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Re-Thinking the Sustainability of Sovereign Debt

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ABSTRACT

This article explores the contributions that law can make to the development of a holistic approach to sovereign debt sustainability. We focus on debt sustainability assessments (DSAs) conducted by the International Monetary Fund (IMF), which are linked to the IMF's surveillance and lending functions and determine whether it is necessary to restructure the debt of a country in debt distress and the timing, process, and terms of such a debt restructuring. While the precise causes of each country's debt situation are unique, all countries are grappling with the rising costs and growing risks posed by climate change and other environmental and social factors. We suggest that the IMF's current treatment of these environmental and social factors is opaque, unpredictable, and hard for the citizens of affected countries and other outsiders to understand. It also obscures the true burden that debt obligations impose on a sovereign and the country's residents, and, thus, the amount of debt relief that it may need in order to achieve a sustainable debt position. To address these shortcomings, we identify financial, economic, environmental, and social (FEES) factors that we contend should be incorporated in the design of the frameworks governing DSAs and the operating principles and practices of the IMF through which DSAs are conducted. We argue that the IMF should draw on various hard and soft sources of international and transnational law to develop a FEES-based approach to sovereign debt sustainability that is more consistent, predictable, and legitimate than the current approach.

I. INTRODUCTION

The International Monetary Fund (IMF or Fund) estimates that more than half of low-income developing countries and about one-fifth of emerging market countries are either in debt distress or facing likely debt distress.[1] Their inability

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to sustainably manage their debt can result in slower economic growth, reduced life expectancy, worsening child mortality, and decreased capacity to make the investments needed to deal with climate mitigation and adaptation and to achieve the Sustainable Development Goals (SDGs).

The IMF considers a country's public debt to be sustainable if the government is able to meet all its 'current and future payment obligations without exceptional financial assistance or going into default.'[2] Assessing the sustainability of a country's debt is a growing challenge. It cannot accurately be determined only from the level of the country's debt and its revenue generating capacity. It is also influenced *inter alia* by the country's vulnerability to climate shocks; the resilience, transparency, and efficacy of its governance arrangements, including the adequacy and efficacy of its laws applicable to public borrowing and debt management; the level of socio-economic inequality; and the treatment of women.

The IMF has recognized that it needs to expand the scope of its operations in order to continue fulfilling its international monetary and financial stability mandate. This has been eloquently and forcefully argued in a recent article by the Fund's Managing Director, Kristalina Georgieva and General Counsel, Rhoda Weeks-Brown.[3] They argue that in order to continue complying with its mandate the IMF needs to evolve. It must incorporate the 'macro-critical' aspects of such 'emerging' issues as 'climate change, gender, inequality, governance, anti-corruption, and social protection' into the Fund's operations. In their view, the IMF can incorporate these environmental and social issues into its existing legal mandate and practices and operations.[4]

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[1] Vitor Gaspar, Marcos Poplawski-Ribeiro and Jiae Yoo, 'Global Debt Is Returning to its Rising Trend', IMF Blog (13 September 2023), https://www.imf.org/en/Blogs/Articles/2023/09/13/global-debt-is-returning-to-its-rising-trend.

[2] See Dalia Hakura, 'What Is Debt Sustainability?', 57 Finance and Development 60 (2020), https://www.imf.org/external/pubs/ft/fandd/2020/09/pdf/what-is-debt-sustainability-basics.pdf. The IMF defines debt sustainability as: '… when the primary balance needed to at least stabilize debt under both the baseline and realistic shock scenarios is economically and politically feasible, such that the level of debt is consistent with an acceptably low rollover risk and with preserving potential growth at a satisfactory level.' International Monetary Fund, 'Review of The Debt Sustainability Framework For Market Access Countries' (3 February 2021), at 12, https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/02/03/Review-of-The-Debt-Sustainability-Framework-For-Market-Access-Countries-50060. See also Martin Guzman, 'The Elements of Sovereign Debt Sustainability Analysis', CIGI Papers No. 196 (November 2018), at 1, https://www.cigionline.org/sites/default/files/documents/Paper%20No.196web.pdf.

[3] Kristalina Georgieva and Rhoda Weeks-Brown, 'The IMF's Evolving Mandate within a Constant Mandate', 26 Journal of International Economic Law 17 (2023).

[4] Ibid ('[T]he Fund's increased focus on these emerging issues is not an expansion of its mandate, but rather *reflects continuing evolution in the economic understanding of what is critical for the achievement of that mandate*.') (emphasis in original)). Ibid, at 18.

This article tests their contention by focusing on the IMF's debt sustainability assessments (DSAs). The IMF uses DSAs to assess the sustainability of a member's debt and determine whether it is eligible to access IMF financing. The IMF also uses it, in cases of debt default, to assess how much relief the country may need from other creditors.[5] We argue that DSAs should move beyond the financial and macroeconomic indicators that have traditionally been the focus of the DSA. We posit that that DSAs should expand to incorporate environmental and social factors, in addition to these economic and financial factors. We label this new approach, encompassing financial, economic, environmental, and social factors, a FEES-based approach to debt sustainability. We contend that this broader approach will help make DSAs more consistent, predictable, and comprehensive.

A FEES-based approach to debt sustainability responds to critiques of DSAs as being overly narrow, inconsistent, and unreflective of the full range of environmental and social risks facing low-income and emerging market developing countries.[6] A FEES-based approach does not require the Fund to exceed or alter its mandate. Rather, we argue that this approach will ensure that the IMF fulfills its mandate in a way that is consistent with its obligations and responsibilities as a creature of international law. First, international legal instruments—such as environmental and human rights treaties, international soft law norms and standards applicable to international finance and global governance, national and supranational financial regulation, and a growing corpus of sustainability taxonomies and norms—articulate a legal basis on which a FEES-based definition of debt sustainability can be established. This would also enable the IMF to develop FEES assessments that could function in a similar way to the IMF's Reports on the Observance of Standards and Codes (ROSCs) that inform the Financial Sector Assessment Program (FSAP) and which are used in the Financial Sector Stability Assessments (FSSAs) for IMF surveillance.[7] Second, these international legal instruments, norms, and standards will help promote good governance in the IMF by enhancing the transparency of its process and decisionmaking in regard to DSAs, its accountability for its own decisions and actions in regard to the DSA, and the participation of other parties. These measures can help improve the legitimacy of the IMF's role in sovereign debt restucturings and its efficacy in helping its member countries in debt distress.[8]

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[5] International Monetary Fund, Debt Sustainability Analysis, Introduction, https://www.imf.org/external/pubs/ft/dsa/ (visited 7 April 2024).

[6] Ulrich Volz, et al., 'Debt Relief for a Green and Inclusive Recovery: Securing Private-Sector Participation and Creating Policy Space for Sustainable Development', Heinrich-Böll-Stiftung, SOAS, University of London and Boston University (2021), at 20, https://www.bu.edu/gdp/files/2021/06/DRGR-Report-2021-FIN.pdf.

[7] See International Monetary Fund, '2021 Comprehensive Surveillance Review — Overview Paper' (17 May 2021), at 15–16, https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/05/18/2021-Comprehensive-Surveillance-Review-Overview-Paper-460270 (noting the significant macroeconomic and financial implications of climate change in the context of the IMF's surveillance activities).

[8] In addition to improving DSAs, a FEES-based approach to debt sustainability may facilitate recognition, development, and adoption of state-contingent debt instruments, thematic bonds, and

To support these arguments, this article is organized as follows. Section II examines the legal basis for the IMF's role in sovereign debt management and restructuring, including through its use of DSAs. We present justifications for integrating FEES factors into DSAs and outline the role of law in this integration. Section III describes the sources of international, transnational, and domestic law that can provide guidance on incorporating FEES factors into DSAs. In Section IV, we explore the institutional pathways through which DSAs can be more effectively and legitimately used in sovereign debt restructurings and propose several reforms to that effect.

II. DSAs AND THEIR LIMITATIONS IN ADDRESSING SOVEREIGN DEBT SUSTAINABILTY

The IMF was created to promote international monetary cooperation and stability by helping members deal with balance of payments problems in ways that are not destructive of national or international prosperity.[9] The IMF Articles of Agreement, which were adopted on 22 July 1944 and came into force on 27 December 1945, provide the legal basis for its role in global economic governance. The IMF exercises surveillance over its members' monetary and fiscal policies, gives them policy advice, and provides conditional financial assistance to members that experience balance of payments problems. The Articles of Agreement do not give the Fund any formal legal authority over transactions between sovereigns and their creditors. Nonetheless, the Fund plays a powerful role as a catalyst, advisor, and monitor in regard to sovereign debt.[10] The combination of the IMF's surveillance of members' economic and financial policies and its lending framework gives the Fund a unique role in sovereign debt restructurings.[11] DSAs are integral to this role.

A. The IMF's mandate with respect to emerging issues

restructuring techniques that address environmental and social objectives. See Stephen Kim Park and Tim R Samples, 'Towards Sovereign Equity', 21 Stanford Journal of Law, Business, and Finance 240 (2016) (exploring the use of state-contingent debt instruments); Federico Lupo-Pasini, 'Sustainable Finance and Sovereign Debt: The Illusion to Govern by Contract', 25 Journal of International Economic Law 680 (2022) (examining and critiquing the use of sustainable finance bonds and loans in sovereign debt); Patrick Bolton, Lee C Buchheit, Beatrice Weder di Mauro, Ugo Panizza, and Mitu Gulati, 'Environmental Protection and Sovereign Debt Restructuring', 17 Capital Markets Law Journal 307 (2022) (proposing a variation of debt-for-nature swaps).

[9] See Articles of Agreement, art 1. For a broader discussion of the IMF mandate, see Rosa Lastra, *International Financial and Monetary Law* (OUP 2015), chs 12 and 13.

[10] See Mitu Gulati and George Triantis, 'Contracts without Law: Sovereign versus Corporate Debt', 75 University of Cincinnati Law Review 977 (2007).

[11] Vassilis Paliouras, 'The Right to Restructure Sovereign Debt', 20 Journal of International Economic Law 115 (2017), at 121–23; see also Lastra, above n 9, at 525 (referring to the role of the IMF as an 'arbiter' in sovereign debt negotiations).

The word mandate is defined by Georgieva and Weeks-Brown as 'the Fund's purpose and broad powers',[12] anchored in the laws governing the IMF.[13] The precise meaning and scope of the IMF's mandate, as stipulated in Article I of its Articles of Agreement, is not fixed and has evolved over time.[14] In 2010, the Fund published two papers on the mandate and its legal framework.[15] The opening paragraph, referring to the IMF's mandate, stated:

> The term encompasses at least two ideas. One has to do with expectations regarding the role of an institution. The other, more formal, refers to the legal framework, the purposes and powers, which in the Fund's case are anchored in the Articles of Agreement. The greater the clarity in—and consonance between—the two notions, the more effective an institution can be. Unfortunately, clarity and consonance are often lacking in the Fund's mandate to promote economic stability and collaboration, reflecting the seemingly narrow cast of the Articles, with purposes that speak to the issues of a bygone era (e.g., trade and payments restrictions) and powers that do not even reference today's most compelling issues (e.g., the systemic risk in a globalized financial sector).[16]

The emerging issues are challenging the IMF to revisit its view of its mandate. The IMF's Independent Evaluation Office (IEO) is currently preparing an evaluation of the Fund's mandate that is expected to be discussed by the IMF Executive Board in June 2024.[17]

According to Georgieva and Weeks-Brown, the IMF is adjusting its surveillance, financial, and advisory functions to address emerging macro-critical challenges that its member countries are confronting. These include governance and anti-corruption, climate change, inequality, gender and the digitalization of finance.[18] The IMF has worked on anti-corruption and governance[19] and

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[12] Georgieva and Weeks-Brown, above n 3, at 17.

[13] See Lastra, above n 9, ch 13. The laws of the IMF must be analysed in the context of its Articles of Agreement, its By-Laws, Rules, and Regulations and the decisions, interpretations, and resolutions of the Executive Board and the Board of Governors of the IMF.

[14] See Daniel D. Bradlow, *The Law of the International Financial Institutions* (OUP 2023), at 121–50.

[15] See International Monetary Fund, The Fund's Mandate: An Overview, https://www.imf.org/external/np/pp/eng/2010/012210a.pdf (22 January 2010); International Monetary Fund, The Fund's Mandate: The Legal Framework, https://www.imf.org/external/np/pp/eng/2010/022210.pdf (22 February 2010).

[16] The Fund's Mandate: An Overview, above n 15, at 2.

[17] The IEO refers to the IMF's narrow legal mandate in conjuction with the broader activities of the Fund, which have expanded significantly in the last 45 years. See International Monetary Fund, Independent Evaluation Office (IEO), 'Draft Issues Paper: The Evolving Application of the Fund's Mandate' (8 June 2023), at para 1, https://ieo.imf.org/-/media/IEO/Files/evaluations/ongoing/fma-draft-issues-paper-v2.ashx.

[18] See Georgieva and Weeks-Brown, above n 3, at 21–28.

digitalization of financial services for some time, while its work on gender,[20] inequality and climate change began more recently.

Arguably, climate change is the most prominent of these emerging issues and so this article uses it as its primary example. While the IMF considers climate change to be macro-critical,[21] and is embedding it in its functions and country work, this process is still relatively nascent.[22] The IMF continues to maintain that a 'more systematic and in-depth engagement' is required.[23] This includes the IMF providing additional financing to qualifying low-income member countries. For example, in May 2022, the IMF established the Resilience and Sustainability Trust (RST). This trust provides more affordable, longer-term financing to low income and vulnerable middle-income countries that already receive funding from other IMF financing facilities in order to enable them to achieve their climate goals.[24] The IMF acknowledges that the RST does not offer sufficient financing to meet member countries' needs.[25]

B. DSAs in the context of the IMF's mandate

Pursuant to Article IV of the IMF's Articles of Agreement, IMF members are required to endeavor to direct their economic policies towards promoting stability in their own economic and financial situations and in international financial and

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[19] Georgieva and Weeks-Brown point out that in 2017, the IMF launched a review of the 1997 governance policy, and the following year, the Executive Board adopted the 2018 Framework for Enhanced Fund Engagement to provide further guidance regarding the 1997 policy. See ibid, at 21; see also International Monetary Fund, 'Review of 1997 Guidance Note on Governance—A Proposed Framework for Enhanced Fund Engagement, International Monetary Fund' (22 April 2018), https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/04/ 20/pp030918-review-of-1997-guidance-note-on-governance.

[20] Georgieva and Weeks-Brown, above n 3, at 28. The IMF Executive Board endorsed on 22 July 2022 a comprehensive strategy to mainstream gender in the Fund. See International Monetary Fund, 'IMF Strategy Toward Mainstreaming Gender', Policy Paper No. 2022/037, https://www.imf.org/en/Publications/Policy-Papers/Issues/2022/07/28/IMF-Strategy-Toward-Mainstreaming-Gender-521344.

[21] See International Monetary Fund, Remarks by the IMF Managing Director Kristalina Georgieva at the Paris Summit Closing Press Conference (23 June 2023), https://www.imf.org/en/News/Articles/2023/06/23/sp062323-mdremarks-paris-summit-closing-presser ('The IMF has over the last years, integrated climate considerations into everything we do, because climate is macro-critical.').

[22] Georgieva and Weeks-Brown, above n 3, at 24 ('[U]ntil recently, the Fund's work on climate has been conducted mostly on an ad hoc or pilot basis.').

[23] Ibid, at 24.

[24] See International Monetary Fund, Resilience and Sustainability Trust, https://www.imf.org/en/Topics/Resilience-and-Sustainability-Trust (visited 7 April 2024).

[25] International Monetary Fund, '2023 Review of Resource Adequacy of the Poverty Reduction and Growth Trust, Resilience and Sustainability Trust, and Debt Relief Trusts' (7 April 2023), https://www.imf.org/en/News/Articles/2023/04/07/pr23112-2023-review-of-resource-adequacy-of-the-poverty-reduction-growth-trust (noting a shortfall of SDR 6.5 billion, equivalent to approximately USD 8.8 billion).

monetary arrangements.[26] DSAs are a critical component of the IMF's Article IV consultations with individual member countries and are a critical input into decisions concerning balance of payments assistance under Article V of the Articles of Agreement.

Despite their significance in IMF operations, neither the content of nor the process for conducting DSAs are explicitly governed by either the Articles of Agreement or any secondary or internal legal authority established by the Fund.[27] Rather, DSAs are carried out by IMF staff with general oversight by the IMF's Executive Board.[28] Internal staff papers and guidance notes drafted by IMF staff and approved by IMF management serve as the basis for the DSAs. The DSA framework for low-income countries, known as the Debt Sustainability Framework for Low Income Countries (LIC DSF),[29] is implemented jointly with the World Bank.[30] The framework used for market access countries is known as the Sovereign Risk and Debt Sustainability Analysis for Market Access Countries (MAC SRDSF).[31] The LIC DSF and MAC SRDSF (hereinafter jointly the DSFs) set forth the concepts, data sources, and time horizons in which the IMF determines the sustainability of a member country's debt and the process by which the Fund conducts DSAs.[32] These frameworks reflect an institutional response by the IMF to criticism of its role in debt crises in the 1990s.[33] While they establish a rules-bound process for conducting DSAs, the parameters in which sustainability is defined and applied require the IMF staff to make substantial policy judgements.[34] To the IMF's critics, DSAs reflect an inherently

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[26] Articles of Agreement, art IV, sec 1. See Adam Feibelman, 'Law in the Global Order: The IMF and Financial Regulation', 49 N.Y.U. Journal of International Law & Policy 687 (2017), at 706–08.

[27] Michael Riegner, 'Legal Frameworks and General Principles for Indicators in Sovereign Debt Restructuring', 41 Yale Journal of International Law Online 141 (2016), at 145.

[28] Ibid.

[29] International Monetary Fund, 'Guidance Note on the Bank-Fund Debt Sustainability Framework for Low Income Countries' (17 December 2017), https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/02/14/pp122617guidance-note-on-lic-dsf.

[30] See International Monetary Fund, IMF-World Bank Debt Sustainability Framework for Low-Income Countries, https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/39/Debt-Sustainability-Framework-for-Low-Income-Countries (visited 7 April 2024). The IMF and the World Bank are expected to shortly initiate a comprehensive review of the LIC DSF. See World Bank Group, Independent Evaluation Group, 'The World Bank's Role in and Use of the Low-Income Country Debt Sustainability Framework' (14 April 2022), at 2, https://ieg.worldbankgroup.org/sites/default/files/Data/reports/ap_licdsf.pdf.

[31] International Monetary Fund, 'Staff Guidance Note on the Sovereign Risk and Debt Sustainability Framework for Market Access Countries' (8 August 2022), https://www.imf.org/en/Publications/Policy-Papers/Issues/2022/08/08/Staff-Guidance-Note-on-the-Sovereign-Risk-and-Debt-Sustainability-Framework-for-Market-521884 [herinafter MAC SRDSF Guidance Note].

[32] See MAC SRDSF Guidance Note, above n 31, at 10–13.

[33] See Christina Laskaridis, 'More of an Art than a Science: The IMF's Debt Sustainability Analysis and the Making of a Public Tool', 10 Œconomia 789 (2020), https://doi.org/10.4000/oeconomia.9857.

[34] See MAC SRDSF Guidance Note, above n 31, at 12 ('While there are no hard ex-ante constraints, judgment underlying SRDSAs prepared by IMF staff is scrutinized in the

creditor-oriented approach to debt sustainability, prioritizing the repayment of creditors over the needs of residents of sovereign borrowers.[35]

DSAs influence sovereign debt restructuring negotiations by determining the quantum of and conditions for IMF lending, and its expectations on the quantum of financial support that the debtor should receive from official and private creditors.[36] Under the Articles of Agreement, the IMF is precluded from lending to countries with unsustainable debt, unless the country takes steps to restore debt sustainability.[37] DSAs help the IMF assess how a country's current level of debt and prospective borrowing capacity affects its present and future ability to meet debt service obligations. DSAs function as a tool to identify, prevent, and resolve potential debt crises. The framework consists of two complementary economic components: analysis of the sustainability of total public debt and of the total external debt. The DSFs, therefore, view sustainability primarily in terms of financial sustainability (i.e., can the debtor continue meeting its financial obligations?) and macro-economic sustainability (i.e., can the debtor raise the funds to meet its budget and current account deficits?).[38]

However, the risks posed by climate change and other FEES factors on sovereign debt sustainability mean that the IMF is faced with the task of incorporating these factors into DSAs in a manner that is consistent with the IMF's mandate. To do so, the IMF must not only develop metrics or models that take those factors into account but also establish a principled basis for making the judgments that are inherent in any DSA. While DSAs have always involved some element of judgement,[39] the emerging issues are inherently less precise and more discretionary.

C. The roles of law in reforming the DSA

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interdepartmental review process, with IMF Management arbitrating disagreements across departments.').

[35] See Christina Laskaridis, 'When Push Came to Shove: COVID-19 and Debt Crises in Low-Income Countries', 42 Canadian Journal of Development Studies 200 (2021), at 212; see also Christina Laskaridis, 'Refusing to Improve: Sovereign Debt Repayment Difficulties and the Political Economy of Inertia in UNCTAD 1964–1979' in Ndongo Samba Sylla (ed), *Imperialism and the Political Economy of Global South's Debt* (Emerald 2023), at 130 (observing that '[c]reditors outsourced the relevant economic analysis to be used in restructuring to the IMF, strengthening its role in crisis management…[and] increasingly emphasized debt repayment problems as largely balance of payments problems arising from domestic mismanagement').

[36] Karina Patrício Ferreira Lima, 'Sovereign Solvency as Monetary Power', 25 Journal of International Economic Law 424 (2022), at 430.

[37] Articles of Agreement, art V, sec 3 (governing the terms on which the IMF may assist member countries with balance of payments problems). See also European Central Bank, 'The IMF's role in sovereign debt restructurings', Occasional Paper Series, No. 262 (September 2021), at 13, https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op262~f0e9e1e77e.en.pdf.

[38] See International Monetary Fund, above n 2. See also International Monetary Fund, 'Debt Sustainability Assessment' (29 July 2017), https://www.imf.org/external/pubs/ft/dsa/.

[39] The IMF acknowledges the exercise of judgment inherent to determining the economic and political feasibility of a sovereign implementing domestic adjustment policies to avoid defaulting on its debt. See MAC SRDSF Guidance Note, above n 31, at 97.

For the IMF, the challenge is distinguishing between those aspects of, for example, climate change that are macro-critical and those that are not. It is clear that there is not a bright line between these two categories. However, in the absence of some clearly articulated and applicable norms and standards, the IMF can only rely on its own judgment in making the distinction. The DSFs do not require the Fund to provide complete explanations about what factors it considered in making its judgment in particular cases, what weight it gave to each factor, or what other considerations it took into account in reaching a particular decision.[40] Nor are there cognizable procedures that clarify whether actors other than the government representatives of an IMF member country (such as its residents) can participate in the IMF's determination of that country's debt sustainability.[41]

As a result, both IMF member countries and other stakeholders are hampered in their ability to understand why the IMF made a particular decision or to evaluate what this decision may suggest about how the IMF will respond in the future to similar situations. In addition, it would not be unreasonable for the IMF, in the absence of clearly accepted international standards, to state that its decision is completely case specific and based only on the facts and circumstances of a particular case. However, there are three reasons why this is an inadequate response, which we discuss below.

1. Clarifying the criteria for debt sustainability

In the absence of clear standards, it is not possible to understand, for example, if the IMF would consider a debt distressed country's strategy to use its fossil fuel resources to expand its supply of electricity over the next twenty years (before switching to renewables to meet its Paris Agreement commitment to be carbon neutral by 2060) to be macro-critical.[42] It is possible that the IMF would view the environmental and social costs of fossil fuel use and the risk of creating stranded assets to be macro-critical because their impacts will start becoming evident within the next ten years. But it is also possible that it would view this policy as having a positive macro-economic impact because over the next ten years the increased availability of electricity will support a higher economic growth rate and increase the fiscal space the country has to support its efforts to reach its decarbonization commitments. This uncertainty makes it harder to predict how the IMF, in conducting a DSA, will assess and analyse the trajectory of any particular economy over the period in which it is assessing the country's debt sustainability risks. This, in turn, will affect its assessment of the size of the

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[40] See ibid, at 104–06. The publication of stand-alone DSAs is decided by the Fund's Executive Board on a case-by-case basis. Ibid, at 105.

[41] Riegner, above n 27, at 146.

[42] The IMF assesses the DSA over three time horizons with the longest term being 10 years. See International Monetary Fund, 'Review of The Debt Sustainability Framework For Market Access Countries', Policy Paper No. 2021/003 (25 November 2020), https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/02/03/Review-of-The-Debt-Sustainability-Framework-For-Market-Access-Countries-50060.

country's financing gap and the level of debt relief that will be needed from the country's creditors in order for its debt to be deemed sustainable and the country eligible for IMF financing.

Economists and policymakers at the IMF and elsewhere are increasingly recognizing that this approach needs to be updated and expanded to include a broader range of factors.[43] Notably, the IMF has sought to integrate climate-related risks into the MAC SRDSF long-term assessment.[44] However, there is not yet general agreement on the broader definition of sustainability or how to assess environmental and social sustainability in the context of a country's fiscal profile. The result is that the current DSA approach to FEES factors lacks clarity, certainty, predictability, and precision.

Law can be helpful in this regard. There are a broad range of international hard and soft law instruments that can help the IMF identify the various factors that it should incorporate into a FEES-based approach to debt sustainability.[45] For example, in deciding whether or not to treat the country's carbon intense energy strategy as macro-critical, the IMF could review the member country's international climate-related commitments. This could involve assessing, in conjunction with the member country and other relevant stakeholders,[46] the economic implications of the country's nationally determined contribution (NDC) under the Paris Agreement and consider how they may affect its macro-economic situation over the DSA's time horizons. The IMF could also commit that it will, if appropriate in a particular country, respect and comply with its obligations under any other global or regional international environmental legal instruments to which it is bound, including, for example the requirements for *ex ante* impact assessments stipulated in certain environmental treaties,[47] the environmental and social risk management frameworks of the World Bank and other multilateral development banks (MDBs), and industry-specific standards such as the UN Principles on Responsible Banking[48] and the Equator Principles.[49] These

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[43] Ibid, at 37 ('[G]lobal warming and rising sea-levels will have gradual and, cumulatively, much more profound effects over the long-term, A few countries might face existential threats and the need to rethink their economic models; others may need to undertake substantial spending for adaptation (e.g., changing crop varieties and building higher dikes to guard against sea levels) and mitigation.').

[44] MAC SRDSF Guidance Note, above 31, at 84–95 (describing the climate change module that models the debt sustainability impacts of investments in climate mitigation and adaptation). The MAC SRDSF also includes an optional long-term module that addresses the effects of natural resource extraction. See ibid, at 80–82.

[45] We identify and describe some of the most relevant instruments in Section III below.

[46] These stakeholders could include communities, civil society organizations, corporations, business associations, and trade unions in the member country as well as other member countries that are affected by spillovers from the affected member country's policies and actions.

[47] See, for example, UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 38 I.L.M. 517, https://unece.org/environment-policy/public-participation/aarhus-convention/text; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 4 March 2018, https://repositorio.cepal.org/handle/11362/43583.

[48] United Nations Environment Programme, Principles for Responsible Banking, https://www.unepfi.org/banking/bankingprinciples/ (visited 7 April 2024). See Principles for

standards can help guide the IMF and its staff in making these determinations on a principled basis without dictating their outcomes.[50] They also can serve the purpose of clarifying to member countries and other stakeholders how the IMF will make its decisions and what their reasonable expectations of the IMF should be.

2. Understanding the targeted and spillover effects of sustainability risks

A second problem is that the macro-critical aspects of these emerging issues are different from more traditional macro-economic issues like inflation or exchange rates. The latter set of issues is generalized in their impacts. Thus, they affect all actors in the society, regardless of wealth, status, or location. To be sure, the impact on different social groups within the society varies dramatically, but all are affected. However, this is not necessarily the case with environmental and social factors. For example, a fiscal policy reform intended to wean a particular set of communities from their dependency on coal mining and to promote non-carbon based economies in these communities can be macro-critical because of its impact on export earnings, tax receipts, and budgetary allocations, but it will necessarily be designed to primarily affect specific economic actors. While there will be spillover impacts on society as a whole, they will be collateral to the primary intended impacts on the coal producing communities. To fully understand these targeted and spillover impacts and their macro-economic implications, the IMF will have to assume new due diligence responsibilities in order to assess how economic actors and social groups affected by their actions will respond to these policy measures. This has implications for DSAs. For example, it may suggest that the sovereign debtor may need more debt relief in order to help finance the transition from coal mining in a socially just and environmentally sustainable way. It may also indicate that the creditors that funded coal related activities may need to provide larger haircuts and more new financing than those creditors that fund more socially and environmentally responsible activities.

Law can help the IMF establish a principled basis for these engagements. For example, it can help the IMF identify with whom it should consult, how it should organize these consultations, and the scope of the impact assessments it undertakes.[51] The specific international and regional human rights and international environmental treaties that the member country has signed can provide some guidance in this regard. In addition, international soft law and

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Responsible Banking Guidance Document (April 2022), https://www.unepfi.org/publications/principles-for-responsible-banking-guidance-document/.

[49] Equator Principles, About the Equator Principles, https://equator-principles.com/about-the-equator-principles/#TheEquatorPrinciples (visited 7 April 2024).

[50] See Sabine Michalowski, 'Sovereign Debt and Social Rights–Legal Reflections on a Difficult Relationship', 8 Human Rights Law Review 35 (2008), at 68 (noting the value of international human rights law as a means of clarifying the trade-offs between sovereign debt obligations and social welfare protection).

[51] See Daniel D. Bradlow and Stephen Kim Park, 'A Global Leviathan Emerges: The Federal Reserve, COVID-19, and International Law', 114 American Journal of International Law 657, 664 (2020).

global governance standards that the country has supported in international forums and that many of its creditors will have adopted and applied in their own environmental, sustainability and human rights policies might also be useful reference points in this regard.

3. Providing guidance on the temporality of debt sustainability

A third problem is the question of how the IMF will deal with the temporal aspect of these emerging issues in determining macro-criticality. For example, the IMF estimates that 'emerging and developing economies could boost gross domestic product by about 8 percent over the next few years by raising the rate of female labor force participation by 5.9 percentage points.'[52] This could suggest that the IMF should treat evidence suggesting that a particular debt distressed country could significantly increase the trend growth rate of the economy by changing its inheritance, property and contract laws that discriminate against women as macro-critical. On the other hand, if the changes will only have an impact over a six to ten year period, the IMF may decide that the changes will happen too slowly to be viewed as macro-critical within the context of the current DSA and debt discussions.

The reasonableness of the IMF's decision will depend on the IMF's judgement about a mix of macro-economic and other issues, such as the urgency of ending gender discrimination in this member country, its estimate of the time over which the changes will affect the trend growth rate, the speed and sustainability of societal responses to the changes in the law, and the strength of opposition to these changes. The IMF, in its foundational paper on debt sustainability, has acknowledged the difficulty of determining the appropriate time horizon for its projections.[53]

In this case, the relevant hard and soft international law instruments can be helpful in identifying the factors that should be considered in determining what aspects of these issues are macro-critical. The norms and principles that they establish can help guide the IMF in exercising discretion and provide a basis for educating member country governments and other stakeholders on what their expectations of the IMF should be.

It should be noted, however, that the law may be less helpful in determining the actual time period over which the legal reforms will produce their macro-economic and financial impacts. Identifying the appropriate time period in which to consider issues macro-crticial is an empirical issue and law is only one input into resolving it.[54] Other relevant factors include the efficacy of the

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[52] Antoinette M. Sayeh, Alejandro Badel, and Rishi Goyal, 'Countries That Close Gender Gaps See Substantial Growth Returns' (27 September 2023), https://www.imf.org/en/Blogs/Articles/2023/09/27/countries-that-close-gender-gaps-see-substantial-growth-returns.

[53] See International Monetary Fund, 'Assessing Sustainability' (28 May 2002), https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Assessing-Sustainability-PP148, at 33.

[54] See Task Force on Climate, Development and the IMF, 'The International Monetary Fund, Climate Change and Development: A Preliminary Assessment' Rishikesh Ram Bhandary and

governance institutions in the country, political support for the reforms, the strength of the opposition to the reforms and the education levels and technical capacities of the women that are expected to benefit from the reforms.

In this respect, the current approach of the IMF with respect to climate change is relevant. The MAC SRDSF, while acknowledging the relevance of climate as a macro-critical issue, confines debt-related risks associated with climate adaptation and mitigation to its long-term assessment based on the presumption that climate risks will only materialize after the next five years.[55]

III. SUSTAINABILITY IN THE INTERNATIONAL LEGAL ARCHITECTURE

The above examples demonstrate that sustainability is a broad and evolving concept that implicates a range of FEES factors that are relevant to DSAs and the IMF's role in sovereign debt restructurings. They also show that there are hard and soft international legal instruments and international norms and standards that can help the IMF develop a principled, predictable, and consistent approach to managing these factors. Finally, they underscore that the IMF needs more detailed operational policies to inform staff, member countries, and other stakeholders about how the IMF addresses FEES factors in DSAs and how it uses its discretion in particular cases.

The following discussion focuses on these emergent legal norms and standards and how they can help manage FEES factors in the context of DSAs.

A. The definition of sustainability

The starting point for considering how legal standards can be applied to DSAs is defining the term sustainable. The Brundtland Report defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[56] Thus, the term sustainability encompasses economic factors as well as environmental factors (e.g., climate change, pollution, renewable energy, biodiversity), social factors (e.g., financial inclusion, socio-economic inequality, labor rights, economic, social, and cultural rights), and governance factors (e.g., transparency and accountability, rights of association, diversity and non-discrimination, management practices and decisionmaking procedures). The United Nations sought to operationalize the concept with the adoption of the Sustainable Development Goals (SDGs) in 2015.[57] The United Nations Trade and Development Programme (UNCTAD) has developed a methodology, the

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Marilou Uy (eds) (2023), at 45, https://www.bu.edu/gdp/files/2023/03/TF-Assessment-Report-FINAL.pdf (noting the various time horizons for climate risks).

[55] See MAC SRDSF Guidance Note, above n 31, at 74.

[56] Report of the World Commission on Environment and Development: Our Common Future (1987), at 39–41, https://www.un-documents.net/ our-common-future.pdf.

[57] See G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (2015). The 17 goals of the SDGs, with their 169 targets, collectively work toward achieving sustainable development.

UNCTAD Sustainable Development Finance Assessment (SDFA), for determining the impact of achieving SDGs 1-4 on debt sustainability.[58] Following the onset of the COVID-19 pandemic, UNCTAD developed a tool for assessing the sustainability of the external and public debt of countries.[59] However, the SDFA, given its focus on four SDGs, does not include all the social and environmental factors included in our proposed FEES-based approach.

The IMF can also accommodate all the macro-critical aspects of sustainability within the scope of its mandate. The flexble language used in Article I of the IMF Articles of Agreement has allowed the Fund to adjust and readjust its role over the years in response to different economic circumstances. For example, Article I(ii) states that one of the IMF's purposes is '[t]o facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy'. The interpretation of 'balanced growth' and 'development of the productive resources' can easily incorporate sustainability considerations.

A key factor in achieving sustainable development is the quality and quantity of available financing.[60] This has spurred government regulators, financial and commercial intermediaries, industry associations, and civil society organizations to develop and implement a diverse range of taxonomies, metrics, data providers, credit ratings, and accounting and disclosure standards relating to sustainability. However, there is no general agreement among them on how to incorporate these issues into their activities. For example, some stakeholders maintain that green finance only means climate finance, while others argue that it should also include the social and economic aspects of climate change.[61] As a result, there is not yet a universally accepted definition of what qualifies as green in the context of finance or sustainable activities.[62]

This lack of agreement undermines the effectiveness of governance institutions and applicable regulations. This poses a particular challenge for an institution like the IMF, which has a specialized monetary, fiscal, and financial stability mandate but must increasingly address issues like climate change,

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[58] See United Nations Conference on Trade and Development, UNCTAD Sustainable Development Finance Assessment (SDFA), https://mobilizingdevfinance.org/tool/unctad-sustainable-development-finance-assessment-sdfa (visited 7 April 2024).
[59] See Keith Lockwood, 'User Manual: UNCTAD Sustainable Development Finance Assessment Framework Policy Dashboard' (September 2022), https://mobilizingdevfinance.org/research-material/user-manual-unctad-sustainable-development-finance-assessment-framework-policy, at 3.
[60] Intergovernmental Panel on Climate Change, 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (2022), at 32.
[61] See The Economist, 'A broken system needs urgent repairs' (21 July 2022), https://www.economist.com/special-report/2022/07/21/a-broken-system-needs-urgent-repairs.
[62] Grantham Research Institute on Climate Change and the Environment, 'What is climate finance?' (22 February 2023), https://www.lse.ac.uk/granthaminstitute/explainers/what-is-climate-finance-and-where-will-it-come-from/.

gender, inequality, social protection, corruption and governance—or at least those aspects of these issues that are macro-critical.

Notwithstanding the lack of a widely accepted and holistic definition of sustainability, existing domestic, transnational, and international law instruments can provide guidance on how to incorporate FEES factors into DSAs. These instruments include international environmental and human rights treaties, global governance standards, domestic regulation, and international soft law.

B. Legal authority and international standards

There is relatively little international law that deals directly and explicitly with sovereign debt sustainability. Nevertheless, there are a range of hard and soft international legal instruments that are relevant to assessing it.

1. International human rights and environmental treaties

There are treaties applicable to the environmental and social aspects of debt sustainability. For example, the United Nations Framework Convention on Climate Change (UNFCCC), which is the parent treaty of the Paris Agreement and the 1997 Kyoto Protocol, calls for financial assistance from parties with more financial resources for those that are less endowed and more vulnerable.[63] International human rights conventions also address issues relevant to a broadened definition of debt sustainability. For example, the Convention on the Elimination of Discrimination Against Women (CEDAW)[64] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[65] clarify the obligations of states in regard to the macro-critical aspects of gender and inequality. In addition, there are regional treaties that include provisions dealing with social and environmental issues relevant to debt sustainability, such as the African Charter of Human and People's Rights[66] and the European Convention on Human Rights.[67]

In the examples described in Sections II.C.2 and II.C.3 above, the IMF could refer to these treaties to determine if a DSA will help the member both achieve debt sustainability in a timely manner and comply with its treaty commitments. The IMF could also use them to determine if a member country's

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[63] U.N. Framework Convention on Climate Change, Adoption of the Paris Agreement, 12 December 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev.1, art 9. Climate finance is defined as local, national or transnational financing that seeks to support mitigation and adaptation actions that will address climate change. UNFCCC, Introduction to Climate Finance, https://unfccc.int/topics/introduction-to-climate-finance (visited 7 April 2024).

[64] Convention on the Elimination of Discimination Against Women, 18 December 1979, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46, U.N. Doc. A/34/46.

[65] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3.

[66] African Charter on Human and Peoples' Rights, 27 June 1981, 21 I.L.M. 58, https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights.

[67] European Convention on Human Rights, 4 November 1950, 213 U.N.T.S. 221, as amended by Protocol No. 15, ETS No. 005, https://rm.coe.int/1680a2353d.

official and private creditors are providing debt relief that is consistent with their environmental and social obligations and responsibilities applicable to that member's DSA. Furthermore, the IMF could use these treaties as an input in developing operational standards applicable to the DSA.

2. International soft law and global governance standards

International soft law, which is the primary form of international regulation in the global financial system,[68] refers to international instruments that establish standards of conduct but are non-binding.[69] However, the fact that soft law instruments are non-binding does not mean that they do not exert any compliance pull over their intended targets. Their compliance pull can arise from the reputational costs of non-compliance or from the way in which markets react to instances of non-compliance.[70] In addition, national regulators may incorporate them into domestic hard law measures.[71]

Under certain circumstances, soft law standards can more effectively address global policy objectives than international treaties.[72] Examples of international soft law standards that are sufficiently well observed, offering the benefits of predictability are international banking regulatory standards, the environmental and social frameworks of the MDBs, and the IMF's own guidance notes on surveillance.[73]

The soft law instruments and global governance standards applicable to sustainability tend to focus on due diligence and impact assessments in the

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[68] Robert B. Thompson, 'Financial Regulation's Architecture within International Economic Law', 17 Journal of International Economic Law 807 (2014); see Lastra, above n 9, ch 14; Chris Brummer, *Soft Law and the Global Financial System* (CUP 2012), at 116–19; David Zaring, *The Globalized Governance of Finance* (CUP 2020), at 21–32.

[69] See Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', 54 International Organization 421 (2000), at 421–22.

[70] Kenneth W. Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit', 42 Vanderbilt Journal of Transnational Law 501 (2009), at 543.

[71] See Leonardo Borlini, 'On Financial Nationalism and International Law: Sovereignty, Cooperation and Hard/Soft Governance in International Finance', 31 European Journal of International Law 1133 (2020), at 1153. The IMF's surveillance may be viewed as serving this compliance function. See Feibelman, above n 26, at 734–38.

[72] See Kern Alexander, Rahul Dhumale, and John Eatwell (eds), *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (OUP 2005), at 140–41; Daniel D. Bradlow, 'Soft International Law and the Promotion of Financial Regulation and Responsibility', in Daniel D. Bradlow and David B. Hunter (eds), *Advocating Social Change Through International Law: Exploring the Choice Between Hard and Soft International Law* (Brill 2020); Gregory Shaffer and Mark A. Pollack, 'Hard and Soft Law', in Jeffrey L Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013), at 215–16; Motoko Aizawa, Daniel Bradlow, and Margaret Wachenfeld, 'International Financial Regulatory Standards and Human Rights: Connecting the Dots' 15 Manchester Journal of International Economic Law 2 (2018).

[73] See Chris Brummer, 'Why Soft Law Dominates International Finance—and not Trade', 13 Journal of International Economic Law 623 (2010), at 640.

planning and structuring of transactions.[74] They can help assess the sustainability of the financing of individual projects, the debts of individual institutions and, in aggregate, the national economy. These instruments and frameworks address an array of policy objectives and target parties, which fall into three broad categories.

First, international soft law standards include frameworks that specifically address sovereign debt.[75] Most prominently, these frameworks include the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing[76] and the IIF Principles on Stable Capital Flows and Fair Debt Restructuring.[77] In addition, an UNCTAD ad hoc Working Group on a Debt Workout Mechanism pointedly calls for a broader definition of debt sustainability that transcends economic considerations.[78] Some scholars have argued that sovereign debt sustainability is a principle that incorporates the protection of economic, social, and cultural rights and constitutes a principle of public international law.[79]

A second category contains financial sector standards that address sustainability, including:

- the Principles on Responsible Investing (PRI);[80]
- the Basel capital standards for banks;[81]
- standards developed by the Task Force for Climate-related Financial Disclosures (TCFD) that provide guidance to market participants on

[74] See, for example, World Bank Environmental and Social Framework, https://www.worldbank.org/en/projects-operations/environmental-and-social-framework (visited 7 April 2024).

[75] See Anna Gelpern, 'Hard, Soft, and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing', in Carlos Espósito, et al. (eds), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (OUP 2013), at 356–78.

[76] United Nations Conference on Trade and Development, Principles on Promoting Responsible Sovereign Lending and Borrowing (2012), https://unctad.org/system/files/official-document/gdsddf2012misc1_en.pdf. Scholars have argued that the soft law-based principles articulated by UNCTAD reflect emerging customary international law. See Juan Pablo Bohoslavsky, Yuefen Li, and Marie Sudreau, 'Emerging customary international law in sovereign debt governance?', 9 Capital Markets Law Journal 55 (2014).

[77] Institute for International Finance, Principles for Stable Capital Flows and Fair Debt Restructuring, April 2022 Update, https://www.iif.com/portals/0/Files/content/2_Updated%20Debt%20Principles_vf.pdf.

[78] See United Nations Conference on Trade and Development, 'Sovereign Debt Workouts: Going Forward. Roadmap and Guide' (2015), at 54, https://unctad.org/en/PublicationsLibrary/gdsddf2015misc1_en.pdf (stating that 'sustainability requires going beyond merely economic considerations in debt restructurings. Respect for human rights, particularly socio-economic rights, and political risks need to be taken into consideration.').

[79] Juan Pablo Bohoslavsky and Matthias Goldmann, 'An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law', 41 Yale Journal of International Law Online 13 (2016).

[80] See Principles on Responsible Investing, What are the Principles for Responsible Investment?, https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment (visited 7 April 2024).

[81] See Bank of International Settlements, The Basel Framework, https://www.bis.org/basel_framework/index.htm (visited 7 April 2024).

disclosure of information on financial implications of climate-related physical, risks, and liability risks;[82]

- standards developed by the Network for the Greening of the Financial System (NGFS), a network of central banks and financial supervisors;[83] and
- standards developed by the International Sustainability Standards Board (ISSB), with the support of the International Organization of Securities Commissions (IOSCO) and in coordination with the International Accounting Standards Board, that are applicable to sustainability disclosures in capital markets.[84]

International organizations have sought to develop sustainability standards in the financial sector. For example, the World Bank has developed a carbon pricing dashboard[85] and published a guidance to emerging markets countries to facilitate the development of national green taxonomies.[86] To encourage greater alignment of environmental metrics with a low-carbon transition, the OECD has contributed to the G20 Sustainable Finance Working Group.[87]

Finally, there are soft international law instruments that are applicable to the corporate sector more generally, including financial institutions. Among the most prominent and influential are the UN Guiding Principles on Business and Human Rights[88] and the OECD Guidelines for Multinational Enterprises.[89] This category includes standards dealing with a broad range of environmental and social issues that are relevant to debt sustainability, such as the SDGs and the UN guidelines for human rights impact assessments.[90] In addition, the Guiding Principles on Foreign Debt and Human Rights, endorsed by the UN Human

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[82] See Task Force for Climate-related Financial Disclosure, https://www.fsb-tcfd.org/ (visited 7 April 2024).
[83] See Network for the Greening of the Financial System, https://www.ngfs.net/en (visited 7 April 2024).
[84] See International Sustainability Standards Board, https://www.ifrs.org/groups/international-sustainability-standards-board/ (visited 7 April 2024).
[85] See The World Bank, Carbon Pricing Dashboard, https://carbonpricingdashboard.worldbank.org/map_data (visited 7 April 2024).
[86] See The World Bank, 'How to Develop a National Green Taxonomy for Emerging Markets – A New World Bank Guide' (13 July 2020), https://www.worldbank.org/en/news/press-release/2020/07/12/how-to-develop-a-national-green-taxonomy-for-emerging-markets-a-new-world-bank-guide.
[87] See Organisation for Economic Co-operation and Development, 'ESG Investing and Climate Transition: Market Practices, Issue and Policy Considerations' (2021), https://www.oecd.org/finance/ESG-investing-and-climate-transition-market-practices-issues-and-policy-considerations.pdf.
[88] See UN Guiding Principles on Business and Human Rights, https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (visited 7 April 2024).
[89] See Organisation for Economic Co-operation and Development, 'OECD Guidelines for Multinational Enterprises', https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en/ (2023).
[90] See United Nations Global Compact, 'Guide to Human Rights Impact Assessment and Management (HRIAM)' (2010), https://unglobalcompact.org/library/25.

Rights Council, call for DSAs to take into account the ability of countries to ensure the realization of human rights in determining the sustainability of a country's debt.[91]

3. National and supra-national sustainable finance regulation

National and supra-national regulatory authorities are increasingly promoting sustainability in financial markets.[92] The overarching objective of these regulatory measures is to incentivize corporations, investors, and other financial market participants to adopt and apply more sustainable practices and policies in their activities.[93] The regulatory frameworks developed in leading financial jurisdictions, because their regulators exercise extraterritorial regulatory power, are transnational in effect and global in scope.

The European Union has been at the forefront of such global regulatory efforts.[94] The foundation of the EU's sustainable finance framework consists of the Taxonomy, a classification system for sustainable economic activities,[95] the Climate Transition Benchmarks Regulation,[96] and disclosure requirements for investment funds and advisors (Sustainable Finance Disclosure Regulation (SFDR)) and companies (Corporate Sustainability Reporting Directive (CSRD)).[97] Through implementation of these frameworks, the EU has developed

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[91] See Mauro Megliani, 'For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries', 31 Leiden Journal of International Law 363 (2018), at 373–74.

[92] See Dimitri Demekas and Pierpaolo Grippa, 'Walking a Tightrope: Financial Regulation, Climate Change, and the Transition to a Low-Carbon Economy', 8 Journal of Financial Regulation 203 (2022).

[93] See Lupo-Pasini, above n 8, at 680–81. The European Commission characterizes these measures as sustainable finance, defining it as 'the process of taking due account of environmental and social considerations in investment decision-making, leading to increased investments in longer-term and sustainable activities'. European Commission, 'Action Plan: Financing Sustainable Growth', COM/2018/097 final (8 March 2018), at 2.

[94] See Dirk A. Zetzsche, Marco Bodellini and Roberta Consiglio, 'The EU Sustainable Finance Framework in Light of International Standards', 25 Journal of International Economic Law 659 (2022), at 677–78; see also Kalin Anev Janse and Anu Bradford, 'The Brussels Effect on Sustainable Finance', Project Syndicate (26 April 2021), https://www.project-syndicate.org/commentary/eu-sustainable-finance-taxonomy-brussels-effect-by-kalin-anev-janse-and-anu-bradford-2021-04.

[95] Under the EU Taxonomy, an environmentally sustainable investment must contribute to at least one of six specified environmental objectives, do no significant harm to any of the other objectives, and comply with minimum safeguards concerning labor and human rights. Zetzsche, Bodellini and Consiglio, above n 94, at 663, 665.

[96] See European Commission, Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019, OJ 2019 L317; see also European Commission, 'Strategy for Financing the Transition to a Sustainable Economy', COM(2021) 390 final (6 July 2021), at 2–3.

[97] The European Commission has adopted the first set of European Sustainability Reporting Standards for companies subject to the CSRD. See European Commission, 'The Commission adopts the European Sustainability Reporting Standards' (31 July 2023), https://finance.ec.europa.eu/news/commission-adopts-european-sustainability-reporting-standards-2023-07-31_en.

detailed standards for measurement, disclosure, and assessment of sustainability factors and their impacts.[98]

Other leading capital market regulators have followed suit, including:

- the United States Securities and Exchange Commission (SEC) has adopted final rules to enhance and standardize climate-related disclosures by issuers,[99] and
- the UK government has published inter alia the Green Finance Strategy, announcing its intent to explore the revision of sustainability disclosure rules, launch a UK Green Taxonomy, and regulate ESG ratings providers.[100]

IV. REFORMING THE DSA PROCESS

The content of the DSFs is deeply intertwined with the procedures through which DSAs are conducted. Accordingly, the following discussion considers who should decide whether a country's debt is sustainable and what actions can be taken. It also considers whether DSAs should remain within the legal authority of the IMF while also enhancing the transparency, accountability, and participation of other parties.

A. The value of procedural reform

The international norms and standards discussed in the previous section deal with both the substantive and procedural issues relevant to DSAs conducted by the IMF. First, they influence the *ex ante* expectations of sovereigns and other market participants about what factors the IMF will consider in making DSA-related decisions and what criteria it will apply in making these decisions. Second, they help identify which actors will play what role in the DSA and what their respective responsibilities will be. They also identify what constraints may be

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[98] See European Commission, 'The Commission adopts the European Sustainability Reporting Standards' (31 July 2023), https://finance.ec.europa.eu/news/commission-adopts-european-sustainability-reporting-standards-2023-07-31_en (adopting the European Sustainability Reporting Standards (ESRS) as the basis for corporate disclosure obligations under the CSRD); Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJ 2019 L 317, at art 4 (requiring disclosure of principal adverse impacts of investment decisions on sustainability factors under the SFDR). On 22 November 2023, the European Parliament adopted a new regulation concerning green bonds and other environmentally sustainable and sustainability-linked bonds. See Regulation (EU) 2023/2063 of the European Parliament and of the Council of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds, OJ 2023 L 2631.

[99] Securities and Exchange Commission, 'SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors' (6 March 2024), https://www.sec.gov/news/press-release/2024-31.

[100] HM Government, Mobilising Green Investment: 2023 Green Finance Strategy (March 2023), at 9–10, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1149690/mobilising-green-investment-2023-green-finance-strategy.pdf.

applicable to the authority of each of these actors. Third, they help all stakeholders decide if the process that the IMF is following in doing the DSA is fair and legitimate.[101] This, in turn, can influence the credibility, efficiency and sustainability of a debt restructuring.[102]

It is clear that incorporating the full range of FEES factors substantially complicates both the procedural and substantive aspects of DSAs. Given the novelty and complexity of these issues, it is unreasonable to expect that IMF staff will always make DSA decisions that lead to sustainable and optimal outcomes in regard to all the relevant FEES factors in each particular member country. However, it is not unreasonable to expect the IMF to formulate operating policies and practices that are transparent and understandable to all those affected by its decisions and that are intended to maximize the benefits and minimize the adverse consequences of the IMF's decisions and operations. In addition, it is reasonable to expect the IMF to acknowledge that, given the complexity and inherent unpredictability of the situations in which it must operate, and despite the best efforts of its staff, its decisions and operations may cause unintended harms to the populations of its member countries.

B. Options for reforming the DSA process

A range of procedural reforms may enhance the transparency of DSAs, broaden the participation of stakeholders and ensure fair accountability for all decisionmakers, including the IMF, in the DSA process.

1. Consultation and accountability in the design of the DSA

While the LIC DSF was jointly created with the World Bank, DSAs do not involve other international financial institutions or multilateral development agencies.[103] A soft reform option would therefore involve IMF staff consulting with regional multilateral banks as well as specialized international agencies such as UNDP, UNCTAD, and UNEP and other stakeholders regarding the environmental and social impacts of DSAs and when revising the DSFs. This would help ensure that the IMF, in any revisions to the DSFs, meaningfully takes into account inputs by its member countries and other stakeholders on how to incorporate FEES factors in DSAs.[104]

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[101] See Armin von Bogdandy & Matthias Goldmann, 'Sovereign Debt Restructurings as Exercises of Public Authority: Towards a Decentralized Sovereign Insolvency Law', in Carlos Espósito, et al. (eds), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (OUP 2013), at 58–59.

[102] See Stephen Kim Park and Tim R Samples, 'Distrust, Disorder, and the New Governance of Sovereign Debt', 62 Harvard International Law Journal 175 (2021), at 185–87.

[103] See Jan Wouters and Jed Odermatt, 'Comparing the 'Four Pillars' of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO', 17 Journal of International Economic Law 49 (2014), at 69–74 (describing coordination efforts between the IMF and the World Bank and FSB).

[104] See Karina Patrício Ferreira Lima, 'Reforming the International Monetary Fund's Debt Sustainability Assessments towards Achieving the UN's Sustainable Development Goals (SDGs):

2. Right to participate in DSA process

The DSA process should reflect the fact that DSAs are a critical situs for determining the meaning of debt sustainability and negotiating the terms of a debt restructuring. Procedural rights regarding the use of DSAs can be tailored to meet the needs of countries at various stages of debt distress. For example, an IMF member, under certain stipulated circumstances, might have the right to demand the Fund initiate a DSA.[105] Once a DSA has been initiated, the DSA process may grant civil society representatives in the country (such as commercial creditors, labor unions, think tanks, and pension funds) the right to engage with the IMF on the macro-critical aspects of the FEES issues they deem relevant to the DSA and on the conclusions of the DSA.

One context in which the right to use DSAs is being debated concerns the publication of DSAs in a pre-default context outside of an IMF lending program.[106] Prompted by the IMF's publication of two technical notes on Argentina's debt sustainability at the request of the Argentine government in June 2020, the question of what rights should be granted to member countries vis-à-vis a DSA remains contested.[107] In this instance, the preliminary DSA—or, more technically, the preliminary analysis that would be embedded in a DSA—was not directly linked to the IMF's surveillance or lending functions. Moreover, the Argentine government was able to use the data and analysis in the DSA as it deemed appropriate in the context of its debt restructuring negotiations.

3. Accountability of the IMF with respect to DSAs

Once the DSA is completed, there is the question whether the IMF should be held accountable for the way in which it develops and uses the DSA in its engagements with the member country. Towards this end, an independent accountability mechanism could receive and investigate complaints about IMF operations from complainants alleging that they have been harmed by the IMF's failure to fully comply with its own policies and procedures in developing or using the DSA.[108] It

A Crucial Post-Pandemic Recovery Agenda', 2 African Journal of International Economic Law 32 (2021), at 44–46.

[105] DSAs could triggered by the fulfillment of certain macroeconomic conditions. Under one proposal, the IMF and World Bank would be required to complete preliminary assessments of debt relief needed for all countries eligible for debt relief under the Common Framework for Debt Treatments. See Masood Ahmed and Hannah Brown, 'Fix the Common Framework for Debt Before It Is Too Late', Center for Global Development (January 18, 2022), https://www.cgdev.org/blog/fix-common-framework-debt-it-too-late.

[106] European Central Bank, above n 37, at 15–16.

[107] Ibid, at 16 (noting the problems and challenges associated with disclosure of DSAs in sovereign debt restructurings at the behest of member countries).

[108] See Danny Bradlow, 'The IMF Needs an Ombudsman with Clout', Financial Times (6 October 2021), https://www.ft.com/content/1c4ce23e-15f2-4461-b9f7-48a198276fe1;Danny Bradlow 'The IMF is changing and needs an independent ombudsman', Bretton Woods Project (21 July 2022), https://www.brettonwoodsproject.org/2022/07/the-imf-is-changing-and-needs-an-independent-ombudsman.

is merely a characteristic of good governance for the IMF to offer those adversely affected by its operation access to such a mechanism. This is particularly important because the IMF, as an international organization, enjoys privileges and immunities under international law and domestic statutes, and therefore, cannot be readily sued in any court in the world by these communities and individuals or even its member countries.[109]

Such a mechanism offers two other benefits. First, it offers the IMF the opportunity to gain new information on the social and environmental impacts of its policies and operations. This follows from the fact that the mechanism would be triggered by complaints from communities, civil society organizations, and external non-state stakeholders that currently do not have access to IMF decisionmakers but are affected by IMF policies and operations in the member country. Second, it helps the IMF identify and mitigate the adverse impacts of ongoing IMF operations in real time.

V. CONCLUSION

Governments throughout the world are facing growing debt distress due to environmental and social risks that are likely to continue growing in importance and prominence in sovereign debt discussions. Their scope, magnitude, and complexity challenge the ability of sovereigns to fulfill their financial obligations as they fall due. They also pose broader questions about how governments should balance their obligations to their creditors and the current and future residents of their country, the ecological health of the planet, and the international community. In our view, the sustainability of economies, societies, and the planet hinges on how all relevant stakeholders, including the IMF, respond to these questions.

As reflected by Georgieva and Weeks-Brown's article, the macro-criticality of the full range of FEES factors compels the IMF to re-think its unique and pivotal role in defining sovereign debt sustainability. At stake is the ability of countries to respond to climate change and the other complex environmental and social factors that will shape and constrain their future. It also will influence the role, legitimacy, and efficacy of the IMF as an actor in global economic governance.

In this article, we have discussed how law can help address the substantive and procedural shortcomings of DSAs and make them fit for purpose in the future context in which the IMF and its members will have to operate. We suggest, first, that DSAs should explicitly address FEES factors based on the standards, norms and principles drawn from international treaties, international soft law, global governance standards, and sustainable finance regulation. Second, we contend that the IMF needs to make institutional reforms designed to improve the policies and procedures governing DSAs so that they incorporate the full range of FEES factors in a way that is viewed as legitimate and effective. By doing so, we argue

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[109] See Marco Simons and MacKennan Graziano, 'Jam v International Finance Corporation: The US Supreme Court Decision and its Aftermath', 5 Business and Human Rights Journal 282 (2020) (analyzing the US Supreme Court's application of a restrictive theory of sovereign immunity to international organizations).

that these proposals will facilitate a more sustainable outcome for debt distressed countries.