82] Das, Papaioannou and Trebesch (n 1), 29; Goldmann (n 69), 16. On types of legitimacy, Schmidt..
[83] IMF Articles of Agreement, Article IV; disclosure is also part of the Comparability of Treatment Clause, one of the Five Key Principles of the Paris Club, cf. http://www.clubdeparis.org/sections/composition/principes/cinq-grands-principes ; cf. Goldmann (n 69), 21.

macroeconomic data and debt information relevant for the workout.[84] This obligation is partly codified in UNCTAD Principle 15: "The sovereign borrower should provide the necessary information which would demonstrate that the sovereign is unable to normally service its debt." In addition, Principles 10, 11 and 13 establish transparency, disclosure and monitoring requirements for regular debt operations which apply *a fortiori* throughout debt restructuring negotiations.[85] *See above, C.IV., and below, E.I., E.III.*

- *International organizations* involved in debt restructuring are also subject to transparency requirements. The IMF and the World Bank have embraced transparency in internally binding Access to Information and Transparency Policies.[86] These Policies stipulate concrete rules and exceptions, and the IMF's Policy calls transparency an "*overarching principle*".[87] This means not only that the default rule is that documents and information are accessible, but also that exceptions should be interpreted narrowly.[88] The DSF Guidance Note already requires higher scrutiny cases to be accompanied by a write up giving reasons. More generally, the UN Statistical Principles make clear that official statistics must be accessible to all in order to "honour citizens' entitlement to public information".[89] *See C.I., E.I., E.III.*
- *Private lenders* are *a priori* not directly subject to these public transparency requirements, but national law usually subjects them to disclosure rules that increase with the size and system-relevance of the actor. Besides, public transparency is a legitimatory basis for making private investors acknowledge part of their responsibility in a default if they chose to extend credit notwithstanding insurmountable existing debts known to the public.[90] *Below, E.I., E.III.*

These existing transparency rules are broadly applicable to public activities and do not, as a rule, exclude indicators from their application. More specifically, the UN Statistical Principles explicitly require mandates and rules under which statistical systems operate to be made public and stipulate that statistical standards, categories and classifications must be made transparent for all users.[91] The IMF's Transparency Policy subjects a wide range of documents containing statistical information to disclosure. This applies *a priori* not only to the DSA and indicators used in them, but also statistics and raw data on which they are based. The IMF Staff Guidance explicitly requires staff be transparent and provide justification when they exercise discretion in the application of DSF indicators.[92] Transparency and reason-giving obligations generally increase with the intensity of governance by information exercised by a particular indicator or DSA.[93]

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[84] Ibid., 20.
[85] Ibid., 20.
[86] IMF, '2013 Review of the Fund's Transparency Policy -- Supplementary Information and Revised Proposed Decisions; June 17, 2013' (2013); World Bank, *Access to Information Policy* (2010). On these, see Hunter, 'International Law and Public Participation in Policy-Making at the International Financial Institutions', in Bradlow and Hunter (eds.), *International financial institutions and international law* (2010); Dann (n 69), §32.
[87] IMF (n 86), 6.
[88] Note however that Ibid., para. 76, allows for edits to market-sensitive information, including statements on liquidity and solvency. Another example for such an explicit exception is contained in the World Bank's Access to Information Policy which excepts write ups for the World Bank's Country Policy and Institutional Assessment Indicators from disclosure, see Riegner (n 12).
[89] Fundamental Principle 1; Principle of International Statistical Activities 1.
[90] Gelpern (n 41); UNCTAD (n 63), 2-3.
[91] Fundamental Principle 7; International Statistics Principles 3 and 4.
[92] IMF (n 16), 8.
[93] Cassese and Casini (n 11); Dutta (n 11); Bogdandy and Goldmann (n 11).

The principle of transparency and respective legal sources thus lead to the following conclusions for DWM indicators:

- As a rule, public institutions must make all debt data and indicators in their possession available to the public, unless explicit exceptions apply. If public decisions are based on indicators, this basis must be disclosed. If one or a set of indicators is chosen for a DWM, this presupposes that relevant actors can be obliged to disclose the necessary data. In particular, such regulation must specify which financial information a creditor must disclose in order to enjoy the benefits of a restructuring. In this, transparency must be balanced with the need to conduct restructurings negotiations effectively with aim of restoring sustainability.[94] *See below, E.III.*
- The process in which indicators are constructed and applied should be transparent. The mandate of the respective institution, the methods and process used, as well as the data sources that feed into indicators should be disclosed in advance. Indicators should be named appropriately to designate what they actually measure. The outcome of indicators should be publicly available, along with raw data and other evidentiary bases. This goes in particular for indicators that have significant legal consequences or involve the exercise of International Public Authority. *See C.IV. C.V., E.II., III.*

The existing debt regime does not yet ensure transparency at an optimal level. The bases upon which decisions are made, including economic data and indicators, often remain obscure despite detailed requirements to the contrary in UNCTAD principles 10, 11, 13, and 15. Lack of transparency on the part of sovereign debt administrators has caused price shocks when crucial information is eventually revealed, as has been the case when true extent of the Greek budget deficit became known in 2009. Sometimes creditors and debtors disagree on whether specific financial information must be disclosed in negotiations, e.g. currency reserves.[95]A DWM indicator framework should remedy this situation and better balance the principle of transparency with other requirements.

IV. Ownership and collective autonomy

Ownership and collective autonomy are further principles that govern restructurings in general and the use of indicators in particular. They represent an area-specific reformulation of the principle of sovereignty, which is increasingly regarded not as a purpose unto itself but as a vehicle for collective self-determination and domestic democracy. Restructuring and adjustment processes can have significant impact on a state's ability to exercise meaningful financial and economic self-determination. Doctrinally, this has been expressed by qualifying restructurings as an exercise of International Public Authority by international institutions that determines and conditions collective autonomy.[96] Ownership over restructurings thus remains a major factor for the input legitimacy of a DWM, and it constitutes an effective response to concerns about technocracy and depoliticization which can seriously compromise acceptance. It thus needs to be carefully balanced with competing principles.

The sources are found, firstly, in the principle of sovereignty as adapted to the debt restructuring context. Besides, ownership has been codified as a key principle of development finance in the Paris Declaration and has become a guiding principle for the international financial institutions.[97] It is expressed and given effect in concrete procedural rules in IMF

[94] Goldmann (n 69), 21-22.
[95] Cf. Ibid., 16; Gelpern (n 41).
[96] Bogdandy and Goldmann (n 1).
[97] Cf. Ibid., 58.

and World Bank Policies and Procedures.[98] In domestic law, constitutional principles of democracy generally require parliamentary approval of budgetary measures in order to guarantee collective autonomy.

Some of these sources explicitly apply ownership to indicators: The Paris Declaration expressly requires donors to refrain "from requesting the introduction of performance indicators that are not consistent with partners' national development strategies" and to link funding "to a single framework of conditions and/or a manageable set of indicators derived from the national development strategy."[99] World Bank Policies and Staff Guidance encourage country ownership of quantitative poverty assessments and indicators.[100] Ownership can also be exercise within international institutions by empowering their political organs representative of states: The OECD PISA indicators, for instance, are based on an explicit mandate from the political organs that laid out the fundamental political orientation of the indicator system.[101] Likewise in domestic law, otherwise independent statistical offices are subject to political direction when it comes to the purposes and political priorities of data collection.

In terms of content, sovereignty traditionally entails that the legitimate authorities of a state have independent control over the direction of the national economy and effective involvement in economic planning.[102] In the DWM context, this entails ownership by the state over the restructuring. This materializes on three levels:

- *Autonomy in restructuring decision*: States remain formally sovereign to decide whether to restructure. They cannot be legally forced to default without their consent. States can consent to a restructuring ad-hoc on the occasion of an individual restructuring or express consent ex-ante by means of a treaty or secondary legislation. Domestic law specifies in how far democratic principles require the participation of parliament in such decisions.
- *Ownership over restructuring process*: Once a state has declared its default and a restructuring is negotiated, ownership requires a measure of control by the state over the process. Besides, it plays a role for lending conditionalities (an issue beyond the scope of this study). The flipside of state ownership is a responsibility of the government to actively engage in negotiations and take the lead in making reasonable proposals. The ability to do so presupposes sufficiently reliable financial data.
- *Ownership over statistics and indicators*: While sustainability and transparency may require less government control and less political influence over statistics and indicators in some respects, some non-technical aspects are subject to ownership requirements. Hence, even where an independent institution produces sustainability assessments and indicators, some form of functionally adequate political control needs to remain in order to ensure oversight and political legitimacy of value choices and uncertainty management.

This leads to the following conclusions on indicators in a DWM:

- No indicator can currently be imposed as a legally binding, automatic trigger compelling governments to restructure without their consent. Changing this would

[98] Dann (n 69), § 14.
[99] Paris Declaration, paras. 45, 16.
[100] World Bank Operational Policy 1.00; World Bank Guidance Note on Poverty Assessments, July 2004.
[101] IMF (n 3), 25-26.
[102] Dann (n 69), § 14.

require a formal treaty or an amendment to existing treaties transferring this competence to an international institution.

- Where indicators entail political value choices, normative decisions on how to deal with uncertainty and/or the exercise of International Public Authority, these choices should be made (or be explicitly delegated) by appropriately legitimated political organs. States can delegate such choices ex-ante to political organs of international organizations in which affected member states are fairly represented. *See above, C.V., below, C.IV., C.V., E.II.*
- In any event, states should be given a formal opportunity to publicly comment on, and if need be, rebut independent debt sustainability assessments and indicators. This may involve a formal three-step procedure with a draft DSA, a public government response, and a final determination.[103] *See E.III.*

Besides, there remain two open questions:

- Participation: It is open whether ownership legally requires participation of other actors, namely private creditors, CSOs and the general public.[104] Literature and commentators have voiced doubts whether state consent alone is under all circumstances sufficient and have called for more inclusive processes in assessing debt sustainability and in deciding on restructurings.[105] In this regard, national law generally requires parliamentary involvement but not necessarily public consultation or direct participation in budgeting. Internationally, participation has been cited a principle of an emerging Global Administrative Law, and the UN Statistical Principles call at least for "regular consultations with key users both inside and outside the relevant organization to ascertain that their needs are met".[106] *See E.III.*
- Equality: Sovereign equality requires international institutions to treat their members equally. Little thought has been given so far what this means for indicators: Does equal treatment require the application of the same indicators and consistent thresholds across countries? Or rather that unlike countries be treated differently? The UN Statistical Principles simply point out that the use of uniform international concepts and classifications promotes consistency.[107] Yet practice is uneven, and the IMF for instance insists that the DSF should take into account country specific features.[108] *See E.II.*

So far, ownership has been realized to varying degrees and in a variety of ways. In practice, it depends on the capacities of the defaulting state and its relative bargaining power. In the EU, indicators negotiated by member state governments and ratified by national parliaments display higher ownership than those developed and applied exclusively by international organization technical staff without any involvement of political bodies. Again, a new DWM requires careful balancing of ownership with other principles so as to give effect to collective autonomy, while avoiding dysfunctional or even paralyzed political decision-making processes.[109]

[103] For such a proposal, see Brookings (n 2), 33.
[104] For active NGO contributions to the debt debate, see only Kaiser (n 2); Eurodad (n 30).
[105] Bogdandy and Goldmann (n 1), 58. Cf. also IMF (n 3), 40. On participation as a GAL principle, see Kingsbury, Krisch and Stewart (n 9).
[106] Principle of International Statistical Activities Principle 1.
[107] Fundamental Principle 9.
[108] Das, Papaioannou and Trebesch (n 1), 83.
[109] Bogdandy and Goldmann (n 1).

V. Human rights and social protection

The success of a restructuring is not only determined by the restoration of debt sustainability but also depends on the extent of social and human cost and suffering it entails. These concerns are captured by the principle of human rights and social protection. It requires states and international organizations to respect, protect and fulfil human rights when they engage in restructuring and adjustment measures and to limit negative impacts on rights wherever possible. As restructurings are exercises International Public Authority that may curtail individual entitlements, they must comply with human rights obligations.[110] This view has recently been confirmed by case law and independent UN experts. [111] Human rights entail an obligation to monitor rights fulfilment based on statistics and indicators and to take these into account in debt assessments and restructuring negotiations. Similar obligations to monitoring of social or human development impact also exist independently from human rights by virtue of other commitment. Assessing and mitigating human and social impact assessment contributes to both the throughput and output-legitimacy of a DWM.

The <u>sources</u> of rights and social protection are found primarily in domestic constitutions and legislation as well as in regional and international human rights treaties.[112] Besides, founding treaties and secondary law of IMF, World Bank, the ILO and the EU lay down social objectives with regard to poverty reduction, standards of living or employment.[113] A particularly relevant source is the Covenant on Economic, Social and Cultural Rights (CESCR/“the Covenant”), as these rights are often primarily affected by debt service and adjustment measures. Substantive human rights obligations as well as associated monitoring duties are reinforced by other commitments to poverty reduction and social protection, namely by the Millennium Development Goals, its indicators and monitoring commitments.

The <u>content</u> of human rights obligations in restructurings has recently been restated in the UN Guiding principles on foreign debt and human rights. They call upon states to “ensure that any and all of their activities concerning their lending and borrowing decisions, those of international or national public or private institutions to which they belong or in which they have an interest, the negotiation and implementation of loan agreements or other debt instruments, the utilization of loan funds, debt repayments, the renegotiation and restructuring of external debt, and the provision of debt relief when appropriate, do not derogate from [human rights] obligations”.[114] Rights potentially curtailed during a restructuring include *inter alia* the rights to health, to food, to education, and to social security. These rights are subject to the principles of non-discrimination, progressive realization, non-retrogression and the guarantee of minimum core obligations. This means at

[110] Ibid., 60 et seq. Another justification is based on the *erga omnes* effet of human rights obligations Pfeiffer, ‘Zahlungskrisen ausländischer Staaten im deutschen und internationalen Rechtsverkehr’ *Zeitschrift für vergleichende Rechtswissenschaft 141* 141 (2003) 102; Hofmann and Krajewski, ‘Staatsschuldenkrisen im Euro-Raum und die Austeritätsprogramme von IWF und’ *Kritische Justiz* 45 (2012) 2.

[111] The European Committee of Social Rights held that labour market reforms implemented by Greece in the course of its debt crisis violated the European Social Charter, European Committee of Social Rights, Complaints No. 65/2011 and 66/2011, decisions on the merits of 23 May 2012. See further UN (n 74).

[112] From the vast literature, see most recently Krennerich, ‘Social Security – Just as much a Human Right in Developing Countries and Emerging Markets’ *Law and Politics in Asia, Africa and Latin America* 47 (2014) 105 and the further contributions in that special issue; and Baderin and McCorquodale (eds.), *Economic, social and cultural rights in action* (2007).; Riedel, *Theorie der Menschenrechtsstandards* (1986).

[113] See namely IMF Art. I (ii); IBRD/IDA Articles I and OP 1.00 on poverty reduction; Art. 3 (3) of the Treaty on European Union.

[114] UN (n 74).

the very least that cutting back on social spending must be non-discriminatory, be justified and must not go below the floor set by minimum core obligations.[115]

These rights and principles also entail a procedural duty to monitor the fulfilment the rights. UN Treaty Bodies have interpreted this duty to require the collection and use of specific human rights statistics and indicators, enabling comparisons over time and disaggregated for vulnerable groups.[116] The UN Office of the High Commissioner for Human Rights (OHCHR) has developed a set of indicators to measure ESC rights for these purposes in a participatory procedure.[117] In addition, the UN Independent Expert on debt and human rights has a mandate for quantifying minimum standards to support the realization of the Millennium Development Goals.[118] Generally, social or human impact assessments are becoming an increasingly widespread tool in policy making and are also used, for instance, in development finance and EU trade policy.[119]

Human rights obligations apply to a variety of actors and result in the following <u>conclusions</u> for a DWM:

- Human rights impact assessments based namely on ESC rights indicators should be conducted for three distinct purposes in restructurings and adjustments:
    - For monitoring the evolution of rights enjoyment in order to detect and mitigate disproportionate and disparate human impact;
    - For distinguishing between inability and unwillingness to serve debt, as indicators help define a legally required floor of minimum social protection and spending;
    - For ascertaining the permissible volume and content of adjustment, and consequently the necessary size of restructuring and haircuts.
- <u>States</u> are required to protect and monitor rights in their own territory when they restructure their debt and go through adjustment. These obligations also apply, in principle, to creditor states when they act within international institutions and/or with extraterritorial effect.[120] Both creditor and debtor states are under a duty to collect human rights statistics and indicators, as specified by UN Treaty Bodies and the OHCHR, and are required to take them into account in restructuring negotiations and decisions. *See above, C.I., C.V., and below, E.I.*
- <u>International organizations</u> are indirectly bound by human rights, by virtue of their status as special organizations of the UN or on other doctrinal grounds.[121] This also

[115] Ibid.; 112); Klee, *Die progressive Verwirklichung wirtschaftlicher, sozialer und kultureller Menschenrechte: Eine Interpretation von Art. 2 Abs. 1 des Internationalen Pakts für wirtschaftliche, soziale und kulturelle Rechte*, Schriften zum öffentlichen, europäischen und internationalen Recht (2000), vol. 10.

[116] See Kalantry, Getgen and Koh, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators' *Human Rights Quarterly* 32 (2010) 253;Rosga and Satterthwaite (n 8); Welling, 'International Indicators and Economic, Social, and Cultural Rights' *Human Rights Quarterly* 30 (2008) 933.

[117] OHCHR, 'Human Rights Indicators. A Guide to Measurement and Implementation' (2013). For other approaches, see e.g. Fukuda-Parr, Lawson-Remer and Randolph, 'An Index of Economic and Social Rights Fulfilment: Concept and Methodology' *Journal of Human Rights* 8 (2009) 195.

[118] http://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/IEDebtIndex.aspx, See also http://www.imf.org/external/np/exr/facts/pdf/jdsf.pdf.

[119] See e.g. UNDP, 'Human development impact assessment of trade policy' (2012).

[120] Carmona, 'The obligations of 'international assistance and cooperation' under the International Covenant on Economic, Social and Cultural Rights' *The International Journal of Human Rights* 13 (2009) 86; Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Reproduced in (2012) 34 HRQ 1084.

[121] Dann (n 69), §15; Bernstorff, 'Social Rights in the WTO' *Law and Politics in Asia, Africa and Latin America* 42 (2009) 4; Darrow, *Between light and shadow: The World Bank, the International Monetary*

- means that they must not aid or assist breaches of ESC rights by states through advice or finance.[122] At a minimum, this includes an obligation to take into account the human rights indicators introduced by states in restructuring and adjustment negotiations. The limited mandate of an international organization should not be interpreted as an obstacle to considering and measuring the impact of the organization's operations on human rights and human development.[123] Finally, if international aid is allocated to a restructuring state, an appropriate fraction of this assistance should be devoted, where necessary, to building statistical capacity for human rights and human development monitoring. *See C.I., C.V., and E.I., E.III.*
- Private creditors must be legally regulated by states so as to prevent them from violating human rights of others, and they are under their own moral obligation to comply with fundamental human rights standards, as specified by the UN Guiding Principles on Business and Human Rights.[124] The Human Rights Council has explicitly affirmed that this includes private sovereign debt creditors.[125] *See E.I.*
- Finally, all creditors, public and private, are bound by a good faith obligation not to request debt workouts and adjustment which would prevent the debtor state from fulfilling its international human rights obligations.[126] This in turn entails an obligation to take into account human rights indicators introduced into negotiations and dispute settlement by the state, as assisted by international institutions. *See C.I., C.V., E.I.*

These obligations can in some instances be legally enforced through e.g. the European Court of Human Rights, the European Social Charter Committee, or UN human right bodies and procedures.[127] But even independently of legal enforcement, they can have a discursive effect on public opinion and in political negotiations, parliamentary debates and economic bargaining. The more substantiated social rights claims in restructurings are through statistical evidence, the more potential there is for their serious considerations. Yet methodological and prudential caveats apply to the quantification of rights with particular force: Indicators must never reduce rights to mere numbers in cost-benefit calculations, and they can never replace judicial enforcement and political activism. Rights indicators will only contribute to the legitimacy of a DWM if they make human impact a genuine concern of all actors and make them take rights seriously.[128]

E. Recommendations for the use of indicators in a DWM

This section makes concrete recommendations for the use of indicators in a DWM and proposals for the legal design of the required indicator framework. It first answers how indicators should be used and what functions they should perform in a DWM (I.), then turns

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Fund and international human rights law (2003); Skogly, *Human Rights Obligations Of The World Bank And The IMF* (2001).

[122] Art. 14 of the Draft Articles on the Responsibility of International Organizations.

[123] Cf. Coomans, 'Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations' *Max Planck Yearbook of United Nations Law* 11 (2007) 339.

[124] UN, 'Guiding Principles on Business and Human Rights: A/HRC/17/31' (2011).

[125] UN HR Council, Resolution 20/10, A/HRC/RES/20/10, 18 July 2012, paras. 12-13, available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/162/01/PDF/G1216201.pdf?OpenElement, 12.

[126] Goldmann (n 69), 14.

[127] See e.g. European Committee of Social Rights, Complaints No. 65/2011 and 66/2011, decisions on the merits of 23 May 2012; UN (n 74).

[128] Cf. Dworkin, 'Rights as Trumps', in Waldron (ed.), *Theories of Rights* (1984), 153 (arguing that rights are trumps that escape cost-benefit-calculus). On the pitfalls of rights indicators, see Satterthwaite (n 67); Rosga and Satterthwaite (n 8).

to what their sources should be and who should design them (II.), and finally addresses how indicators should be applied (III.).

The recommendations and proposals draw from the lessons learned discussed in part C. and are based on the general principles developed in part D. The lessons learned ground the recommendations in practical experience, and the principles provide a normative framework for assessing and discussing the effectiveness and legitimacy of DWM indicators. The proposed framework contributes to the solution of problems encountered in current debt restructurings, such as procrastination and fragmentation, and to the acceptance of a DWM among relevant stakeholders. In this, international law makes an essential contribution to a DWM, while avoiding to overregulate matters better left to statistical and economic expertise.

I. How should indicators be used in a DWM?

Recommendation 1: Initiation of a restructuring
A restructuring under the DWM should require **a) a formal request by the debtor state, and** **b) the substantive finding by a competent international institution that debt is unsustainable.**

Elaboration: Indicators should not be used as automatic triggers for a debt restructuring. Rather, a workout process should be initiated when the cumulative requirements of a formal government request and a substantive finding of debt unsustainability are met. In this case, a standstill of litigation and good faith obligations will be triggered. A finding that debt is unsustainable should create a presumption that a restructuring is needed and require a government unwilling to restructure to publicly respond to the finding and to rebut the presumption.

Reasons:

- Changing existing law and practice would require governmental agreement on a treaty or a treaty amendment, which is unlikely. Granting formal decisional autonomy will ensure government buy-in and governmental discretion will be de-facto limited by borrowing needs and market constraints. *See above part C.V.*
- The principles of ownership and collective autonomy argue for leaving the formal decision to restructure with the legitimate government of the sovereign debtor state, subject to a political process. *See C.V., D.IV.*
- The principle of sustainability requires independent assessment of the debt situation but does not support the use of indicators as automatic triggers for a restructuring, as currently available indicators do not predict the need for a restructuring reliably enough and remain subject to legitimate disagreement among economic experts. The procedural correlate to this is a a rebuttable presumption. *See above C.I., C.II., C.V., D.II., and below, E. III.*

Recommendation 2: Debt sustainability assessment to signal need for restructuring
Debt sustainability should be assessed by a set of indicators in conjunction with a reasoned and transparent qualitative assessment

Elaboration: The need for a restructuring should be assessed and signaled by a debt sustainability assessment. This assessment should not be based on a single indicator but use a set of several indicators and cross-checked these against each other. In addition, indicators be combined with a qualitative expert assessment. This assessment should be reasoned and transparent in all cases, and not only when it departs from standard indicators classifications. It should be conducted periodically for all states and be complemented by extraordinary assessments when vulnerable countries are hit by shocks. Extraordinary assessments should lead to a rapid determination whether debt has become unsustainable. Periodic debt sustainability assessments should be used more systematically for early warning and to induce responsible borrowing. Relevant indicators should be named appropriately not to mislead about what they measure. States must disclose the relevant data necessary for all assessments and indicators.

Reasons:

- Sustainability should be assessed also by means of indicators because experience shows that these can contribute to evidence-based policy, coordination and transparency. Besides, the principle of sustainability requires that restructuring decisions be based on impartial and reliable evidence. *See C.I.-V., D.II., D.III.*
- Experience from the IMF and the EU as well as the principle of sustainability militate against using a single indicator. No single existing indicator is currently reliable and tested enough. Imbuing a single indicator with significant consequences for restructuring incentivized gaming of the indicator and may detract attention from other important factors. Having several competing indicators possibly allows selecting the best performing one further down the road. *See C.II., C.V., D.I.*
- Grasping the complexity of debt sustainability requires combining these indicators with qualitative assessments, namely in order to account for unpredictable shocks that may nudge vulnerability into crisis. These assessments should be transparent and reasoned to comply with the principle of transparency. *See C.V. D.III. and below, E.II.*
- Using these indicators and assessments more systematically as means of "governance by information" can increase market transparency and induce responsible borrowing even in the absence of agreement on an institutionalized DWM. If indicators are used deliberately in this way, they require a public legal framework that ensures their sustained legitimacy and effectiveness. *See C.IV., C.V.*

Recommendation 3: Restructuring negotiations and disputes
Debt assessments and indicators should be used to render restructuring negotiations and dispute settlement more efficient, coordinated and transparent.

Elaboration: Debt assessments and indicators should be used as a formal basis for restructuring negotiations in order to reach their aim of restoring debt sustainability more efficiently. This basis should be publicly available. There should not be an indicator based automatism for determining haircuts and allocating losses. The indicator-based sustainability assessment should be referred to more consistently in contract drafting and dispute settlement in order to achieve coordination and minimize the effects of forum fragmentation. They should namely affect the risk allocation in ex-ante contract drafting and ex-post litigation where the law allows judges such interpretive moves. Where indicators made risk levels transparent, informed decisions to take such risks should entail the responsibility to bear that risk.

Reasons:

- The principle of sustainability requires negotiations and decisions to be based on impartial and reliable statistical evidence. Experience shows that full disclosure of necessary data leads to more efficient restructuring results. *See C.V., D.II.*
- The principle of transparency requires that debt data and indicators be available to the public that the statistical bases of public decisions be disclosed. *See D.III.*
- Currently available indicators do not allow for the automatic allocation of losses and objective determination of haircuts. Ownership over the restructuring process requires some discretion for the restructuring state to conduct the negotiations. *See C.I., C.IV., D.IV.*
- A more widely accepted indicator-based debt assessment has the potential to become a common reference point for dispute resolution in order to achieve coordination of private litigants, as has been partly illustrated by the coordination effects of the MDGs. States and courts should explore whether increased reference to DWM assessments and indicators in the drafting and interpretation of bonds terms and Collective Action Clauses would serve these goals. *See C.IV.*

Recommendation 4: Human impact assessment
Human rights and social indicators should be used to monitor and mitigate the social and human impact of restructurings

Elaboration: A debt sustainability assessment should not be considered valid unless it also assesses available evidence and indicators on economic, social and cultural rights. These findings should help establish a minimum floor for social spending and should be taken into account when distinguishing unwillingness from inability to pay and when determining the size of permissible adjustment and of necessary haircuts.

Reasons:

- Experience shows that restructurings and adjustment are more acceptable when they take social concerns into account. Human rights indicators can bring such concerns to the attention of decision makers in restructurings. *See C.I., C.V.*
- Human rights principles require states and international institutions to monitor fulfilment of, namely, economic and social cultural rights by means of adequate statistics and indicators. These provide some objective guidance for the legally required floor of social protection and spending. Debt assessments must reflect this, and all parties must take these findings into account in restructuring decisions and negotiations. *See D.V.*
- The limited mandate of an international organization need not be interpreted as an obstacle to considering and measuring the impact of the organization's operations on human rights. *See C.I., D.V.*

II. What should be the sources of indicators and who should design them?

Recommendation 5: General Assembly Resolution on general principles
A United Nations General Assembly resolution on a DWM should recognize general principles governing debt assessments and indicators

Elaboration: If the General Assembly passes a resolution on a DWM, this resolution should contain a clause that recognizes general principles for debt assessments and indicators. These general principles should be based on applicable law and should guide any further design and use of debt assessments and indicators in restructuring.

Reasons:

- Debt sustainability assessments and indicators not only depend on their technical quality, but also on acceptance by states, international institutions, private creditors, and affected citizens. Such acceptance is facilitated when normative principles ensuring legitimacy of indicators are explicitly recognized by a broadly representative institution. *See C.V., D.I.*
- The General Assembly enjoys such broad representativeness and is set to deal with the issue of debt restructurings in any event. The example of the MDGs indicates that indicators based on a GA resolution can gain wide acceptance. *See C.IV.*
- A GA resolution gives effect to the principle of ownership and collective autonomy of all states and ensures a measure of equality in terms of the ground rules applicable to indicators for all states. It would also render the normative basis for assessment and indicators transparent. *See D.IV., D.III.*

Recommendation 6: Sources and competences	
6 a) **Scenario: Treaty-based DWM**	**If the DWM is based on a new treaty, that treaty should** **a) provide for a competence of the political organ to regulate basic features of debt sustainability assessments and indicators in secondary legislation** **b) lay down general principles for debt assessments and indicators, including that their basic political orientation should be defined by secondary regulation** **b) define competences and procedures for the implementation of these principles and for the application of the indicators by an expert organ**
6 b) **Scenario: DWM with enhanced role of existing institutions**	**If the DWM is based on the enhanced the role of existing institutions, those institution should enact formal secondary legislation that** **a) lays down general principles for debt assessments and indicators** **b) specifies the mandate for sustainability assessments and indicators and defines their basic political orientation** **b) defines competences and procedures for the**

	implementation of the mandate and for the application of the indicators by an expert organ
6 c) **Scenario: DWM based on soft principles, no institutional change**	**If the DWM is not accompanied by institutional change, a set of soft law principles should** **a) lay down general principles for sustainability assessments and indicators and specify rules for their design and application** **b) encourage relevant actors to implement these rules and principles in their internal regulations and practice**

Elaboration: Indicators should neither be enshrined directly in treaty law nor left entirely to experts without normative guidance. Instead, debt sustainability assessments and indicators should be regulated in a cascade of legal sources and be designed in an interplay of political and expert organs. Depending on the ultimate institutional setup of the DWM, general principles and competences for debt assessments and indicators should be regulated in treaty or secondary law. Assessment criteria and indicators they should be based on an explicit mandate from a political organ. This mandate should spell out the basic political orientation of the criteria and indicators, namely regarding value choices and treatment of uncertainty. The implementation of the mandate should be delegated to expert organs that act impartially and free from political influence. These expert organs should ultimately design and apply the concrete assessment criteria and indicators, subject to the general principles and legal mandate. If a DWM does not involve new legislation, soft law principles should be enacted and formulate the above principles and rules as guidance for existing arrangements and promote their implementation in law and practice of existing institutions.

Reasons:

- Experience indicates that indicators require expertise, flexibility and enforceability to function well. They must be based on state of the art economic and statistical knowledge, express sufficient normative commitment, flexibly account for unexpected events, and be applied independently, consistently and free from undue political interference. This circle can only be squared by careful allocation of different aspects of designing sustainability assessment and indicators to different organs, and by enshrining relevant rules in a cascade of sources ranging from general and binding to more concrete and flexible. *See C.I., C.II., C.III., C.IV.*
- Sources and competences need to balance the principles of sustainability, transparency and ownership. Ownership and transparency require that value choices and uncertainty must not be obscured in technical debt assessments and indicators but must be made transparent and be decided upon (or be expressly delegated) by appropriately legitimated political organs. This means that general principles for assessments and indicators should be laid down in primary or secondary law enacted by state representatives and political organs. *See C.V., D.III., D.IV.*
- To avoid the exercise of unchecked power by means of “governance of information”, those assessments and indicators that qualify as exercise of International Public Authority should be based on an explicit mandate from a political organ that specifies their basic political orientation. *See C.IV., C.V., D.IV.*
- Giving effect to the principle of sustainability requires that assessments and indicators incorporate expert knowledge, and independent expert organs are best positioned to define detailed assessment criteria and indicators, subject to enacted

legal requirements. These requirements include giving of reasons that justify the choice of criteria and indicators *See D.II., III.*

III. How should indicators be applied?

Recommendation 7: Independent application of assessment criteria and indicators
Assessment criteria and indicators should be applied by independent expert organs of a competent international institution whose impartiality is guaranteed by organizational safeguards

Elaboration: A non-political organ of a competent international institution should apply the assessment criteria and indicators based on expert knowledge. This process should be insulated from political influence. The assessment should be organizationally separated and fire-walled from eventual lending operations that the same institution might perform.

Reasons:

- An independent, international expert organ is better placed to impartially assess debt sustainability and to apply indicators than the respective state or its creditors. Experience shows that governments may lack the capacity, incentives, or willingness to provide impartial assessments. Objective debt information bears attributes of a global public good that needs to be supplied by international public institutions. The principle of sustainability thus requires that these implementation functions be delegated to a neutral expert organ. *See C.I., C.II., C,V., D.II.*
- This organ should be subject to organizational safeguards that guarantee its autonomy from undue influence and avoid conflicts of interest, and the appearance of such conflicts. If the institution also performs lending functions, the principle of sustainability requires the organizational separation of statistical and assessment functions. *C.I., C.V., D.II.*

Recommendation 8: Procedure for debt sustainability assessment
The procedure in which assessment criteria and indicators are applied should involve a mandatory government response, be transparent and subject to reason giving, and provide an opportunity for public comment

Elaboration: The application procedure should proceed in three steps:

- The competent international institution first produces a reasoned draft DSA and transmits it to the government for a response. The government is required to respond and to disclose information and data necessary for the assessment.
- Draft DSA and response are then made public to give creditors, other international institutions, CSOs and the general public notice and opportunity for comment.

- After a reasonable time period, the international institution publishes a final DSA taking into account government response and public comment.

The final DSA gives reasons that justify the determination made and indicates possible disagreement with the government. The use of indicators in the DSA should equally be justified in a generally understandable manner. Data sources and statistical methods should be disclosed and margins of error and possible uncertainties be flagged.

<u>Reasons</u>:

- The principle of ownership requires that states participate in the assessment process, as subsequent restructurings are exercises of International Public Authority that restrict collective autonomy. Such participation also improves the information base of the assessment and is thus required by the principle of sustainability. *See C.IV., C.V., D.II., D.IV.*
- Transparency requires disclosure of the relevant drafts, assessments, indicators, data and other evidentiary bases on all sides. Reason-giving is already required by specific rules and applies as a general principle where an assessment and indicator constitutes an exercise of International Public Authority. *See D.III.*
- Participation by other actors may not be legally required, but notice and comment procedures have the potential to contribute to the legitimacy and acceptance of the assessment. They may also introduce new information and data into the process, namely on social impacts, and can thus contribute to the realization of human rights monitoring obligations. *See C.V., D.IV., D.V.*
- A public finding that debt is unsustainable can have reputational and economic consequences for a state that may thus convince a government to restructure in time. This contributes to the principle of sustainability. Such an effect of "governance by information" can potentially be enhanced by systematic dissemination efforts and other measures. It needs to be balanced with collective autonomy and avoid stigmatization of the state by means of an orderly and transparent assessment process with opportunity for rebuttal. *See C.IV., C.V., D.II., D.V.*

Recommendation 9: Data quality and good statistical governance
Indicator use should be accompanied by measures ensuring data quality and good statistical governance

Elaboration: Any debt sustainability framework hinges on availability and reliability of financial, economic and social data. States are thus required to maintain sufficient statistical capacity and to ensure observance of state-of-the-art scientific methods. Where necessary and appropriate, technical assistance needs to build this capacity, in particular for monitoring economic, social and cultural rights.

Reasons:

- Experience shows that lack of reliable data is a problem in many states potentially affected by a DWM and that indicators may obscure such problems and thus exacerbate them further. This may seriously compromise the ability of debt assessments and indicators yield adequate evaluations. *See C.IV., C.V.*
- Hence, the principle of sustainability requires efforts to ensure availability and quality of financial and economic data. Human rights monitoring obligations require statistics and indicators on social, economic and cultural rights. Where capacity is lacking, relevant actors should providing or better coordinating assistance rather than continuously resorting to estimates. Transparency requires that remaining lack of data, estimates and margins of error be clearly indicated and flagged. *See D.II., D.III., D.V.*

Recommendation 10: External review and political re-evaluation
Sustainability assessments and indicators should be subject to periodic external expert review and to political re-evaluation in regular intervals

Elaboration: Assessment process, criteria and indicator should be reviewed periodically by an independent external body. This should take the form of expert evaluation. The resulting evaluation reports should feed into a political process that reconsiders the adequacy of existing arrangements in regular intervals and initiates necessary reforms.

Reasons:

- Debt assessments and indicators remain vulnerable to changing economic circumstances, scientific progress and evolving values and political priorities. Experience shows that they require periodic updating and adaptation to react to these processes. *See C.II., C.V.*
- The principle of sustainability thus requires periodic review by an independent body that has no stakes in the existing system. Evaluation is the functionally adequate form of review. Outcomes should feed into a learning cycle, and regularized political reconsideration should enable orderly reaction to these and other concerns while avoiding undue and irregular political influence. *See D.II.*