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Manchester Journal of International Economic Law



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– – Asif H Qureshi, Editorial, MJIEL, 2004, Volume 1, Issue 1

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- ❖ Awareness of a development dimension in international economic relations.

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Free Trade Hall, Manchester: Built on land offered by Richard Cobden in St Peter's Fields, by the Anti-Corn Law League, the fine permanent stone building replaced a simple brick building of 1843 which itself replaced a timber pavilion of 1840. Its name derives from the pivotal role played by Manchester in the repeal of the Corn Laws in 1846 and the promotion of Free Trade and Liberalism in the history of England.

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International Financial Regulatory Standards and Human Rights: Connecting the Dots[†]

Motoko Aizawa,* Daniel Bradlow** and Margaret Wachenfeld***

ABSTRACT: *This paper's hypothesis is that the international standard setting bodies (SSBs) could improve the quality of their international standards by incorporating a human rights analysis. It focuses on five SSBs and seven of their international standards and its findings include the following: First, the standards all implicate the right of non-discrimination, and the rights to information, privacy and an effective remedy. Second, they each raises economic, social and cultural rights issues, including the obligation to allocate 'maximum available resources' to the progressive realization of economic, social and cultural rights; the human rights responsibilities of private actors exercising delegated regulatory authority, and the need for financial decision-makers to account for all the impacts and risks of their decisions and actions. Third, the SSBs' failure to utilize such international standards as the UNGPs, the PRI, and the Equator Principles means that they have not comprehensively addressed the risk factors facing the financial sector. Fourth, the benefits that the SSBs gain from utilizing a human rights analysis outweigh their costs. Fifth, there are manageable risks to human rights if the financial sector adopts a human rights approach.*

1. INTRODUCTION: FRAMING THE DISCUSSION

Historically, the purpose of the financial sector has been to provide support to the real economy. It promotes savings and allocates funding for productive investments, thereby helping the real economy to create jobs and deliver the goods and services that people need. In this way the

[†] The authors thank Josua Loots and Nthope Mapefane for their excellent research assistance with this paper and Shimri Segal for his assistance organizing the first workshop at which the first draft of this paper was presented at the Centre for Human Rights and Humanitarian Law at American University Washington College of Law. The authors wish to thank the Centre for Human Rights and Humanitarian Law at American University Washington College of Law, the International Development Law Unit, Centre for Human Rights, University of Pretoria and the International Corporate Accountability Roundtable (ICAR) for hosting workshops at which they presented earlier drafts of this paper and the participants in those workshops for their very helpful comments on those drafts of the paper. Daniel Bradlow would also like to thank colleagues at Humboldt University, George Washington University Law School and the Nordic Human Rights Trust Fund at the World Bank who arranged for him to present the paper at their respective institutions and to the participants in those presentations whose thought-provoking comments stimulated new thinking about this project. For information on this paper contact Daniel Bradlow at danny.bradlow@up.ac.za.

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financial sector contributes to making societies wealthier and contributes to their resilience, stability and the degree of equality in a society.¹

However, over the past half century the financial sector has come to dominate both the global economy and many countries' domestic economies.² The total value of the assets in the international financial sector are currently about four times larger than the global economy, which was estimated to be about US\$120 trillion in purchasing power parity terms in 2016³. The size of the financial system as part of the economy tripled in the US and UK from the 1950s to 2000s. Its contribution to the growth of the real economy has also become more attenuated. For example, about 85% of the business of banking in the US is now the buying and selling of existing assets, rather than contributing to the development of new assets. About 65% of bank lending in the UK is now for buying residential real estate and another 14% is for commercial properties, much of which is for already existing assets. Private debt as a percentage of GDP in rich countries increased from 50% in 1950s to 170% in 2006.

Despite its economic dominance, it is unclear that finance is contributing effectively to making societies wealthier, more stable, more equal, and more resilient. Approximately 2 billion people are excluded from its services, the problems of unemployment, poverty and inequality are becoming worse around the world, and many societies are showing symptoms of social fragility, such as substance abuse, breakdown of families and intolerance.⁴

This divergence between the size and profitability of the financial sector and the results it is delivering in real economic terms raises questions about whether or not the regulatory frameworks that guide its activities and the decisions of those who are responsible for designing and implementing them have adapted adequately to the changes in the financial sector. The experience both during and since the global financial crisis suggests that insufficient attention has been paid to understanding all the impacts of financial regulations with the result that they can have significant unintended consequences.

To give an example: The Financial Action Task Force (FATF) was established by governments to develop a global strategy for fighting money laundering and terrorist financing. It developed a set of recommendations that requires banks to become more active participants in this fight. It makes them responsible for knowing their customers and the nature of their

¹ According to International Monetary Fund (IMF) Managing Director Christine Lagarde, the goal of finance is '... to put resources to productive use, to transform maturity, thereby contributing to the good of economic stability and full employment – and ultimately to the well-being of people. In other words, [the true purpose of finance] is to enrich society'. Christine Lagarde, Managing Director, IMF, 'Economic Inclusion and Financial Integrity', Coalition for Inclusive Capitalism Conference, 2014.

² Information in this paragraph is drawn from Adair Turner, *Between Debt and the Devil - Money, Credit, and Fixing Global Finance* (Princeton University Press, 2017).

³ CIA, 'The World Fact Book', available at: www.cia.gov/library/publications/the-world-factbook/geos/xx.html (accessed March 2018).

⁴ See, for example, Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press, 2014); Branko Milanovic, *Global Inequality - A New Approach for the Age of Globalization* (Belknap Press, 2016); Anne Case and Angus Deaton, 'Suicide, Age, and wellbeing: an Empirical Investigation', *NBER Working Paper* 21279, June 2015, in David A. Wise (ed.), *Insights in the Economics of Aging* (Chicago: University of Chicago Press, 2017), Chapter 10, 307-34; and Anne Case and Angus Deaton, 'Mortality and Morbidity in the 21st Century', *Brookings Papers on Economic Activity*, Spring 2017, 48(1): 397-476. The online appendix, appendix figures, the data and programs, and a non-technical discussion of the paper are available at: www.brookings.edu/wp-content/uploads/2017/08/casetextsp17bpea.pdf (accessed March 2018).

transactions and for notifying the relevant authorities about any suspicious transactions or customers. The FATF recommendations have achieved a degree of success in meeting their objective. However, the recommendations have also had some unintended human rights consequences. FATF did not anticipate that some banks would decide not to service customers seeking to remit relatively small amounts to their families in another country while other banks would decide to increase their charges on these transactions. The result was that the Task Force's recommendations have adversely affected the ability of the beneficiaries of these remittances to meet their food, housing, health and education needs. In one particularly striking example, the Somali community in England was forced to ask the UK government to intervene with British banks in order to help them preserve access to at least one bank that could send their remittances to their families in Somalia.⁵ On the positive side, the Task Force came to understand that their recommendations had an impact on money laundering arising from human trafficking, and issued a guidance on how to address such money laundering (and hence human trafficking).⁶

As this example shows, international financial regulatory standards affect how human beings interact with and are affected by the financial system. The way in which the standards are formulated can influence the precise nature and extent of these impacts but they cannot avoid having an effect on the human beings who use, or would like to use, the financial system. Consequently, the international standards inevitably raise human rights issues. This raises the question of whether a human rights analysis would add value to the quality of financial regulation.

This paper seeks to answer this question in regard to the international financial standard setting bodies (SSBs) and their international financial regulatory standards. Its hypothesis is that incorporating a human rights analysis into the standard-making processes of the international SSBs would improve the quality of their standards.⁷ This analysis could be integrated into other internal processes such as a regulatory impact analysis or it could be carried out as a bespoke human rights impact assessment. It would make the actual and potential positive and negative human rights impacts of proposed international standards more visible. This knowledge would enable these bodies to formulate their standards with a better understanding of their full costs and benefits and how these costs and benefits will be allocated among their various stakeholders. It will also help mitigate the risk of unintended consequences, including the risk that the costs fall on those least able to bear them.

The reason for focusing on the SSBs' international standards is that they establish the standards that tend to guide national financial regulatory and supervisory authorities around the world in developing their own national financial sector regulatory frameworks. Consequently, improved international standards at the apex of the system should lead to better financial

⁵ Mark Tran, 'Somalis fear Barclays closure of remittance accounts will cut lifeline', *The Guardian*, available at: www.theguardian.com/global-development/2013/jun/24/somalis-barclays-remittance (accessed March 2018).

⁶ The guidance was not driven by a human rights imperative but it prompted banks to look out for signs of human trafficking in certain financial transactions. See FATF, 'Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants', 2011, available at: www.fatf-gafi.org/media/fatf/documents/reports/Trafficking%20in%20Human%20Beings%20and%20Smuggling%20of%20Migrants.pdf (accessed March 2018).

⁷ See Box 1 and Part 2 for a more detailed explanation of the SSBs.

regulation and supervision at the national level where human rights impacts – positive and negative – will ultimately be experienced.

The paper has a second purpose. It seeks to facilitate dialogue between financial regulators and human rights experts. The lack of serious interaction between financial regulators and the human rights community has increased the risk that the adverse human rights impacts caused by the failures of the financial sector will continue. This situation is likely to continue until both the human rights community and the financial regulators take the time to learn about the relevance of the other sector to their work. The human rights community needs to develop sufficient understanding of the financial sector and the international financial regulatory structure that they can begin to articulate more clearly and precisely how international financial regulatory standards impact on human rights. Similarly, the financial community in general and financial regulators and supervisors, in particular, need to understand enough about human rights that they come to appreciate that financial transactions and financial regulation inevitably have human rights impacts and that it is in their interest to anticipate and manage these impacts.

There are reasons to believe that the prospects for a productive discussion between human rights experts and financial sector regulators are improving. There are new regulatory initiatives designed to promote a more socially and environmentally sustainable financial system.⁸ Some central banks and financial regulatory authorities, motivated by the consequences of the financial crisis and the recognition that increasingly unequal societies are unlikely to be stable or sustainable, are paying more attention to the distributional impacts of their policies.⁹ Similarly, some human rights experts are researching how human rights can most effectively contribute to economic development.¹⁰

In order to make this case, this paper is structured as follows: Part 2 defines the scope of this paper. It includes brief overviews of the SSBs and the international financial regulatory standards that are the focus of this paper. It also describes the international human rights standards used in this paper. Part 3 explains why human rights are relevant to finance and financial regulation. Part 4 focuses on the nature of the human rights responsibilities and/or obligations of the SSBs, their members and the entities that they regulate. Part 5 focuses on the application of human rights to several key SSB standards, examined through the lens of the six key functions of finance. It provides selected examples of the potential human rights impacts of the standards. Part 6 concludes and has some recommendations for future action.

⁸ See the EU initiative on sustainable finance, available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en (accessed March 2018). Also see, the UNEP Inquiry on a Sustainable Financial System, available at: <http://web.unep.org/inquiry/greening-financial-system> (accessed March 2018); and IHRB and UNEP Inquiry: Design of a Sustainable Financial System, 'Human Rights and Sustainable Finance – Exploring the Relationship', *Inquiry Working Paper 16/01*, 2016, available at: http://unepinquiry.org/wp-content/uploads/2015/10/Human_Rights_and_Sustainable_Finance.pdf (accessed March 2018).

⁹ For example, some central banks in large economies are paying more attention to the distributional implications of their policies. See IHRB and UNEP Inquiry (2016), *supra* note 8, Chapter 3.

¹⁰ Radhika Balakrishnan and Diane Elson (eds.), *Economic Policy and Human Rights: Holding Governments to Account* (University of Chicago Press, distributed for Zed Books, 2011); David Kinley, *Necessary Evil: How to Fix Finance by Saving Human Rights* (Oxford University Press, forthcoming)

2. DEFINING THE SCOPE OF THE PAPER: THE FINANCIAL SECTOR AND HUMAN RIGHTS

This part defines the scope of the paper. It begins with a discussion of the SSBs and the international financial regulatory standards that are the focus of this paper. This is followed by a brief discussion of the concept of human rights as used in this paper.

2.1. The International Financial SSBs and Selected Standards – A Brief Primer

There are fifteen SSBs.¹¹ They include international organizations like the International Monetary Fund and the World Bank Group, and privately funded bodies like the International Accounting Standards Board and the International Auditing and Assurances Board. They also include entities that do not have an independent legal identity like the Basel Committee of Banking Supervisors and the Financial Action Task Force. These SSBs have developed the international standards that are included in the compendium of international economic and financial standards (the Compendium) maintained by the Financial Stability Board (FSB)¹².

The paper is not a comprehensive evaluation of all the SSBs and the standards they have developed. It only focuses on a subset of five SSBs and seven of their standards that establish the core regulatory and supervisory standards for the banking, securities and insurance industries. Each of these SSBs and their core standards are briefly described below.

Box 1: International Standard Setting Bodies and Their Financial Standards Covered in the Paper

| International Standard Setting Body | International Financial Regulatory Standards |
|--|---|
| Basel Committee on Banking Supervisors | The Basel Capital Adequacy Standards (BCA) |
| | Core Principles for Effective Banking Supervision (CPB) |
| | Consolidated and Enhanced Disclosure Framework (CDF) |
| International Organization of Securities Commissions (IOSCO) | IOSCO Objectives and Principles of Securities Regulation (OPSR) |
| International Association of Insurance Supervisors (IAIS) | Insurance Core Principles (ICP) |
| Financial Action Task Force (FATF) | FATF Recommendations (Recommendations) |
| Committee on Payment and Market Infrastructure (CPMI) | Principles for Financial Market Infrastructures (PFMI) |

¹¹ The fifteen SSBs are: Basel Committee on Banking Supervision (BCBS), Committee on the Global Financial System (CGFS), Committee on Payments and Market Infrastructures (CPMI), Financial Action Task Force on Money Laundering (FATF), Financial Stability Board (FSB), International Association of Deposit Insurers (IADI), International Association of Insurance Supervisors (IAIS), International Accounting Standards Board (IASB), International Auditing and Assurance Standards Board (IAASB), International Monetary Fund (IMF), International Organisation of Pension Supervisors (IOPS), International Organisation of Securities Commissions (IOSCO), Joint Forum (JF), Organisation for Economic Cooperation and Development (OECD), World Bank (WB); see FSB, ‘Standard-Setting Bodies in the Compendium’, available at: www.fsb.org/what-we-do/about-the-compendium-of-standards/wssb/ (accessed March 2018).

¹² The FSB acts as a coordinating body for the SSBs. Its membership consists of financial regulatory authorities from 25 jurisdictions; 4 international financial institutions (the IMF, the World Bank, the OECD and the BIS) and 6 SSBs, four of which are discussed in this paper. The Compendium of Standards consists of various economic and financial standards that are internationally accepted as important for sound, stable and well-functioning financial systems, available at: www.fsb.org/what-we-do/about-the-compendium-of-standards/ (accessed March 2018).

2.1.1. Basel Committee on Banking Supervisors (BCBS)

The BCBS is a committee of the Bank for International Settlements (BIS).¹³ It has 27 national banking supervisory authorities as committee members.¹⁴ Its work focuses on developing and promoting international standards for banking regulation and supervision, developing guidelines for their implementation, monitoring their implementation, and sharing information about developments in the banking sector and in banking supervisory and regulatory practices, both with members and non-member banking supervisory authorities, and coordinating with other financial sector standard setting bodies.

The Basel Accords

The BCBS has formulated the world's best known international financial standard, the Basel Accords. The most recent version of these accords is Basel III, established following the 2008 financial crisis. It focuses on regulation, supervision and risk management of the banking sector. The Basel Accords consist of the following three pillars:

*Pillar 1: The Basel Capital Adequacy Standards (BCA)*¹⁵

The BCA establishes minimum standards for the amount of capital that a bank must maintain. It requires banks to maintain a minimum level of 'tier 1' capital, which consists primarily of common equity and retained earnings.¹⁶ The amount of capital a bank must maintain is determined on the basis of the total value of its assets, weighted according to their riskiness. The more risky assets are assigned higher weights so that they must be supported by larger amounts of capital. An asset's riskiness is affected by such factors as its liquidity, term, the creditworthiness of the obligor of the asset, and the purpose for which the credit was extended. In general, the risk-weighting of an asset will increase as the term of the asset increases, as its liquidity decreases, as the creditworthiness of the obligor declines and/or as the inherent uncertainty of the purpose of the credit increases.

The BCBS has developed two models that banks can use in determining the risk weightings assigned to their specific portfolio of assets.¹⁷ The BCBS has a standardized model for weighting assets that it expects most banks to use. However, in the case of large and complex banks, it allows them to use their own internal ratings based approach, which, within some constraints, allows the banks to determine for themselves the riskiness of their assets and thus how much capital will be needed to support each category of their assets.¹⁸ The discretion that these banks have in making these assessments was reduced after it was found that there were

¹³ See BIS, 'About Basel Committee on Banking Supervision', 10 August 2017, available at: www.bis.org/bcbs/about.htm (accessed March 2018).

¹⁴ For a full list of members, see BIS, 'Basel Committee membership', available at: www.bis.org/bcbs/membership.htm (accessed March 2018).

¹⁵ BIS, 'Basel Committee on Banking Supervision (2011) – Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems', available at: www.bis.org/publ/bcbs189.pdf (accessed March 2018).

¹⁶ *Ibid.*, at 12.

¹⁷ See Standardised Approach (SA), BCBS, 'Second Consultation – Revisions to the Standardised Approach on Credit Risk', December 2015, available at: www.bis.org/bcbs/publ/d347.pdf (accessed March 2018), and Internal Ratings-Based (IRB) approach, see BCBS, 'An Explanatory Note on the Basel II IRB Risk Weight Functions', July 2005, available at: www.bis.org/bcbs/irbriskweight.pdf (accessed March 2018).

¹⁸ BCBS, IRB approach. *Ibid.*

unduly large variations between the risk weightings used by different banks for similar classes of assets.¹⁹

*Pillar 2: Core Principles for Effective Banking Supervision (CPB)*²⁰

The CPB is aimed at banking supervisors and regulators. It provides them with a set of 29 principles to guide them and their governments in establishing an effective banking regulatory and supervisory framework. It covers such issues as the powers, responsibilities and functions of banking supervisory authorities and such aspects of prudential banking regulation as corporate governance; management of credit; concentration, market, liquidity, interest rate, and operational risk; transparency; and customer due diligence.

*Pillar 3: Consolidated and Enhanced Disclosure Framework (CDF)*²¹

The CDF, issued in 2017, consolidates all existing Basel disclosure requirements from eight separate standards into a single Pillar 3 disclosure framework. It covers the categories of information to be disclosed by banks in their end of the financial year reports. The categories include capital composition, the leverage ratio, the liquidity ratios, the indicators for determining globally systemically important banks, the countercyclical capital buffer, interest rate risk in the banking book and remuneration.²²

2.1.2. International Organization of Securities Commissions (IOSCO)²³

IOSCO is an international cooperative body based in Spain. It has 218 members consisting of securities commissions and other regulatory bodies dealing with securities markets, self-regulatory organizations (SROs), stock exchanges and financial market infrastructure entities.²⁴ Its functions include promoting cooperation among members in developing, promoting and implementing internationally ‘recognized and consistent standards’ of regulation, oversight and enforcement relating to the issuing and trading of securities and the operation of financial markets.

*IOSCO Objectives and Principles of Securities Regulation (OPSR)*²⁵

¹⁹ ‘Governors and Heads of Supervision finalise Basel III reforms’, Press Release, 7 December 2017, available at: www.bis.org/press/p171207.htm (accessed 19 April 2018) According to the chair of the Basel Committee, the agreement reached to finalize Basel III and the regulatory reforms therein will ‘will help reduce excessive variability in *risk-weighted* assets and will improve the comparability and transparency of *banks’ risk-based capital ratios*’. [emphasis added]

²⁰ BCBS (2012), ‘Core Principles for Effective Banking Supervision’, available at: www.bis.org/publ/bcbs230.pdf (accessed March 2018).

²¹ BCBS (2017), ‘Pillar 3 Disclosure Requirements – Consolidated and Enhanced Framework’, available at: www.bis.org/bcbs/publ/d400.htm (accessed March 2018).

²² Based on its consultations with stakeholders, the BCBS has agreed to defer issuing new disclosure requirements on operational risk to a later phase of the review of the Pillar 3 framework. Meanwhile, operational risks are to be disclosed in accordance with a 2004 Pillar 3 framework. *Ibid.*, at 10.

²³ IOSCO, ‘About IOSCO’, October 2017, available at: www.iosco.org/about/?subsection=about_iosco (accessed March 2018).

²⁴ *Ibid.*

²⁵ IOSCO (2017), ‘Objectives and Principles of Securities Regulation’, available at: www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf (accessed March 2018). Note that these are complemented by the Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation that provide IOSCO’s interpretation of the OPSR and give guidance on the conduct of a self-assessment or third-party assessment of the level of implementation, available at: www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf (accessed March 2018).

IOSCO has developed and updated in 2017 the OPSR to help the organization and its members implement and maintain internationally accepted and consistent standards of regulation, supervision and enforcement of financial markets. The OPSR consists of 38 principles that are designed to achieve three specific objectives:

- (i) protect investors,
- (ii) maintain fair, efficient and transparent markets; and
- (iii) reduce systemic risk.²⁶

The OPSR are designed to guide the member organizations of IOSCO towards these objectives. The OPSR cover issues such as the responsibilities of regulators and SROs; enforcement of regulations; cooperation among regulatory authorities; and guidance for different market actors such as issuers, credit rating agencies, auditors, collective investment schemes, market intermediaries, secondary markets, and clearing and settlement entities.

2.1.3. International Association of Insurance Supervisors (IAIS)

The IAIS²⁷ is a corporation based in Switzerland. It is a voluntary membership organization of more than 200 insurance regulators and supervisors from 140 countries. Its mission is to 'promote effective and globally consistent supervision of the insurance industry in order to develop and maintain fair, safe and stable insurance markets for the benefit and protection of policyholders and to contribute to global financial stability'.²⁸

*Insurance Core Principles (ICP)*²⁹

The ICP, which were updated in 2015, consist of 26 principles to guide its members in promoting the organisation's mission. These principles cover such issues as the objectives, powers, functions and responsibilities of insurance supervision; sharing of information between supervisors; the licencing of insurance companies; the qualifications of persons seeking to manage and own insurance companies; corporate governance of insurance companies; risk management; transparency in reporting on the activities of insurance companies; investment activities of insurance companies; financial stability and solvency of insurance companies; and fraud and money laundering through insurance activities.

2.1.4. Financial Action Task Force (FATF)

FATF is an inter-governmental policy making body that has 37 members, consisting of 35 member jurisdictions and 2 regional organizations.³⁰ It also has jurisdictions and regional bodies that are observers or associate members. It has its own secretariat that is housed at the Organization for Economic Cooperation and Development (OECD). FATF's mandate is to

²⁶ IOSCO (2017). *Ibid.*, at 3.

²⁷ IAIS, 'About the IAIS', available at: www.iaisweb.org/page/about-the-iais/ (accessed March 2018).

²⁸ IAIS, 'The IAIS Mission', available at: www.iaisweb.org/page/about-the-iais/file/62748/iais-mission-and-2015-19-strategic-goals-amended-12-november-2015 (accessed March 2018).

²⁹ IAIS (2015), 'Core Principles', available at: www.iaisweb.org/page/supervisory-material/insurance-core-principles/file/58067/insurance-core-principles-updated-november-2015 (accessed March 2018).

³⁰ FATF, 'FATF Members and Observers', available at: www.fatf-gafi.org/about/membersandobservers/ (accessed March 2018).

develop measures to combat money laundering and terrorist financing. FATF operates under a fixed term, usually 10 years, renewable mandate. Its current mandate ends in 2020. The objective of FATF is to develop international standards and promote effective implementation of regulatory and operational measures at the national level for combatting money laundering and terrorist financing (CML/ATF) and ‘other related threats to the integrity of the international financial system’.³¹

*FATF Recommendations (Recommendations)*³²

FATF has developed a set of 40 Recommendations that have been endorsed by the G20 and are designed to further its objectives of CML/ATF. These recommendations cover such issues as the elements of a risk-based approach to dealing with money laundering and terrorist financing; preventive measures, such as customer due diligence rules, that regulatory authorities can adopt to deal with CML/ATF; promotion of transparency in order to better understand the nature of the business of correspondent banks and the beneficial ownership of customers who are legal persons; the responsibilities of regulators in regard to CML/ATF; and the promotion of international cooperation between regulators.

2.1.5. Committee on Payment and Market Infrastructures (CPMI)³³

The CPMI is a committee of the Bank for International Settlements (BIS). Formerly known as the Committee on Payment and Settlement Systems, its membership consists of 25 central banks. Its mandate is to promote the ‘safety and efficiency’ of payment, clearing and settlements systems, which collectively constitute the infrastructure of financial markets, and thereby to contribute to financial stability.³⁴ It acts as a forum for central bank cooperation in regard to these systems and develops international standards designed to strengthen the policy and regulation applicable to payment, clearing and settlements systems around the world.

*Principles for Financial Market Infrastructures (PFMI)*³⁵

The CPMI, in cooperation with IOSCO, developed the PFMI that consist of 24 principles and a statement on the responsibility of central banks and market regulators in regard to financial market infrastructures (FMI). They cover such issues as the legal basis for and governance of market infrastructure; the management of credit, liquidity, business and operational risk by such entities; settlement arrangements; securities depositories; default management; access to the infrastructure; and the efficiency and transparency of the infrastructure.

³¹ FATF, ‘Who we are’, available at: www.fatf-gafi.org/about/ (accessed March 2018).

³² FATF (2012), ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – the FATF Recommendations’, available at: www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf (accessed March 2018).

³³ CPMI (2013), ‘Overview’, available at: www.bis.org/cpmi/ (accessed March 2018).

³⁴ BIS, ‘Committee on Payments and Market Infrastructures (CPMI) – overview’, available at: www.bis.org/cpmi/ (accessed March 2018).

³⁵ CPMI (2012), ‘Principles for Financial Market Infrastructures (PFMI)’, available at: www.bis.org/publ/cpss101a.pdf (accessed March 2018).

2.2. International Human Rights Standards – A Brief Primer

A Brief Overview of International Human Rights Instruments

International human rights are set out in a series of international human rights treaties and other instruments adopted since 1945. Although there are many such instruments, for the purposes of this paper, the focus is on the International Bill of Rights³⁶ that is at the core of the human rights legal regime. It is comprised of the Universal Declaration of Human Rights (UDHR),³⁷ the International Convention on Civil and Political Rights (ICCPR),³⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁹ The two covenants have been ratified by the vast majority of states.⁴⁰ The UN Office of the High Commissioner for Human Rights (OHCHR) is the body within the UN with the mandate from the international community to promote and protect all human rights, including by setting human rights norms and standards and helping translate human rights principles into the laws of States.⁴¹

The human rights of workers, also referred to as labour rights, are covered both in some of the human rights treaties and in a wide range of more specialised labour conventions that are developed and adopted through the International Labour Organisation (ILO).⁴² The ILO Declaration on Fundamental Principles and Rights at Work covers four 'core labour standards' set out below.⁴³ The Declaration commits all ILO member states to respect and promote those principles and rights, whether or not they have ratified the relevant conventions underlying these rights.

³⁶ OHCHR, 'Fact Sheet No.2 (Rev.1), The International Bill of Human Rights', adopted by General Assembly Resolution 217 A (III) of 10 December 1948, available at: www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (accessed March 2018).

³⁷ UN General Assembly, 'Universal Declaration of Human Rights (UDHR) 1948', entered into force on 10 December 1948, Resolution 217(III): International Bill for Human Rights, Part A, available at: www.un.org/en/universal-declaration-human-rights/ (accessed March 2018).

³⁸ OHCHR, 'International Covenant on Civil and Political Rights (ICCPR) 1966', entered into force on 23 March 1976, in accordance with Article 49, General Assembly Resolution 21/2200A (XXI), available at: www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (accessed March 2018).

³⁹ OHCHR, 'International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966', entered into force 3 January 1976, in accordance with article 27, General Assembly Resolution 21/2200A (XXI), 993 U.N.T.S. 3, available at www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf (accessed 14 February 2018).

⁴⁰ OHCHR, Chart disclosing the status of ratifications of human rights treaties, available at: www.ohchr.org/Documents/HRBodies/TB/HRChart.xls (accessed March 2018).

⁴¹ OHCHR, 'Who We Are?', available at: www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx (accessed March 2018).

⁴² ILO, 'Introduction to International Labour Standards', available at: www.ilo.org/global/standards/lang-en/index.htm (accessed March 2018).

⁴³ ILO, 'ILO Declaration on Fundamental Principles and Rights at Work', available at: www.ilo.org/declaration/lang-en/index.htm (accessed March 2018).

Box 2: International Human Rights Instruments

International human rights law has evolved into a large body of binding treaties covering a wide range of issues. They include:

- The **International Bill of Human Rights** consists of the UDHR, and the two binding international conventions based the UDHR: the ICCPR, and the ICESCR.⁴⁴ 169 states, including those hosting all the major financial centres, have signed and ratified the ICCPR.⁴⁵ 164 states have signed and ratified the ICESCR, including almost all the major financial centres. 6 states, including the United States, have signed but not ratified the ICESCR.⁴⁶
- **Seven other core treaties**⁴⁷ cover: (i) the elimination of all forms of racial discrimination;⁴⁸ (ii) the elimination of all forms of discrimination against women;⁴⁹ (iii) the prohibition of torture and other cruel and inhuman or degrading treatment and punishment;⁵⁰ (iv) the rights of the child;⁵¹ (v) the protection of the rights of migrant workers and their families;⁵² (vi) protection from enforced disappearance⁵³; and (vii) the rights of persons with disabilities.⁵⁴ Each of these conventions is only binding on those states that have signed and ratified that convention.
- **Regional human rights instruments** such as the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights and other instruments that have been adopted at the regional level reflect the particular human rights concerns of the region and provide for specific mechanisms of protection.⁵⁵

Other Human Rights Instruments

There are also a number of other human rights instruments that include:

- **ILO Declaration on Fundamental Principles and Rights at Work** covers four core labour rights (freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or compulsory labour; the abolition of child labour; and the elimination of discrimination in respect of employment and occupation) that apply to all ILO member states, whether or not they have signed the relevant conventions.⁵⁶

⁴⁴ OHCHR, *supra* note 35.

⁴⁵ OHCHR, 'Status of Ratification Interactive Dashboard – International Covenant on Civil and Political Rights', available at: <http://indicators.ohchr.org/> (accessed March 2018).

⁴⁶ The 6 states that have signed but not ratified the ICESCR are: Comoros, Cuba, Myanmar, Palau, São Tomé and Príncipe, and United States of America, available at: <http://indicators.ohchr.org/> (accessed March 2018).

⁴⁷ OHCHR, 'The Core International Human Rights Instruments and Their Monitoring Bodies', available at: www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx (accessed March 2018).

⁴⁸ OHCHR, 'International Convention on the Elimination of All Forms of Racial Discrimination (1965)', entered into force 1969, General Assembly Resolution 2106 (XX), available at: www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx (accessed March 2018).

⁴⁹ OHCHR, 'Convention on the Elimination of All Forms of Discrimination against Women (1979)', entered into force 1981, General Assembly Resolution 34/180, available at: www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf (accessed March 2018).

⁵⁰ OHCHR, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)', entered into force 1987, General Assembly Resolution 39/46, available at: www.ohchr.org/Documents/ProfessionalInterest/cat.pdf (accessed March 2018).

⁵¹ OHCHR, 'Convention on the Rights of the Child (1989)', entered into force 1990, General Assembly Resolution 45/25, available at: www.ohchr.org/Documents/ProfessionalInterest/crc.pdf (accessed March 2018).

⁵² OHCHR, 'International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)', entered into force 2003, General Assembly Resolution 45/158, available at: www.ohchr.org/Documents/ProfessionalInterest/cmwf.pdf (accessed March 2018).

⁵³ OHCHR, 'International Convention for the Protection of All Persons from Enforced Disappearance (2006)', entered into force 2010, General Assembly Resolution 61/448, available at: treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-16.en.pdf (accessed March 2018).

⁵⁴ OHCHR, 'The Convention on the Rights of Persons with Disabilities (2006)', entered into force 2008, General Assembly Resolution 61/106, available at: www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx (accessed March 2018).

⁵⁵ OHCHR, 'Regional human rights systems in other parts of the world: Europe, the Americas and Africa', available at: <http://bangkok.ohchr.org/programme/other-regional-systems.aspx> (accessed March 2018).

⁵⁶ ILO, *supra* note 42.

- A wide range of labour rights standards dealing with the **human rights of workers** been developed through the ILO.⁵⁷
- **Other universal human rights instruments:** There are numerous other human rights instruments covering a wide range of topics, for example business and human rights, some of which are binding and others are non-binding.⁵⁸

The human rights stipulated in each treaty become legally binding obligations for each state, and their agencies and instrumentalities, that signs and ratifies that treaty.⁵⁹ Each of these states is obliged to:

- *respect* human rights – not take any action that would violate people’s human rights
- *protect* human rights – take action to make sure that no person or entity subject to its jurisdiction violates or deprives people of their rights – this may include adopting laws and regulatory frameworks that apply to businesses, including financial institutions and to SROs
- *fulfil* human rights – take appropriate measures, including creating institutions and mechanisms, that provide for or support people in fulfilling their rights

At the international level, states are held to account for their actions to uphold these rights through various mechanisms, such as international reporting procedures under UN human rights treaties. Most states have also adopted domestic laws that implement most of their human rights obligations. These laws may include constitutional provisions, specific human rights acts, and laws dealing with particular issues such as anti-discrimination laws.

3. HUMAN RIGHTS, FINANCE AND FINANCIAL REGULATION

3.1. Why Are Human Rights Relevant to Financial Sector Regulation?

Human beings at the beginning and end of the financial sector value chain

The financial sector includes many different actors: commercial banks, investment banks, insurance companies, pension funds, asset management companies, and payment and settlement institutions. In addition, brokers, advisors, legal experts, accountants and auditors, and credit-rating agencies provide supporting services to these institutions and their clients, helping them to structure and execute transactions that meet their financial needs. They also work to ensure that the various financial institutions operate in conformity with the applicable laws and regulations. There are also regulators and supervisors who are responsible for developing the regulations that constitute the financial sector’s regulatory framework, for overseeing specific aspects of the sector, and for ensuring that all participants comply with the applicable laws and regulations.

⁵⁷ ILO, *supra* note 41.

⁵⁸ OHCHR, ‘Guiding Principles on Business and Human Rights (UNGPs)’, *U.N. DOC. HR/PUB/11/04*, available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed March 2018); and ‘Universal Human Rights Instruments’ www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx (accessed March 2018).

⁵⁹ See Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013); Bertrand G. Ramcharan, *The Fundamentals of International Human Rights Treaty Law* (Martinus Nijhoff, 2011), at 16-20.

While the system created by all these actors and the bewildering range of transactions in which they engage is extremely complex, its essence can be described by a relatively simple value chain:

- The starting point of this value chain are *individuals* who have funds that they wish to place into an account that either can be used for paying for their various regular and special transactions or in which the funds can be held, hopefully while earning a return, until they are needed.
- The *institutions* that offer accounts for all or some of these purposes include banks, pension funds, insurance companies, collective investments schemes, and asset management companies. These institutions are willing to take these funds because they can use them in transactions that will generate a return that is greater than their obligations to the individuals who contributed the funds. In particular, they will use these funds to make loans directly to companies or individuals or to buy financial assets, such as debt or equity instruments, commodities, or derivatives that are traded on financial markets.
- The issuers or sellers of these instruments will be public or private sector entities. They will be engaging in these transactions for a variety of different reasons, including funding their ongoing operations or new projects, making investments in real estate or financial instruments, to speculate on financial markets or to realize profits on earlier financial investments.
- Eventually the funds raised through these transactions will be invested in ongoing or new activities in the real economy -- hiring workers and other inputs to produce goods and services that are either consumed directly by individuals or are used as inputs in the production of other goods and services that are ultimately consumed by individuals. Thus, the end point of the financial sector value chain are *individuals*.

There are a few points to note about this value chain that are relevant to the issue of the financial sector and human rights:

- First, human beings are at the beginning and the end of the value chain. This means that the ultimate purpose of the financial sector value chain, regardless of how complex particular transactions in it may be, is to serve the interests of human beings. This suggests that their rights, concerns, and interests should be an important consideration in designing the regulatory frameworks applicable to the financial sector.
- Second, human beings, the institutions with which they place their cash, and the financial sector regulators all have an interest in how the financial institutions and the various actors in the middle of this chain decide to whom to provide financing and how they manage the associated risks. This follows from the fact that finance is an inherently risky activity. The people who provide the cash that starts the value chain are essentially trading their hard-earned cash for the promise of future performance by the party with whom they place the cash. They understand that the institution will use the funds to finance another institution or individual who, in turn, will use the funds in activities that involve risk- either extending financing to another institution or individual or investing in some activity in the real economy. Each of these institutions or individuals hopes that the way in which the funds are

used will generate the returns needed to meet their repayment obligations. This means that all the stakeholders in the financial system are concerned with the safety and soundness of individual financial institutions, the efficiency of financial markets, and the stability of the financial system as a whole. If these factors are not taken into account by financial sector regulators and supervisors, they will ultimately fail to protect the interests and rights of the individuals at either end of the financial sector value chain.

- Third, financial markets inevitably involve intense competition for funds. The financial institutions are all competing for the funds of the human beings at the beginning of the value chain and the other financial actors positioned throughout the chain. This makes regulating their conduct and ensuring that the information provided to customers is accurate and sufficient to make informed decisions and that the system operates fairly an important part of financial regulation.
- Fourth, historically the primary focus of financial regulators and supervisors has been on financial institutions, markets and their associated actors, even though the ultimate purpose of the financial system is to serve the interests of individuals. The complexity of the financial system and the fact that most financial regulators have mandates that only cover a segment of the financial system make it easy to understand why financial regulators have adopted this approach.⁶⁰ However, this development has also created a significant risk of distortion in financial regulations in the sense that they are no longer paying adequate attention to the core purpose of the system -- serving the interests of the individuals and communities who are the start and end points of the value chain.⁶¹

4. HUMAN RIGHTS, THE SSBs, THEIR MEMBERS AND REGULATED ENTITIES

Human rights issues arise in two ways in regard to the SSBs and the international standards that are the focus of this paper.⁶² The first is whether or not the SSBs themselves, their members and the financial sector entities that they regulate have either binding or non-binding human rights obligations or responsibilities.⁶³ The second deals with the human rights implications of the content of the international standards. Each of these sets of issues are discussed below.

⁶⁰ BIS, 'Banking regulation and supervision after the crisis – where are we now, and what lies ahead?', Speech by Mr Fernando Restoy, Chairman, Financial Stability Institute, Bank for International Settlements, at the CIRS Annual International Conference, Lisbon, 1 June 2017, available at: <https://www.bis.org/speeches/sp170601.pdf> (accessed March 2018).

⁶¹ See in particular the OHCHR summary of the extensive concluding observations, general comments and recommendations from UN Treaty Bodies and reports from UN human rights bodies already in 2013 on the impacts of the financial crisis and subsequent austerity measures on human rights. See Annex II to the UN OHCHR, 'Promoting a rights-based approach to economic stabilization, recovery and growth - Background Paper', at 16-62, available at: www.ohchr.org/Documents/Issues/Development/RightsCrisis/OHCHR_Background_Paper.doc (accessed March 2018).

⁶² A third way in which human rights issues can arise in this context relates to the governance of the SSBs and their rule or standard making procedures. While obviously important, these considerations are not directly implicated in the issues that are the primary focus of this part. The reason is that SSB governance and rule-making procedures do not determine if a human rights analysis adds value to the work of the SSBs. They will help determine if the SSBs are optimizing the human rights impacts of their standards.

⁶³ It should be noted that in this paper, we are using the term 'responsibility' in the way it is used in regard to business and human rights. This means that the term is intended to indicate that while businesses may not have legally binding obligations in regard to human rights, they are not free to act without regard to the impact of their operations on human rights. They have a moral and political duty to respect human rights that arises from the fact that they have the capacity to profoundly affect the human rights of the stakeholders in all their operations. Moreover,

4.1. The Human Rights Responsibilities of the SSBs Themselves

None of the SSBs considered in this paper are subjects of international law. The IAIS is a Swiss corporation, the BCBS and the CPMI are committees of the BIS and so do not have their own independent legal identities under international law. IOSCO is a cooperative body, based in Spain, and consisting of a permanent secretariat and a number of committees. FATF is a task force, housed at the OECD, and, although an inter-governmental arrangement, does not have an independent legal identity.

Since none of these entities are subjects of international law, they cannot sign treaties.⁶⁴ This means that none of them are formally bound by the core international human rights conventions. They also have no formal obligations under customary international law.⁶⁵ This means that the SSBs do not have any binding enforceable international human rights obligations. Nevertheless, they do have human rights responsibilities. These responsibilities, although not binding and enforceable, do exert some *de facto* compliance pull because of their impact on the SSBs' reputation, legitimacy and efficacy.

The preamble to the UDHR states that 'every organ of society ...shall strive...to promote respect' for the rights set out in the UDHR and to secure their 'universal and effective recognition and observance'.⁶⁶ The prestige and widely acknowledged moral authority of the UDHR means that all responsible actors on the international stage, even if they are not technically subjects of international law, should pay careful attention to the UDHR.⁶⁷ Entities like the SSBs, which qualify as 'organs of society' that seek to contribute to the governance of the international financial order, therefore, have a moral responsibility to respect human rights. This includes not undermining efforts by states and other social institutions, such as regulatory authorities, to meet their own human rights obligations and responsibilities.

4.2. The Human Rights Obligations of the SSB Members

Except for FATF, the members of the SSBs are not states. Instead they are representatives of the relevant national financial regulatory authorities or national central banks. Thus, while the members of the SSBs are not themselves signatories of international human rights treaties, they are agencies or instrumentalities of sovereign states that have signed human rights treaties and that are bound by applicable customary international law principles. Consequently, the

it is prudent and in their own interest to observe this responsibility because failure to do so can have adverse reputational and financial consequences, and depending on the law in specific countries, legal consequences. The term is not being used in its technical international legal sense to suggest that the financial sector can be held accountable for an international legal wrong if it fails to respect human rights.

⁶⁴ See generally James Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, 2012); Margot E. Salomon, 'International Economic Governance and Human Rights Accountability', in Margot E. Salomon, Arne Tostensen, Wouter Vandenhoele (eds.), *Castling the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, 2007), 153-84, at 21.

⁶⁵ *Ibid.*

⁶⁶ OHCHR, 'Universal Declaration of Human Rights (UDHR)', entered into force 1948, General Assembly Resolution 217, available at: www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (accessed March 2018).

⁶⁷ Mary A. Glendon, 'Knowing the Universal Declaration of Human Rights', *Notre Dame Law Review*, 1998, 73(5): 1153-90; John Tasioulas, 'Human Rights, Legitimacy, and International Law', *The American Journal of Jurisprudence*, 2013, 58(1): 1-25.

members of the SSBs that are regulatory authorities or central banks⁶⁸ will be bound by the commitments of their home states. This includes protecting, respecting and working to fulfil human rights.⁶⁹ This applies both to their national regulatory work and to their activities in the international arena, which includes their participation in the SSBs. The vast majority of the states whose regulatory authorities participate in the work of the SSBs have signed both the ICCPR and the ICESCR and most have also ratified both covenants.⁷⁰ Thus they are obliged to act in conformity with their principles.⁷¹

Pursuant to Article 2 of the ICESCR, signatory states must use 'maximum available resources' to progressively realize economic social and cultural rights (ESCR).⁷² This article highlights two aspects of the obligations of signatories to the ICESCR. First, it acknowledges that, based on local conditions, not all signatories may be in a position to provide all ESC rights to all their citizens at the time they become parties to the ICESCR. As a result, they are obliged to work 'progressively' towards the goal of full realization of these rights. Second, it stipulates that states must use the 'maximum' and not necessarily 'all' available resources for this purpose. It is important to note, however, that 'maximum available resources' include human, regulatory and supervisory resources, as well as financial resources.⁷³ This means that the national financial sector regulatory authorities that are members of the SSBs are obliged, as agencies and instrumentalities of their states, to use their resources to comply with this obligation. In other words, the SSB members have an obligation to use their capacities and resources to respect and promote human rights.

In addition to those human rights obligations that arise from the commitments of their home states, the SSB members, in their own capacity, also qualify as organs of society. Consequently, like the SSBs themselves, they have a moral responsibility to work for an international order that facilitates the realization of human rights.

The conclusion that follows from the above is that the members of the SSBs have both an obligation and a responsibility to pay attention to the human rights impacts of the international standards which they formulate and adopt in the SSBs. Therefore they are required

⁶⁸ Radhika Balakrishnan argues that central banks have human rights obligations and are subject to the maximum available resources requirement. Balakrishnan and Elson (eds.) (2011), *supra* note 10. Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Lusiani, 'Maximum Available Resources and Human Rights: Analytical Report', (Center for Women's Global Leadership, Rutgers, The State University of New Jersey, 2011), available at: www.cwgl.rutgers.edu/docman/economic-and-social-rights-publications/362-maximumavailableresources-pdf/file (accessed 14 February 2018).

⁶⁹ Shelton (2013), *supra* note 59.

⁷⁰ See, Box 2 for a discussion of signatories of the core human rights treaties.

⁷¹ Those states that have only signed the ICESCR at a minimum should act in conformity with its principles at the international level. Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S. 331, Arts. 26-7.

⁷² ICESCR (1966), *supra* note 39, Art. 2, para.1.

⁷³ At least one UN human rights body has commented that the fulfilment of the responsibility to use 'maximum available resources' includes data collection and disaggregation of data, as well as human rights impact assessment and evaluation. See Committee on the Rights of the Child (2003), General Comment No. 5: General measures of implementation of the Convention, available at: www.unicef.org/rightsite/sowc/pdfs/panels/General%20Comments%20of%20the%20Committee%20on%20the%20Rights%20of%20the%20Child.pdf (accessed March 2018). Also See CESCR General Comment No. 3: The Nature of States Parties' Obligations (1990), available at: www.escr-net.org/resources/general-comment-3 (accessed March 2018). See, Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic Social and Cultural rights: Commentaries, Cases and Materials* (Oxford University press: 2014), at 133-63.

to ensure that the standards will respect, protect and promote the fulfilment of human rights in the regulation of that part of the financial sector subject to their regulatory authority.⁷⁴

In this regard, it is important to note that in many financial systems the regulatory authorities delegate the regulation of financial markets to self-regulatory organizations (SROs). This is the case for example in markets for debt and equity securities in countries as diverse as the USA and South Africa. In these cases, the state and the financial regulatory authorities cannot rely on this delegation of authority to evade their obligation to respect, protect and fulfil the rights of those individuals subject to their jurisdiction and to ensure that maximum available regulatory resources are used to realize ESC right. At a minimum, they must ensure that the SRO to whom they have delegated this authority use it in ways that are consistent with the state's human rights obligations.

4.3. The Human Rights Responsibilities of the Regulated Entities

The financial institutions regulated by the members of the SSBs and pursuant to SSB standards are not themselves signatories to any international human rights treaties and are not subjects of international law. Nevertheless, they are organs of society and therefore have a responsibility to respect human rights. The nature of this responsibility has been elaborated in the UN Guiding Principles on Business and Human Rights (UNGPs).⁷⁵ This responsibility entails putting in place a human rights policy, undertaking human rights due diligence to 'know and show' to stakeholders that they have identified and are managing the human rights risks arising from their own operations and business relationships.⁷⁶ These institutions also have a responsibility, pursuant to Pillar 3 of the UNGPs, to put in place processes to remedy adverse human rights impacts with which they are involved.⁷⁷

In fact, most of the globally significant financial institutions either have formal human rights policies or have made public representations in their publications on their commitment

⁷⁴ There is one important caveat to this conclusion. The home states of the members may have all signed different human rights treaties. Consequently, the specific human rights obligations of the SSB members might vary depending on the identity of their home state. However, while this is an important caveat, it does not undercut the general conclusion that the SSB members have a responsibility to pay due regard to the human rights impacts of the international standards developed by the SSBs.

⁷⁵ See Box 2 above.

⁷⁶ A full elaboration of the human rights responsibilities of business, including financial institutions is beyond the scope of this paper. However, there are a number of international statements that discuss how the UNGPs apply to businesses in general and to the financial sector in particular. See e.g., www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf and <https://mneguidelines.oecd.org/rbc-financial-sector.htm> (accessed March 2018).

⁷⁷ See Letter to the Thun Group of Banks by the Working Group, 27-23 February 2017, available at: www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf and www.banktrack.org/download/letter_from_ohchr_to_banktrack_on_application_of_the_un_guiding_principles_in_the_banking_sector_1/ph_banktrack_response_13_june_2017.pdf (accessed March 2018); see also OHCHR guidance note to BankTrack, 12 June 2017, available at: www.banktrack.org/download/letter_from_ohchr_to_banktrack_on_application_of_the_un_guiding_principles_in_the_banking_sector/banktrack_response_final.pdf (accessed March 2018); see also OHCHR response to the non-governmental organisations SOMO and OECD Watch, 26 April 2013, available at: www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf (accessed March 2018).

to respect human rights.⁷⁸ A few have joined the Thun Group⁷⁹ and have explicitly committed to applying the UNGPs. In addition, some of them have also signed onto voluntary standards that include some human rights elements such as the Equator Principles⁸⁰, the Principles of Responsible Investing⁸¹ and the UN Global Compact.⁸²

The conclusion to be drawn from the above is that the regulated financial institutions have at least a moral responsibility to respect human rights in their operations. The SSBs and their members need to take this responsibility into account as they develop their international standards because they should not, as responsible organs of society, do anything that would undermine the ability of these financial institutions to live up to their own human rights responsibilities. In addition, the members of SSBs as agencies or instrumentalities of states, have a duty, to protect human rights, including through the regulation of financial institutions subject to their jurisdiction.⁸³

5. APPLYING HUMAN RIGHTS TO THE SUBSTANCE OF SSB STANDARDS THROUGH THE LENS OF THE FUNCTIONS OF FINANCE

The discussion above established that the SSBs and their members have either an obligation or responsibility (or both) to respect human rights when formulating international financial regulatory standards. This part focuses on the human rights issues that arise from the substance of the SSB standards. It is divided into two parts. The first section describes the functions of finance. The second discusses, in general terms, the international standards that are applicable to each function and provides examples of human rights issues arising from the substantive provisions of the relevant standards.

⁷⁸ Thirty of the financial institutions that are represented on the Board of Directors of the Institute for International Finance, the leading international banking lobbying group, have human rights policies are: HSBC, Credit Suisse AG, SEB, Akbank T.A.S, Swiss Re Ltd., Itaú Unibanco Holding S/A, Banco de Crédito del Perú, Erste Group Bank AG, Allianz SE, UBS AG, Commerzbank AG, Standard Chartered Bank, Grupo Santander, The Goldman Sachs Group, Inc., Citigroup, Deutsche Bank AG, Zurich Insurance Group, UniCredit Group, Aberdeen Asset Management, BBVA, Morgan Stanley, DBS Group Holdings and & DBS Bank Ltd, ING Group, BNY Mellon, MetLife, Inc., Standard Bank Group Ltd, BNP Paribas, Société Générale, JPMorgan Chase, Scotiabank. The 21 GSIFs that have human rights policy are: HSBC, JP Morgan Chase, Barclays, BNP Paribas, Citigroup, Deutsche Bank AG, Bank of America, Credit Suisse, Goldman Sachs Inc., Morgan Stanley, Unicredit, BNY Mellon, Groupe BPCE, Group Credit Agricole, ING Group, Nordea, Royal Bank of Scotland, Société Générale, Standard Chartered Bank, UBS, Grupo Santander; see discussion of human rights policies of major international banks in Daniel D. Bradlow, 'Can Parallel Lines Ever Meet? The Strange Case of the International Standards on Sovereign Debt and Business and Human Rights', *Yale Journal of International Law*, 2016, 41(2): 201-39; see also, Business and Human Rights Resource Centre, 'Finance and Banking', available at: www.business-humanrights.org/sectors/finance/finance-banking (accessed March 2018).

⁷⁹ UBS, 'Thun Group of Banks', available at: www.ubs.com/global/en/about_ubs/ubs-and-society/how-we-do-business/sustainability/thun-group.html (accessed March 2018).

⁸⁰ Equator Principles, 'Equator Principles, June 2013', available at: http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf (accessed March 2018).

⁸¹ UNEP Principles of Responsible Investing, April 2006, available at: www.unpri.org/about/the-six-principles (accessed March 2018).

⁸² UN Global Compact, 'The Ten Principles of the Global Compact', 31 January 1999, available at: www.unglobalcompact.org/what-is-gc/mission/principles (accessed March 2018).

⁸³ See for example, UN Guiding Principles 8-10, *supra* note 58.

5.1. The Six Functions of Finance

Any financial system must perform the following six functions:⁸⁴

- *Facilitate Savings:* A financial system should offer products that persons or companies can use to safely store the funds that they do not need for present purposes. These products should offer their purchasers the probability of preserving and possibly increasing the real value of their savings over time. This is important because the savers will eventually need the funds to pay for such things as retirement, emergencies, education, buying or building property, buying equipment, making investments, special events, and for purchasing health services.
- *Incentivizing investment in the real economy:* The financial system needs to provide financing to governments, firms and others who may have plans for expanding their operations or for beginning new ventures. It should do so in ways that are the most productive in the sense that the recipients, over time, will most efficiently and effectively generate jobs and produce the goods and services that meet the needs of the individuals, communities and societies that the financial system serves.
- *Promoting liquid, transparent and efficient financial markets:* In many financial systems, firms and the public sector will use financial markets to raise funds for their operations and new projects. They will do so by offering individuals and firms the opportunity to buy tradeable financial instruments either directly or through intermediaries. The markets on which these instruments are sold and traded need to be transparent and efficient so that their purchasers can be confident that they are being treated fairly and can understand the risks that they are assuming when they buy particular financial instruments. The markets should also be liquid so that these individuals and firms can be confident that they can relatively easily access and exit the instruments without unduly influencing their price.
- *Managing risk in the financial system:* It is inherent in the nature of finance that it is a risky business. It is the responsibility of financial supervisors and the management of financial institutions to manage the risks associated with financial activity so that these risks do not become an existential threat to individual financial institutions or to the financial system as a whole and its various stakeholders.
- *Promoting an inclusive financial system:*⁸⁵ The characteristic of an inclusive financial system is that it provides the full range of financial products and services required to meet the needs of all its stakeholders. It should be noted that it is possible for a financial system to perform all the other functions of finance in such

⁸⁴ Mary Dowell-Jones and David Kinley, 'The Monster Under the Bed: Financial Services and the Ruggie Framework', *Sydney Law School Research Paper No. 11/61*, 2011, in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementations* (Brill/Martinus Nijhoff, 2012), 193-216. Martin Čihák, Aslı Demirgüç-Kunt, Erik Feyen, and Ross Levine, 'Benchmarking Financial Systems around the World', *The World Bank Policy Research Working Paper 6175*, 2012, available at: <http://documents.worldbank.org/curated/en/868131468326381955/pdf/wps6175.pdf> (accessed March 2018). See also Ross Levine, 'Finance and Growth: Theory, Mechanisms and Evidence', in Philippe Aghion Steven Durlauf (eds.), *Handbook of Economic Growth* (Elsevier, 2005), 866-934, for a discussion on the functions of the financial system.

⁸⁵ Global Partnership for Financial Inclusion (GPII), 'Financial Inclusion Action Plan 2017', available at: www.gpfi.org/sites/default/files/documents/2017%20G20%20Financial%20Inclusion%20Action%20Plan%20final.pdf. See also www.cgap.org/about/faq/what-financial-inclusion-and-why-it-important. (accessed March 2018)

a way that the financial system only serves the interests of some of its stakeholders. For example, it may only offer savings or investment products that are targeted at individuals who have certain levels of income and wealth or at firms that meet certain risk parameters.

- *Ensuring an effective payment system for economic/financial transactions:* This involves helping individuals, firms and institutions pay for specific transactions by moving funds from their financial accounts to the accounts of their counter-parties.

Financial sector regulators and supervisors are responsible for ensuring that the financial system sustainably performs all the above functions. This requires them, collectively, to monitor:

- individual institutions to establish that they are safe and sound
- markets to make sure that they are transparent, fair and efficient
- both individual institutions and markets to ensure that their consumers are treated fairly and that the consumers' needs are served by the financial sector
- both individual institutions and the system as a whole to ensure that it is inclusive, in the sense that it meets the needs of all the stakeholders in the system
- the system as a whole to ensure its stability

This suggests that those who design and implement the financial sector regulatory framework need to take into account the conduct of the various actors in the financial system, the prudence with which financial institutions operate so that they do not undermine their own safety and soundness, the impact of the individual institutions and their activities on the stability of the financial system as a whole, and how well the institutions they regulate are meeting the needs of individuals and the other stakeholders in the financial system.

5.2. The Application of Human Rights to the Functions of Finance and the SSB Standards

The way in which a particular financial system – whether national, regional or global -- performs each of the functions of finance will help advance or hinder the interests of particular stakeholders in the financial system. This necessarily means that the regulations that shape the structure and operations of the financial system will affect the interests of the individuals who are at the beginning and end of the financial sector value chain. Consequently, these regulations, and the international regulatory standards that may guide them, will inevitably have human rights impacts. Those who develop these standards and regulatory frameworks, therefore, can either explicitly choose to incorporate these human rights impacts into their regulatory design or they can choose, at least implicitly, to leave the locus of these human rights impacts to chance and the operation of the financial system.

In the former case, the SSBs and the regulators will need to assess the likely human rights impacts of particular regulatory choices. This will require them to evaluate how the proposed action affects different sub-groups of stakeholders. They will also need to consider how their proposed standard or regulation can be refined to avoid or mitigate negative impacts and optimize positive ones. If they instead leave the impacts up to chance, the risk is that the identity of the actual winners and losers in the system will be largely a matter of the power dynamics in the system. Given that those with the most resources are best able to deflect any adverse

consequence away from themselves, the most likely result is that the adverse human rights impacts will be imposed on those least able to bear them.

This means that if the human rights impacts of the international financial regulatory standards are not expressly assessed and addressed, the result is likely to be a diminution in any positive human rights impacts and an exacerbation of any negative impacts. To illustrate this point, the next section discusses the international financial regulatory standards applicable to each function of finance and the major human rights issues that arise from that function. In each case, it also discusses at least one specific example of the human rights impacts of a provision of a particular international standard.

Human Rights Issues Common to All Functions

The following four specific human rights are common to all six functions of finance:

- *The right of non-discrimination.* This applies to questions of access to financial services, the range of products that financial institutions offer and their suitability for the needs of their consumers, and to the inclusiveness of the financial system. This principle is set out in the UDHR⁸⁶, the ICCPR⁸⁷ and the ICESCR.⁸⁸
- *The right of access to information.* In order for the financial system to function effectively, the individuals and institutions who are the suppliers and consumers of financial products and services and the regulators who oversee the system all need to be provided with sufficient information to make informed decisions. The individual stakeholders in this system have the human right of access to information. This right is addressed in the UDHR⁸⁹ and the ICCPR.⁹⁰
- *The right to privacy.* Since information plays such a critical role in financial decision making there is a risk that those decision makers in a position to do so will ask for inappropriate information or will mismanage⁹¹ or misuse the information that they receive. The right to privacy protects individuals against this risk. It is addressed in the UDHR⁹² and the ICCPR.⁹³
- *The right to an effective remedy.* This right becomes relevant when other human rights are infringed. In addition, it may be relevant when individuals lose access to the financial system without due process. This can happen for a variety of reasons, including that they are deemed to be undesirable customers by financial institutions, when they are accused of engaging in unlawful conduct in financial markets or of using the financial system for unlawful purposes. The right to an

⁸⁶ UDHR, *supra* note 37, Arts. 1, 2 and 7.

⁸⁷ ICCPR, *supra* note 38, Arts. 2(1) and 26.

⁸⁸ ICESCR (1966), *supra* note 38, Arts. (2)2 and 3.

⁸⁹ UDHR, *supra* note 37, Art. 19.

⁹⁰ ICCPR, *supra* note 38, Art. 19.

⁹¹ The risk of mismanagement of information has become more important as the issue of cyber-security becomes a more significant risk for the financial sector. See for example, Equifax, 'Equifax Cyber-Security Incident Involving Consumer Information', 7 September 2017, available at: www.equifaxsecurity2017.com/2017/09/07/equifax-announces-cybersecurity-incident-involving-consumer-information/ (accessed March 2018).

⁹² UDHR, *supra* note 37, Art. 12.

⁹³ ICCPR, *supra* note 38, Art. 17.

effective remedy is set out in both the UDHR⁹⁴ and the ICCPR⁹⁵ and is so well established that it is generally recognized as a requirement of customary international law.⁹⁶

Since these four human rights issues apply across all six functions of finance, they will only be discussed in detail in relation to Function 1 immediately below. In order to avoid repetition, they will not be addressed in detail in the discussion of the other five functions of finance.

It should also be noted that all the functions of finance will implicate at least some of the rights set out in the ICESCR. However, the specific ESC rights that each function impacts will vary and consequently will be discussed, as appropriate, under each function.

Function 1: Facilitating savings

The international standards that are relevant to this function are the CPB, ICP, OPSR, CPMI and the Recommendations. The CPB, ICP and OPSR influence the regulatory frameworks for the banking, insurance and securities markets segments of the financial system respectively. Thus, they influence the products that the financial institutions active in each of these segments can offer to savers, their conduct in marketing these products, and their management of the funds that they receive from savers.⁹⁷ The CPMI is relevant because normally the settlement of and payment for savings products will be made through the relevant payment system.⁹⁸ Finally, the Recommendations require financial institutions to do due diligence on prospective clients before accepting their savings.⁹⁹

All four of the common human rights issues discussed above apply to the savings function. The question of discrimination can arise if regulatory requirements create disincentives for financial institutions to offer financial products that meet the needs of certain sub-groups of savers. This can happen, for example, when the Recommendations discourage institutions from accepting savings from prospective customers who cannot provide sufficient information to give the financial institution confidence that they have obtained the savings legally. The effect of this standard can be to discriminate against the poor because they may not be able to produce the requisite documents or because the standard increases the cost of the products to the point where either the customers can no longer afford the product or it is no longer profitable for the institutions to offer the product. The same customer due diligence regulation may also incentivize financial institutions to concentrate on providing savings products of most interest to wealthy savers. It is also possible, given the inherent limitations of the customer due diligence process, that the same regulation might result in the financial institutions discriminating, in fact, against certain potential savers on unlawful grounds such as gender, race or religion, because they use such grounds as proxies for information that cannot

⁹⁴ UDHR, *supra* note 37, Art. 8.

⁹⁵ ICCPR, *supra* note 38, Art. 2(3).

⁹⁶ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press: 2015), at 58.

⁹⁷ See generally, *supra* notes 19, 25 and 29.

⁹⁸ CPMI (2013), *supra* note 33.

⁹⁹ FATF (2012), *supra* note 32.

be learned through the due diligence process.

A second human rights issue is access to information. In regard to savings, this issue is primarily a consumer protection issue. In particular, the regulatory authorities will need to ensure that the potential savers who are the intended users of the available savings products are provided sufficiently accurate information both about the relevant financial product and the financial institution offering the products that they are able to make informed decisions about which savings products to purchase. It should be noted that significant numbers of savers, consider that, in order to make an informed decision, they need information about both the financial and non-financial aspects of the savings product and the offering institution. In particular, they may want information about the social and human rights performance of the financial institution and some information about how the institution proposes to use the funds raised through its financial products.

Another human rights issue is privacy. There are two aspects to this. First, if not carefully regulated, financial institutions and regulatory authorities, in the interests of managing risk, may demand information from potential savers that constitutes an unreasonable invasion of their privacy. For example, they may require information on their religion or nationality when these are not clearly related to their suitability as savers in the institution but are seen as proxies for identifying customers that they view as undesirable. Second, the financial institutions, if not appropriately regulated, without proper authorization, may intentionally share the information with other interested parties including their own affiliates. They may also unintentionally share the information with others because they fail to adequately protect the privacy of the information they receive from customers.

The fourth human rights issue is access to effective remedies. This is applicable because, as explained above, the parties whose rights have been adversely affected are entitled to an effective remedy.

The following are two examples of how the current international standards do not adequately account for these human rights issues.

The first relates to the information that companies that sell financial products to savers should provide. OPSR Principle 16 stipulates that companies that issue securities should provide ‘full, accurate, and timely’ information on their financial results and other information that is ‘material’ to the investor’s decision to purchase the securities.¹⁰⁰ Principle 17 stipulates that the holders of these securities should be treated in a ‘fair and equitable manner’.¹⁰¹ The explanations provided by IOSCO in regard to these two principles are closely related. They stipulate that failure to disclose material information that is relevant information that could affect the investor’s decision, is inconsistent with fair treatment. However, neither the Principles nor the explanations clarify what categories of information should be considered material for these purposes.

The Principle’s failure to refer specifically to environmental, social and governance

¹⁰⁰ IOSCO (2017), *supra* note 25, OPSR Principle 16.

¹⁰¹ IOSCO (2017), *supra* note 25, OPSR Principle 17.

(ESG) and human rights considerations is surprising because over the past ten to 15 years there has been a growing recognition of the importance of including ESG and human rights considerations in company disclosures. This is beginning to be reflected in some non-binding international standards and binding national regulations.¹⁰²

IOSCO's failure to explicitly incorporate this development into the OPR, even though they have recently been revised is unfortunate for two reasons. First, it reduces the possibility that its members will adopt such requirements. In addition, it increases the risk that those national regulators who do require such disclosures may conclude that they should change their requirements so that they are not imposing more requirements on their regulated entities that their competitors face. Second, it increases the risk that the regulatory authorities are allowing sellers to provide savers with less than fully accurate information about the savings products they are contemplating purchasing. The reason is that the failure to disclose the social and human rights impacts of the issuing company's activity may cause the seller and possible purchasers of the financial instrument to under-estimate the actual risks linked to it. Not only may this distort the calculations of potential purchasers but it poses a reputational risk to the seller. The potential purchasers of these securities might conclude that because the seller is not providing them with 'full, accurate, and timely' information, they are not receiving 'fair and equitable' treatment.

The second example is drawn from the insurance industry. ICP 19¹⁰³ requires insurance supervisors to ensure that customers are treated fairly. ICP 20¹⁰⁴ stresses that supervisors should require insurers to disclose 'relevant, comprehensive and adequate information' to policyholders so that they can understand the risks to which the insurer is exposed and the way in which it manages this risk. The explanation for Principle 19 stresses that the goals of treating customers fairly include reducing the risk that they are sold inappropriate products, that the privacy of the information customers provide is protected, that the expectation of customers are realistically managed and that they are provided with a means for having complaints resolved.¹⁰⁵ The explanation also exhorts the supervisor to make sure that the insurers take into account the interests of different types of customers in designing the products that they offer.¹⁰⁶ The explanations for Principle 20 expand on the kind of information that supervisors should require insurers to disclose.¹⁰⁷ They make it clear that it should include both qualitative and quantitative information. However, it does not specifically indicate that there should be information on the environmental and social, including human rights, impacts of the products

¹⁰² See for example 'UNEP Principles for Responsible Investment (2006)', available at: www.unpri.org/about-pri/the-six-principles/ (accessed March 2018); UN Guiding Principles on Business and Human Rights (UNGPs), *supra* note 52; UN Global Compact, *supra* note 82, Global Reporting Initiative Standards (GRI Standards), available at: www.globalreporting.org/standards (accessed March 2018); ISO 26000 Guidance to Social Responsibility, 1 November 2010, available at: www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en (accessed March 2018). There have also been some interesting innovations in this regard at the national level see e.g., Modern Slavery Act 2015 (c 30), Dodd-Frank disclosure, new French Law No. 2017-399 (LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre), EU requirements around non-financial reporting on environmental, social and governance risks (EU Directive 2014/95/EU and its implementing legislation).

¹⁰³ ICP, *supra* note 29, Principle 19.

¹⁰⁴ ICP, *supra* note 29, Principle 20

¹⁰⁵ ICP, *supra* note 29, Guidance Principle 19.2.4., at 268.

¹⁰⁶ ICP, *supra* note 29, Guidance Principle 19.3, at 288.

¹⁰⁷ See generally ICP, *supra* note 29, at 306-28.

even though these can be material to the policyholder or investor's decisions. This omission is noteworthy because the ICPs were also recently updated and could have reflected the existing non-binding standards dealing with ESG and human rights disclosures.¹⁰⁸ The gaps in the ICP and its accompanying explanations increases the risk that policyholders may purchase insurance products based on incomplete information.

Function 2: Incentivizing investment in the real economy

The international standards that are relevant to this function are the BCA, CPB, ICP, OPSR and CPMI. The BCA, because it assigns risk weightings to bank assets based on such criteria as the term, creditworthiness and liquidity of the assets, influences how much credit banks provide to particular borrowers, for what purposes, and the form in which the credit is provided.¹⁰⁹ The CPB, OPSR and ICP create the regulatory frameworks that guide the financial institutions that will structure the investment products that will be used to finance investments, and that influence the purposes for which financing is provided, the marketing of these investment products, and the management of the risks associated with these investment products.¹¹⁰ The CPMI is relevant because the funds to be allocated to the investment will be disbursed through a FMI.¹¹¹

The human rights issues that can arise in connection with the investment function can be divided into three categories. The first category are the four common human rights issues discussed above.¹¹²

The second category relates to the way in which the international standards influence how financing is allocated for investment purposes. Article 2 of the ICESCR requires that signatories ensure that the 'maximum available resources' are allocated for the 'progressive realization' of specific economic and social rights.¹¹³ As discussed above, the SSBs in their international regulatory standards have the responsibility to respect this requirement. In addition, those SSBs members that are state agencies or instrumentalities need to comply with their home state's obligations in this regard. This means that the standards should help, and not undermine, the efforts of the signatory states and their agencies and instrumentalities, including regulatory authorities, to meet this obligation. As noted above, the 'maximum available resources' concept includes the human, supervisory and regulatory capacities available to the financial regulatory authorities. This suggests that respect for human rights requires that the SSBs should formulate international standards that encourage national regulatory authorities to make best possible use of their human and financial resources to develop a regulatory framework that promotes progressive realization of ESCR. Such a regulatory framework will incentivize the entities they regulate to allocate the 'maximum available' funding for the construction of the infrastructure and the production of the goods and services needed to

¹⁰⁸ ICP, *supra* note 29.

¹⁰⁹ BIS, 'Basel Committee on Banking Supervision (2011), *supra* note 15.

¹¹⁰ See generally, *supra* notes 19, 25 and 29.

¹¹¹ CPMI (2013), *supra* note 33.

¹¹² As indicated, in the interests of efficiency these issues will only be discussed in detail in relation to the savings function.

¹¹³ ICESCR (1966), *supra* note 39, Art. 2.

progressively realize the human rights to food, water, education, health care, decent employment and social security.

The third category relates to the responsibilities of both the regulatory authorities and SROs when the former delegates its regulatory responsibilities to the latter. The key issue in this regard is ensuring that the delegation does not enable the state to evade its human rights responsibilities under the human rights treaties that it has signed.

The following are examples of how human rights arise and are not adequately addressed under particular provisions of the OPSR.

The first example relates to the regulatory authority's responsibility to ensure that the maximum available resources are allocated to the progressive realization of ESCR. OPSR Principle 36 requires the regulators to monitor the conduct of market actors and to have the powers necessary to effectively identify and investigate possible cases of market manipulation.¹¹⁴ The explanation to the Principle makes clear that these powers are important because market manipulation undermines the integrity and fairness of the market and can result in distortions in the allocation of financing.¹¹⁵ This follows from the fact that manipulations may affect key market prices – for example interest rates¹¹⁶-- and thus send inaccurate signals to market participants who are contemplating raising funds for particular investment products. It will also affect how investors allocate their funds for particular investment purposes, thereby also affecting how much funding is made available and on what basis for the progressive realization of ESCR.

The explanation's acknowledgement of the distorting effects of market manipulation is an implicit acknowledgement that the Principle can have a human rights impact. Unfortunately, the opportunity to mitigate the adverse human rights impacts of market manipulation is lost because the Principle and explanation do not explicitly deal with human rights and other social impacts. The fact that they are silent on this point is noteworthy given that some non-binding international initiatives, such as the UN's Sustainable Stock Exchange Initiative, establish requirements relating to reporting on human rights issues.¹¹⁷

The second example arises from OPSR Principle 9, which deals with SROs.¹¹⁸ It states that SROs that have direct oversight responsibilities should 'observe standards of fairness and confidentiality'. This is an important requirement because if SRO's have the authority to discipline individuals that fail to comply with the applicable regulations, they, like the regulatory authority from whom they received their delegated authority, need to provide a level

¹¹⁴ IOSCO (2017), *supra* note 25, OPSR Principle 36.

¹¹⁵ IOSCO, 'Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities (Methodology of Assessment)', available at: www.iosco.org/library/pubdocs/pdf/IOSCOPD155.pdf (accessed March 2018), at 241-8.

¹¹⁶ Liam Vaughn and Gavin Finch, *The Fix: How Bankers Lied, Cheated and Colluded to Rig the World's Most Important Number* (Bloomberg, 2017). See James MacBride, 'Understanding the Libor Scandal', *Council on Foreign Relations*, 12 October 2016, available at: www.cfr.org/background/understanding-libor-scandal (accessed March 2018).

¹¹⁷ Sustainable Stock Exchanges (SSE) Initiative, 'Model Guidance on Reporting ESG Information to Investors: A Voluntary Tool For Stock Exchanges to Guide Issuers', 2015, available at: www.sseinitiative.org/wp-content/uploads/2017/06/SSE-Model-Guidance-on-Reporting-ESG.pdf (accessed March 2018).

¹¹⁸ IOSCO (2017), *supra* note 25, OPSR Principle 9.

of due process that is consistent with the delegating authority's human rights responsibilities before imposing any sanctions on non-compliant individuals. The explanatory notes to Principle 9 state that the SRO should follow 'similar' professional standards of behaviour to the regulator in regard to matters of confidentiality and procedural fairness.¹¹⁹ However, it does not elaborate on what these standards should be or how much, if any, deviation can take place and still constitute 'similar' standards. The failure to fully resolve this issue creates a risk that SROs may adopt practices and procedures in this regard that fail to fully comply with the requirements of the right to an effective remedy. Given the importance of this right, it would be helpful if the international standards clarified that the SROs must comply with the same standards of procedural fairness in performing their responsibilities in this regard as would be expected of the delegating regulatory authority. Failure to do so may, perhaps unintentionally, signal to SROs that they may provide a procedurally weaker form of effective remedy than human rights law requires or than their delegating authority would provide.

Function 3: Managing risk in the financial system

The international standards that are relevant to this function are the BCA, CPB, ICP, OPSR, CPMI and the Recommendations. The risk weightings of the BCA influence the risk management approaches that banks adopt, including the form and nature of the assets in which they will invest and the identify of those to whom they will extend credit.¹²⁰ The CPB, ICP and OPSR create the regulatory framework that determines the approach that the regulated entities should take in managing the risks to which they are exposed. They also affect the approach that the regulatory authorities take towards supervising the risk management approaches of their regulated entities.¹²¹ The CPMI is relevant because the settlement and payment systems have an impact on particular risks that financial institutions must manage, such as liquidity risk and operational risk.¹²² Finally, the Recommendations address the risk that the services of regulated financial institutions will be used by persons engaging in illegal activities.¹²³

There are three categories of human rights issues that can arise in regard to this financial function. The first category are the four common human rights discussed above – non-discrimination, privacy, access to information and right to an effective remedy. The second are the rights and the responsibilities of non-state actors who are exercising regulatory responsibilities delegated to them by the regulatory authorities. One noteworthy aspect of these rights in regard to risk management relates to the responsibilities of banks that use the internal ratings based approach to risk weighted assets in the BCA. In this case the banks are effectively performing a delegated regulatory function but it is not clear that they have been instructed to exercise this authority consistently with all the human rights responsibilities and obligations of the delegating state regulatory authority.

The third category is the definition of which risks are considered relevant for risk

¹¹⁹ Methodology of Assessment, *supra* note 115, at 56.

¹²⁰ BIS, 'Basel Committee on Banking Supervision (2011), *supra* note 15.

¹²¹ See generally, *supra* notes 19, 25 and 29.

¹²² CPMI (2013), *supra* note 33.

¹²³ FATF (2012), *supra* note 32. FATF Recommendations.

management purposes by the financial regulatory authorities. All the international financial regulatory standards considered in this paper discuss risk issues but none of them make clear whether human rights risks should be considered as potential material risks for regulatory purposes. The failure to explicitly address these risks does not mean that human rights risks do not exist—as indicated above finance and financial regulation always and unavoidably have human rights impacts, some of which will pose reputational, operational or credit risks to financial institutions. There are many examples that demonstrate the relevance of human rights risk to finance.¹²⁴ One recent example is the Dakota Access Pipeline project in North Dakota.¹²⁵ In this case, the failure to adequately address human rights risk contributed to the controversies over the financing of the project. These controversies reached such intensity that some of the banks funding the project decided to withdraw from the project rather than to continue bearing the reputational, operational and credit risks associated with the project.¹²⁶

Financial institutions and their regulators are beginning to recognize that the failure to internalize human rights risk merely means that they have implicitly decided to allow the financial actors that may be contributing to the risk to avoid having to accept responsibility for the risk. Financial institutions themselves have adopted standards, such as the Equator Principles¹²⁷, and formed groups such as the Thun Group¹²⁸ to address at least aspects of this issue. At least one national banking supervisor recognized how human rights risks to individual banks could ultimately pose a macroprudential risk to the country's banking system.¹²⁹ In addition, financial reporting standard setting bodies are beginning to pay more attention to ESG issues in financial and corporate reporting.¹³⁰ Consequently, it is surprising that the SSBs are not beginning to address these issues in their various international financial regulatory standards. In this regard, it is interesting to note that, despite the fact that many of the banks using internal risk weighting models are signatories of the Equator Principles, there is no indication that any of these banks include human rights risks in their internal risk weighting models.

The following are two examples of how human rights arise and are not adequately addressed under the current international financial regulatory standards.

¹²⁴ See e.g. available at: <https://business-humanrights.org/en/sectors/finance> (accessed March 2018).

¹²⁵ See e.g. Banktrack, 'Dakota Access Project', available at: www.banktrack.org/project/dakota_access_pipeline (accessed March 2018).

¹²⁶ See e.g. R. Sullivan, 'Dakota Pipeline Lenders under Pressure to Withdraw', *Financial Times*, 8 May 2017, available at: www.ft.com/content/e3588510-28fe-11e7-bc4b-5528796fe35c?mhq5j=e7 (accessed March 2018).

¹²⁷ Equator Principles, 'Equator Principles, June 2013', *supra* note 80.

¹²⁸ UBS, 'Thun Group of Banks', *supra* note 79.

¹²⁹ In 2015, the Peruvian Superintendent of Banks published a document explaining the benefits of environmental and social due diligence to banks, ranging from enhancing the stability of financial institutions to improving macroprudential stability to enhancing the '[i]nternational variables pertinent to the country such as macroeconomic risk, interest costs, debt capacity and credit terms'. IFC, 'The Role of Enhanced Due Diligence in the Regulation of Socio-environmental Risk Management for Financial Firms', 2015, available at: www.ifc.org/wps/wcm/connect/eb7128804924734980e2d5289542d56e/SBN_Role+of+Enhanced+Due+Diligence.pdf?MOD=AJPERES (accessed March 2018).

¹³⁰ 'Global Reporting Initiative (GRI)', available at: www.globalreporting.org (accessed March 2018). Institute of Directors in Southern Africa, 'King Report on Governance for South Africa 2009 (King III)', available at: http://c.y.mcdn.com/sites/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf (accessed March 2018). 'European Commission – EPSC Strategic Notes', 2017, Financing Sustainability – Triggering Investments for Clean Economy, available at: https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_is_sue_25.pdf (accessed March 2018).

The first example relates to the insurance industry, ICP Principle 8 states that a supervisor must ensure that an insurer has an effective system of risk management.¹³¹ The explanatory notes for this principle state that the system must effectively manage the risks that the insurer faces. However, they do not contain a definition of the scope of risks that are relevant for this purpose. This is noteworthy both for the reasons stated above and because insurers have a longer-term perspective than most actors in the financial system. Consequently, they are exposed to a greater variety and more complex risks than most actors in the financial system. The failure to clarify that the risk management system should include human rights risk, therefore, means that the insurance sector and its regulators are probably under-estimating their true risk exposures and so may not be effectively managing all their material risks. This in turn can have adverse financial and reputational implications for the insurance company, as some private sector insurers are beginning to recognise and address.¹³² For example, consider an insurance company that sold credit default cover to investors in a new building project. However, its standard due diligence did not uncover that the project is on land that belonged to a community that was forcibly evicted prior to the commencement of the project. The community has now begun working with other community organizations to block the project with protests and an international campaign. The insurance company's failure to adequately assess the human rights risks associated with this project would therefore have led it to underestimate the reputational and financial risks associated with the transaction. As a result, it could be forced to make unanticipated payments to the investors for delays in or the failure of the project. It is even conceivable that it may feel compelled to make some payment, possibly even though not contractually obliged to do so, to mitigate its own reputational risk from being associated with the project.

The second example comes from the banking sector. Pillar 3 of the BCBS standards deals with the principles of disclosure that should govern bank reporting to regulators and financial markets.¹³³ This pillar states that disclosures should be clear, comprehensive, meaningful to users, meaningful across banks and consistent across time. These are all relevant and important factors. However, the discussion of risk in the BCA documents focuses on financial considerations such as credit, liquidity, and counterparty risk, and value at risk. Although the documents mention qualitative risk considerations, they do not discuss ESG as a specific risk factor and are silent on human rights risk. This is a noteworthy omission because banks have recognized that ESG and human rights issues pose operational risks in bank funded projects. Moreover many of the major international banks have human rights policies¹³⁴, which presumably means that they recognize that human rights are relevant to their operations. In addition, through such standards as the Equator Principles¹³⁵, banks have recognized that human rights factors are a relevant risk factor for at least some aspects of their operations. These developments suggest that both banks and their regulators should treat human rights impacts as one factor that can create material risks that should be directly addressed in bank disclosure

¹³¹ ICP, *supra* note 29, Principle 8.

¹³² CRO Forum, 'Human Rights and Corporate Insurance', November 2014.

¹³³ BCBS (2017), *supra* note 21.

¹³⁴ Bradlow (2016), *supra* note 78.

¹³⁵ Equator Principles, 'Equator Principles, June 2013', *supra* note 80.

requirements under Pillar 3.

Function 4: Promoting liquid, transparent and efficient financial markets

The international standards that are relevant to this function are the CPB, CDF, ICP, OPSR, and CPMI. The CPB, ICP and OPSR create the regulatory frameworks that determine the approach that the regulated entities should take in their participation in financial markets and that the supervisory authorities should take in supervising the activities of their regulated entities.¹³⁶ The CDF seeks to promote market discipline through regulatory disclosure requirements. The CPMI is implicated because the settlement and payment systems have an impact on the efficiency and liquidity of markets.¹³⁷

There are three categories of human rights issues that can arise in regard to this financial function. The first category are the four common human rights discussed above-- non-discrimination, privacy, access to information and right to an effective remedy. The second category includes the responsibilities of SROs and other non-state actors who are exercising delegated regulatory responsibilities. This issue was discussed in regard to the investment and risk management functions and so will not be repeated in connection with this function.

The third category is the definition of the factors that the SSBs treat as having a material influence on the transparency and efficiency of markets. As has been discussed above, human rights considerations can affect confidence in the integrity and fairness of financial markets. This in turn will influence their efficiency and liquidity. Consequently, one would expect the SSBs to pay some attention to human rights issues in the disclosure requirements in their international financial regulatory standards. However, as shown in the following two examples, these issues are not explicitly addressed in the international standards.

The first example deals with disclosures by banks. The current version of the CDF does not provide guidance on how banks should deal with human rights risks. As discussed above this is surprising because many major international banks have recognized that human rights is relevant to their performance and have human rights policies or public statements on their approach to human rights.¹³⁸ The failure of the BCBS and its members to discuss these risks means that it is failing to provide guidance to the banks, their supervisory authorities and the public about how it thinks banks should handle human rights risks in their disclosure statements and to encourage consistency across regulated entities and supervisory authorities in this regard.

The second example deals with the securities industry. OPSR Principle 16 requires that issuers and market actors make 'full, accurate and timely disclosure of financial results, risk and other information which is material to investors' decisions'.¹³⁹ However, the explanatory material on this principle do not expressly require disclosure of ESG and human rights factors. This is a noteworthy omission because, as noted above, there are a number of jurisdictions that now specifically require disclosure of non-financial information, including some human rights

¹³⁶ See generally, *supra* notes 19, 25 and 29.

¹³⁷ CPMI (2013), *supra* note 33.

¹³⁸ Bradlow (2016), *supra* note 78.

¹³⁹ IOSCO (2017), *supra* note 25, OPSR Principle 16.

issues.¹⁴⁰ In fact, accurate and meaningful disclosure of this non-financial information is emerging as best practice.

Function 5: Promoting an inclusive financial system

The international standards that are relevant to this function are the BCA, CPB, ICP, OPSR, and the Recommendations. The BCA's risk weightings influence the range of parties to whom the banks will extend credit, thereby affecting the inclusiveness of their lending services.¹⁴¹ The approach that the BCP, ICP, and OPSR take to such issues as risk management and market conduct affect the cost of the services that their regulated entities can offer to particular groups of customers. Finally, the customer due diligence requirements set out in the Recommendations affect both the price of the services and products that financial institutions offer their customers and the costs to the institutions of mistakes in the customer due diligence process.¹⁴² Both of these concerns influence access to financial services.

The human rights issues connected with this function can be divided into two categories. The first category are the human rights of non-discrimination, access to information, respect for privacy, and right of access to an effective remedy described above. One noteworthy aspect of the right to privacy in regard to financial inclusion is that some techniques used to promote financial inclusion run the risk of violating some of their customers' right to privacy. For example, at least one study has found that the enforcement of Grameen Bank's microcredit agreements relies on some invasion of their customers' rights to privacy.¹⁴³ The use of cross-guarantees and community meetings to enforce loan agreements can not only result in exposing the private affairs of an individual borrower but can indicate to the whole community that the particular group cross-guaranteeing the loan includes a problem debtor, thereby causing adverse reputational consequences for all the group members.

The second category of rights deals with access to the financial system. In this regard, the most relevant consideration is the requirement of Article 2 of the ICESCR that signatories must allocate the 'maximum available resources' for the progressive realization of specific economic and social rights.¹⁴⁴ This provision, which is an obligation of the state and its regulatory authorities and a responsibility of the SSB and the regulated entities, should have an impact on the quantity of financial resources available to governments to use in providing their citizens with access to the food, water, education, health care, decent employment and social security that are their rights as human beings. It also should have an impact on how the SSBs and their members create the incentives and disincentives for regulated entities to facilitate individual's access to the financial services needed to help procure these items for their families

¹⁴⁰ See UK Modern Slavery Act and GRI, *supra* 102. See also Institute of Directors Southern Africa, 'King IV Report on Governance for South Africa, 2016', available at: https://c.yimcdn.com/sites/iodsa.site-ym.com/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf (accessed March 2018).

¹⁴¹ BIS, 'Basel Committee on Banking Supervision (2011), *supra* note 15.

¹⁴² FATF (2012), *supra* note 32. FATF Recommendations.

¹⁴³ Rashmi Dyal-Chand, 'Human Worth as Collateral', *Northeastern University School of Law Research*, Paper No. 09-2006, 2006.

¹⁴⁴ ICESCR (1966), *supra* note 39, Art. 2.

and themselves.

One example of how the international standards raise human rights issues that have implications for financial inclusion is the risk weightings used in the BCA.¹⁴⁵ These weightings tend to favour more liquid and short-term assets. Conversely, credits that are less liquid and longer in tenor but that are more suitable for poorer individuals and small and medium size enterprises receive a higher risk weight and become more expensive. This bias has an adverse impact on both financial inclusion and on the regulatory authority's contributions to the realization of ESCR.¹⁴⁶

In this regard, it is relevant to note that there may be a mismatch between the time horizon over which human rights risk and reward factors may manifest themselves and financial risk calculations. Many human rights risks require a longer-term and broader perspective than is usually adopted in regard to financial risks.¹⁴⁷ For example, it may only be possible to accurately assess all the human rights consequences of a particular project or business merger over an extended period of time.¹⁴⁸ On the other hand, the financial costs and benefits of these transactions can be assessed within a relatively well defined time period and, using discounting techniques, with reasonable confidence. This difference in perspective is not easily accommodated in the current version of the BCA. This suggests that there is a need for some adjustments in either the risk weightings or in the way in which they are applied to those entities that focus on expanding financial inclusion. The BCBS is aware of this and is considering how to apply their standards in a more proportional manner.¹⁴⁹

It should be noted that similar issues of mismatched time horizons arise in regard to climate change. The BCBS has done more work on how to incorporate climate change risks into its risk weightings.¹⁵⁰ The way in which the BCBS deals with climate change may help the SSBs understand how they can address human rights concerns most effectively.¹⁵¹

¹⁴⁵ BIS, 'Basel Committee on Banking Supervision' (2011), *supra* note 15.

¹⁴⁶ Similar issues arise in regard to sustainable finance more generally. See e.g. EU High Level Panel on Sustainable Finance First Report, at 15-6; 'Policy frameworks and market behaviour continue to favour a focus on liquid assets, short-term financial returns and instruments, as well low yielding debt in times of low interest rates. By contrast, investment and lending in infrastructure (equity and debt), small-cap indices, SMEs, securitisation, private equity and real assets is more limited. Yet these assets are often the most critical for the transition to sustainable development... The financial system and policy framework is focused on securing risk-adjusted returns, but the understanding of value often remains constrained to conventional elements rather than considering powerful intangible factors, including the ESG dimensions of performance and impact. Yet these factors are real and increasingly impinge on the financial risks facing individual assets as well as the system as a whole.'

¹⁴⁷ It should be noted that some human rights risks, such as breaches of privacy, may manifest themselves relatively quickly.

¹⁴⁸ Sergio Copiello, 'A Discounted Cash Flow Variant to Detect the Optimal Amount of Additional Burdens in Public-Private Partnership Transactions', *MethodsX*, 2016, 3: 195-204 (Elsevier, 2016), available at: <https://doi.org/10.1016/j.mex.2016.03.003> (accessed March 2018).

¹⁴⁹ Ana Paula Castro Carvalho, Stefan Hohl, Roland Raskopf and Sabrina Ruhnu, 'Proportionality in Banking Regulation: a Cross-Country Comparison', 2017, *BIS Financial Stability Institute*, FSI Insights on Policy Implementation No. 1, available at: www.bis.org/fsi/publ/insights1.pdf (accessed March 2018). It should be noted that some regulators have cautioned that the proportionality principle should not be applied consistently with prudential considerations in financial regulation. Restoy (2017), *supra* note 60.

¹⁵⁰ See e.g. University of Cambridge Institute for Sustainability Leadership (2014), 'Stability and Sustainability in Banking Reform – Are Environmental Risks Missing in Basel III?', available at: www.unepfi.org/fileadmin/documents/StabilitySustainability.pdf (accessed March 2018).

¹⁵¹ BIS Remarks by Mr Luiz Awazu Pereira da Silva on 13 July 2017, 'Green Finance: Can It Help Combat Climate Change?', available at: www.bis.org/speeches/sp170713.pdf (accessed March 2018).

Another mismatch can be found between the international regulatory standards' attention to the size of the institution (in terms of assets, operations and volumes of transactions) and its systemic importance, and the relative lack of attention to the number of clients served by an institution. Institutions serving poorer communities can have large number of customers, which makes them extremely important for the welfare of some communities even though they are small institutions in terms of assets and other financial indicators. The social, human rights and political consequences of the failure of such a bank can be profound, even if its economic and financial consequences may be relatively small. This suggests that the application of international standards to smaller institutions requires discretion and care. The SSBs should also pay more attention to international soft law standards like the Principles on Responsible Investing, those proposed by the Alliance for Financial Inclusion, and the Global Reporting Initiative in developing standards and explanations applicable to this situation. It also suggests that there is a need for the SSBs to provide more guidance on the meaning of the principle of proportionality in the implementation of the international financial regulatory standards.¹⁵² The work of the FATF in regard to proportionality is potentially an important step.¹⁵³

Function 6: Ensuring an efficient payment system for economic transactions

The international standard that is directly applicable to this function is the PFMI.¹⁵⁴ It provides principles to guide central banks and market regulators in developing or supervising safe and efficient payment systems that serve the interests of all participants in the financial system.

While all four of the common human rights issues described above are applicable to the PFMI, the most relevant human rights principle in regard to this function is the prohibition against discrimination. In inclusive systems, all interested people and firms should have access to the payment system, either directly or through one of its participants, so that they are able to execute payments for their transactions at a reasonable price and level of efficiency. They should only be excluded from the payment system when they are shown, through appropriate due process, to be doing something that undermines the integrity, efficiency and operations of the payment system.

The international standard also should protect against the payment system being used to

¹⁵² National regulators and supervisors struggle with how to concretize and implement proportionality in domestic financial regulations, fearing that easing requirements for smaller financial institutions would result in the country falling out of compliance with the relevant SSB standards, or the country receiving poor assessment by the organizations with supervisory functions for international financial standards, such as the World Bank and IMF. The five-country survey and recommendations of the Global Partnership for Financial Inclusion on the effects of various international standards on financial inclusion illustrates the predicaments of national regulators. See GPFI, Global Partnership for Financial Inclusion 2011: 'Global Standard Setting Bodies and Financial Inclusion – Insights and lessons from five countries: Brazil, Kenya, Mexico, the Philippines and South Africa', available at: https://cenfri.org/wp-content/uploads/2011/10/Global-standard-setting-bodies-and-financial-inclusion-report_GPFI_2011.pdf (accessed March 2018).

¹⁵³ G20 Financial Inclusion Experts Group – ATISG Report (2010), *Principles for Innovative Financial Inclusion from the Access through Innovation Sub-Group of the G20 Financial Inclusion Experts Group FATF*, available at: www.gpfi.org/sites/default/files/documents/Principles%20and%20Report%20on%20Innovative%20Financial%20Inclusion_0.pdf (accessed March 2018). 'The proportionality criteria allow countries to apply a risk-based approach allowing, for example, the application of reduced or simplified customer due diligence (CDD) measures for certain lower-risk products or even, in justified cases, for an exemption from CDD measures', see FATF Guidance for Risk Based Approach for Prepaid Cards, Mobile payments and Internet based Payment Services (2013), available at: www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-RBA-NPPS.pdf (accessed March 2018).

¹⁵⁴ CPMI (2012), *supra* notes 31 and 35.

facilitate unduly risky or illegal activity. This is harder to implement than to state because of the number of transactions passing through any payment system and the way in which transactions are aggregated in the payment system. Consequently, the regulatory authorities need to strike a balance between requiring adequate information to identify risky or illegal activity and the individuals engaging in it and demanding so much information that compliance with the regulations becomes unduly invasive, burdensome and expensive. If the balance is incorrect there is a risk that the safety and efficiency of the system can be undermined either because it is abused by some users or because using it becomes too costly.

An example of the importance of the PFMI dealing with the right to non-discrimination is Principle 18 which sets out the requirement that there should be fair and open access to the financial market infrastructure.¹⁵⁵ The Principle does not however clarify which criteria should be considered in determining if access is 'fair'. The explanatory notes refer to 'reasonable risk-related requirements'¹⁵⁶ for participating in the FMI but does not explain what requirements are 'reasonable'. Moreover, the general discussion of risks in the PFMI only mentions risks related to the safety, efficiency and stability of the FMI, such as legal risk, systemic risk, credit risk, liquidity risk, general business risk and operational risk.¹⁵⁷ While these are important and relevant considerations, they do not deal with all the relevant factors. In particular, it leaves open the possibility that the FMI's management of these risks could be discriminatory in impact, perhaps unintentionally. In an age in which the financial system is being used to impose sanctions on individuals and entities deemed to be engaging in unacceptable activity, this risk is not insignificant.¹⁵⁸

This risk also highlights the importance of the right to an effective remedy. If the FMI excludes people unfairly or without any reasonable process, they need to be able to exercise their right to an effective remedy. This is particularly relevant in the context of the PFMI, because efficiency and effectiveness can often require the FMI to exclude parties engaging in illegal or risky activity without any *ex ante* process. The PFMI should therefore require that those unfairly excluded should be granted access to an effective remedy. The failure of the PFMI to expressly state this as a requirement can lead their members and the regulated FMI's to fail to take this matter into account in their implementation of the PFMI.

Since financial market infrastructures play such critical roles in all financial systems, their management can have profound effects on how effective they are in supporting or undermining the contribution of the financial system to the progressive realization of human rights. The SSB and its members therefore have a responsibility to ensure that the governance of financial market infrastructures at least meet their obligations to respect human rights. Unfortunately, it is not always clear that the CPMI is meeting this responsibility. PFMI Principle 2 states: 'An FMI should have governance arrangements that ... support the stability of the broader financial system, other relevant public interest considerations, and the objectives

¹⁵⁵ CPMI (2012), *supra* note 35, PFMI Principle 18.

¹⁵⁶ CPMI (2012), *supra* note 35, para. 3.18.1, at 101.

¹⁵⁷ CPMI (2012), *supra* note 35, PFMI Section 2, at 18-20.

¹⁵⁸ See e.g. *Kadi (Yassin Abdullah) and Al Barakaat International Foundation v. Council and the commission*, joined cases C-402/05 and C-415/05 P [2008] ECR I-6351.

of relevant stakeholders.’¹⁵⁹ This appears to be applicable to both the structuring of the FMI’s governance and the selection of the individuals who work in these structures. The principle refers to the need to take the public interest into account in these governance arrangements. However, neither the principle nor its accompanying explanatory note clarifies what is included in the definition of the public interest for this purpose. The explanatory note indicates that the FMI should ‘place a high priority on the safety and efficiency of its operations and explicitly support financial stability and other relevant public interests’ but does not clarify what is meant by ‘other relevant public interests’.¹⁶⁰ Some indication of what might be meant by this phrase can be deduced from the explanatory list of the criteria that should be used in selecting the members of the board of directors of the FMI. They include their independence, skills, experience and knowledge of FMIs.¹⁶¹ While these are all important and relevant criteria, there is no suggestion that the criteria should include an ability to understand the broader societal and human rights implications of FMI activity. Without more specific direction to members about what the public interest entails, it is unlikely that factors such as these will be taken into consideration.

An example of a situation that could have a negative human rights impact under these standards is if the FMI decides to exclude certain foreign financial institutions from participation because it is not confident that they are being effectively regulated by their home country regulators. As a result, the cost of clearing or settling transactions increases for all the customers of the excluded institutions even though many of them may not have done anything wrong. In the extreme if there are no other FMIs available to the excluded financial institutions, the result could be that all the citizens of a particular country could be excluded from accessing the FMI.¹⁶²

This unfortunate outcome could be avoided, or at least mitigated, if the CPMI clarified that the ‘public interest’ included the social and human rights impacts of the FMI’s activities. One way to do this might be to require greater diversity and broader representation of all stakeholders in the governance of the FMIs. Failure to do so increases the risk that the interests of some stakeholders, such as institutions serving the poor or small businesses, receive inadequate attention in the governance of the FMIs. This could result in them being effectively excluded from the payment system because it is too expensive or onerous for them to meet the conditions for participation in the system.

6. REFLECTIONS AND SUGGESTIONS

The preceding parts sought to illustrate the multiple points of intersection between human rights

¹⁵⁹ CPMI (2012), *supra* note 35, PFMI Principle 2.

¹⁶⁰ CPMI (2012), *supra* note 35, PFMI Paragraph 3.2.2, at 27.

¹⁶¹ CPMI (2012), *supra* note 35, PFMI Paragraph 3.2.10, at 29.

¹⁶² IMF, ‘Recent Trends in Correspondent Banking Relationships – Further Considerations’, 16 March 2017, available at: www.imf.org/~media/Files/Publications/PP/031617.ashx (accessed March 2018). Samuel M. Maimbo (ed.), ‘Remittances and Economic Development in Somalia’, *The World Bank, Social Development Papers: Conflict Prevention and Reconstruction (CPR)*, Paper No. 38, November 2006, available at: http://siteresources.worldbank.org/INTCPR/Resources/WP38_web.pdf (accessed March 2018).

and international financial standards. This part summarizes the findings of this study, and reflects on lessons that can be drawn from the analysis. It concludes by noting possible actions to be considered by the SSBs as well as making suggestions on some future areas of research.

6.1. Findings of the Study

The following three key findings can be drawn from the above analysis.

6.1.1. Human rights responsibilities of SSBs and their members

The SSBs do not have human rights obligations because they are not subjects of international law. Consequently, they cannot be signatories to any human rights conventions and are not bound by customary international law. Nevertheless, they have their own independent human rights responsibilities, based on such documents as the UDHR, and these responsibilities extend to the contents of their international standards. The SSBs' human rights responsibilities include not undermining the human rights obligations of their members or the ability of the entities that their members regulate to meet their own human rights responsibilities. They also include promoting respect for human rights.

The members of SSBs that are agencies or instrumentalities of sovereign states – central banks and regulatory and supervisory authorities - have human rights obligations. These obligations are derived from the obligations of their home states, which are bound by the various international human rights treaties that they have signed and ratified and by the applicable customary international law principles. Consequently, the members of the SSBs are obliged to protect, respect and work to fulfil the human rights obligations of their home states, and they are required to use 'maximum available resources' to progressively realize ESCR. These obligations apply both to their national regulatory work and to their activities in the international arena, which include their participation in the SSBs. It is important to note that the regulatory agencies cannot evade their obligations by delegating their authority to SROs. The SROs which are delegated this authority must exercise their authority in conformity with the obligations of the SSB members.

Finally, the financial institutions that are regulated by the members of the SSBs have human rights responsibilities, derived from such non-binding international instruments as the UNGPs. These principles state that businesses have a responsibility to respect human rights.

6.1.2. Human rights impacts of international financial standards

In Part 5, this study discussed the human rights implications of each function of finance and how they apply to the selected international financial regulatory standards. It helps demonstrate one of the key lessons of this paper, namely that international finance and financial regulations cannot avoid having human rights implications. This follows inevitably from the fact that finance is ultimately about serving individuals and creating wealthier, more inclusive and robust societies. The issue confronting the SSBs and their members, therefore, is not whether or not to take human rights impacts into account in their formulation of their international standards but how to take these impacts into account. They can do this explicitly and optimize the way the impacts are managed or they can do it implicitly and leave the consequences of the

impacts to chance and the capacity of the various stakeholders to manage these impacts. This issue is discussed further below.

6.1.3. Human rights approach to international financial regulatory framework

Historically, financial regulation has concentrated on the safety, soundness, transparency, efficiency and fairness of individual financial institutions, markets and the financial system. Regulators and supervisors have also paid attention to the conduct of institutions and markets. These are all important and necessary factors for financial regulatory frameworks. There is no question that failure to either consider these issues or to monitor them closely would in and of itself have negative human rights consequences. However, they are not sufficient.

As discussed above, the human rights impacts of the activities of particular financial institutions can cause reputational, operational and financial risks for these institutions and, potentially, those with whom they interact. In extreme cases, these risks can affect the entire financial system.¹⁶³ The SSB standards seem particularly blind to the risks posed to human beings at the start and end points of the financial sector value chain. This is a significant deficiency in the case of poor and marginalized individuals because they have the least capacity to manage any adverse human rights impacts caused by financial institutions and the regulatory authorities. The failure to adequately account for them and their interests in financial sector regulatory standards can result in their exclusion from the financial system.

6.2. Lesson from the Study: Value Addition of Incorporating Human Rights Considerations into Financial Standards

6.2.1. The human rights value proposition

As discussed above, a human rights approach can make transparent hidden costs of international financial regulatory standards. In this sense, it is contributing to a more accurate assessment of the true costs and benefits of proposed standards. Nevertheless, it cannot be denied that such an approach, merely by adding additional tasks to the standard-making process, will increase the costs of making and implementing international regulatory standards. This will lead many to demand a more explicit description of the value that human rights considerations add to financial regulation and supervision. They will also question whether the benefits outweigh the costs.

The Benefits of a Human Rights Approach

Human rights can add value to international financial standard setting in a number of different ways.

- First, as indicated, a human rights approach should facilitate developing a disaggregated understanding of the positive and negative human rights impacts of any standard on the different groups of stakeholders in the standard. This helps mitigate the risk of the standard having unintended adverse consequences. It also enables the SSBs to determine how they can avoid or mitigate the negative impacts

¹⁶³ See e.g. Peruvian Case, *supra* note 129.

and optimize the positive impacts, thereby improving the quality of the standard.

- Second, a human rights perspective can also improve the capacity of the SSBs to comprehensively assess the risks to the safety and soundness of individual financial institutions, the fairness and efficiency of markets and to contribute to the stability of the financial system. This follows from the fact that a human rights approach by making transparent the impacts of proposed standards on individual savers, investors and consumers of financial services will make it easier for the SSBs and their members to understand the likely response of the various stakeholders to the proposed standards. This will enable them to adjust the standards to optimize its impact. It will also enable them to better assess how well the financial system is performing all its functions and the sustainability and stability of the system.
- Third, a human rights approach should allow all affected stakeholders to better understand the potential impacts on them of the proposed standard. This can help promote greater engagement and exchange of views about the content of the standards, thereby ensuring that the standards are as responsive as possible to the needs of the SSB members, the regulated entities and their customers. This increased engagement may also provide the SSBs with new information that makes it easier for them to identify and address any unintended consequences of the proposed standard.
- Fourth, if the SSBs and their members have a good understanding of the human rights impacts of their proposals, they will be able to identify the potential linkages between what they are proposing and the responsibilities of other governmental agencies. The potential impact can be communicated to other parts of the government that can consider introducing regulatory measures to mitigate their negative impacts or optimize their potential positive effects. The human rights approach thus helps government agencies communicate and coordinate when there is otherwise little incentive for them to do so. For example, once the FATF recognized that its know-your-customer recommendations were making it easier for banks to identify potential customers engaged in human trafficking, it could begin working with law enforcement agencies to reduce the exposure to human trafficking within the communities in which their regulated entities operate.
- Fifth, in order to conduct an effective human rights analysis, the SSBs will need to be more transparent and more open to participation by all stakeholders. This in turn should increase confidence that the international standards are responsive to all stakeholders in the financial value chain. It should also enhance their legitimacy and credibility, thereby making the standards more robust.

The Costs of the Human Rights Approach

It is clear that the cost of developing international financial regulatory standards will increase if the SSBs begin to incorporate a human rights approach into the formulation of their standards. This is a consequence of the SSBs undertaking a human rights risk assessment for each proposed standard. Its members will need to undertake similar national assessments, thereby adding to the cost of adapting their national regulatory frameworks to changes in the

international standards. Furthermore, the costs of monitoring and evaluating the implementation and effectiveness of the standards, including collection and analysis of disaggregated data, will rise.

The additional costs are not just financial. Incorporating a human rights approach into financial regulation and supervision will create additional tasks for the regulatory and supervisory authorities. The additional human rights related tasks could potentially compromise their independence. This follows from the fact that their human rights impact assessment and collection of disaggregated data will reveal the potentially negative consequences of proposed standards and which groups are most likely to be adversely affected by the standard. Given that these human rights impacts are hard to quantify, the regulators and supervisors will need to exercise some discretion in deciding how to manage these impacts. The way in which they exercise their discretion may subject them to increased scrutiny and political pressure, possibly leading to calls for them to be subjected to more oversight and to having less independence.

The Benefits Outweigh the Costs

This study posits that the positive effects of the human rights approach outweigh the negative. As indicated above, the negative human rights impacts will occur regardless of whether financial regulatory standards account for them. This means that the SSBs, their members and their regulated entities are incorrectly calculating the costs and benefits of their actions if they ignore these impacts. This leads to distortions in the allocation of finance and imposes opportunity costs, measured in economic, financial, and human rights terms, on society.

Making the human rights costs more transparent will help reduce these distortions and costs. This, in turn, will have beneficial effects on the safety of financial institutions, the efficiency of financial markets and the stability of the financial system. It will also have a positive effect on the allocation of financial resources and on financial inclusion, thereby helping ensure that the financial system helps make societies wealthier and contributes to their resilience, stability and the degree of equality in a society.

It is also important to note that there are precedents for expanding financial sector rulemaking to include non-financial factors. This has been done in regard to promoting financial inclusion in financial systems across all continents.¹⁶⁴ The Financial Stability Board has also encouraged the SSBs to reflect on their specific roles and responsibilities in relation to climate change. While these are both welcome developments, they should not be viewed as obviating the need for a human rights approach to financial regulation.¹⁶⁵ Such an analysis, for example, may not fully capture the impact of the Basel standards on the ICESCR requirement for states and their agencies to allocate maximum available resources to the progressive realization of ESCR. This information can only be garnered from an explicit human rights analysis.

¹⁶⁴ For example, G20 has embraced the importance of financial inclusion at the Seoul Summit in 2010. GPF, 'G20 Financial Inclusion Action Plan 2014', available at: www.gpfi.org/sites/default/files/documents/2014_g20_financial_inclusion_action_plan.pdf (accessed March 2018).

¹⁶⁵ University of Cambridge Institute for Sustainability Leadership (2014), *supra* note 150. This study indicates that, while a climate analysis would improve Basel III, it would not capture all the potential human rights impacts of the Basel capital standards.

Similarly, while close attention to financial inclusion will address some human rights issues, it does not address all of them. In particular, it may not deal with the possibility that the techniques used to promote financial inclusion can also create violations of human rights, such as lack of privacy, extreme indebtedness, discrimination, and marginalization.¹⁶⁶ While these impacts are no doubt unintended, they can be identified and mitigated most effectively through a human rights analysis.

6.3. Are there Unintended Consequences for Human Rights?

This study has argued that incorporating a human rights analysis into financial regulation will add value to financial regulation, even though it will impose some costs. In this section, we explore the risks to human rights from being incorporated into the formulation of international financial regulatory frameworks and standards.

Human rights are universal and inalienable; indivisible; interdependent and interrelated. Among other things, this means that all human rights have equal status, and cannot be placed in a hierarchical order. This human rights principle can be difficult to reconcile with the prioritization process and practical trade-offs that financial regulatory agencies and financial institutions, like all government agencies and businesses, make every day.

The international human rights framework is not insensitive to the need for regulators, policy makers and project implementers to set priorities and make trade-offs. The stipulation in Article 2 of the ICESCR that states must utilize 'maximum available resources' to progressively realize ESC rights is an implicit acknowledgement of this reality. It indicates to signatory states and their agencies and instrumentalities that setting priorities and making trade-offs must be guided by the drive to progressively realize ESC rights. However, it does not provide signatories with clear guidance on how to implement this obligation or on how to compare impacts on particular human rights in the course of making trade-offs. For example, the principles do not provide guidance on how governments should allocate scarce resources between investments in health and in promoting growth and jobs or between developing water infrastructure and education.

Human rights law, both at the national¹⁶⁷ and international level¹⁶⁸ has developed some jurisprudence on how these decisions should be made. However, the jurisprudence is limited and leaves many relevant issues unaddressed. This suggests that there is a risk that having the SSBs and their members incorporating human rights into their standard-making procedures will require them to address human rights questions of first impression. Their decisions could,

¹⁶⁶ See e.g. Dyal-Chand (2006), *supra* note 143.

¹⁶⁷ See e.g. *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC). Right of access to medicine in Brazil, see Acórdão. RE 271286 AgR/RS. Agravo Regimental no Recurso Extraordinário. Relator: Celso de Mello (Supremo Tribunal Federal, Diário da Justiça Eletrônico, RE 271286 AgR/RS, November 24, 2000), available at: www.stf.jus.br/portal/diarioJustica/verDiarioProcesso.asp?numDj=226&dataPublicacaoDj=24/11/2000&incidente=3542020&codCapitulo=5&numMateria=37&codMateria=3; in J Amon & J Biehl, 'Between the Court and the Clinic: Lawsuits for Medicines and the Right', available at: www.princeton.edu/system/files/research/documents/biehl_between_the_court_and_the_clinic.pdf (accessed March 2018). Supreme Court of India, *Novartis AG v. Union of India & Others*, Civil Appeal No. 2706-2716 of 1 April 2013, available at: <https://indiankanoon.org/doc/165776436/> (accessed March 2018).

¹⁶⁸ See e.g. CESCR, General Comments of UN Committee on Rights of Child, *supra* note 73.

therefore, establish precedents which could shape the human rights jurisprudence in regard to these prioritization and trade off questions. It is not clear that human rights will be well served by having these precedents set by financial regulators rather than human rights experts.

It is our contention that this risk is an acceptable one. The reason is that human rights prioritization and trade-offs require consideration of technical financial and ESG factors as well as human rights factors. Consequently, good decision making in this area requires the participation of a range of experts and stakeholders. The protection against non-compliant human rights decisions lies in the process of decision making and its compliance with principles of transparency, participation, non-discrimination and effective remedy. As long as these procedural principles are followed, the risk to human rights of having financial regulators make decisions with human rights implications can be kept at acceptable levels.

Moreover, the financial system is constantly evolving. The SSBs have no choice but to develop international standards in response to the evolution of the financial system. As noted, these standards will have human rights consequences regardless of whether or not financial regulatory standards account for them. Such costs are particularly high when they fall on those who cannot easily bear them. Consequently, it is preferable that the SSBs incorporate a human rights approach into their standard making process so that they account for all the consequences of their proposed standards. This not only makes the costs and benefits of the proposed standard more transparent but also increases the capacity of the SSBs and their members to ensure that the standards do not impose disproportionate burdens on some of the more vulnerable stakeholders.

Another benefit for society of incorporating a human rights analysis into the work of the SSBs is that it will facilitate the process of incorporating an international human rights approach more generally into economic and financial decision making. The precedent that the SSBs set should encourage other decision makers to embed human rights considerations in the economic and financial system. From this perspective, human rights could also have something to gain from interfacing with SSBs and the financial standards.

6.4. Suggestions on the Way Forward

This section makes some suggestions to stimulate a broader debate on the topic of international financial standards and human rights. It also suggests further research topics to be considered by the academic community.

6.4.1. Transparency

The financial markets are making slow but steady progress toward more disclosure for the benefit of broader audiences and more diverse groups of users of disclosed information. Many SSB standards already set out transparency principles, and the scope of disclosure is gradually expanding with each revision of the standards. Yet, the SSBs and the international standards considered in this paper continue to promote disclosure that is focused on supervisors and market participants in order to bring efficiency and stability in the financial markets. They do not yet require disclosures that take account of these broader shifts in demand for information.

Take Basel Pillar 3 as an example. It does not encourage disclosure of certain qualitative or non-financial information, such as environmental and social risks or human rights risks, that may be relevant and material to stakeholders in the financial system. This is surprising because, as indicated above¹⁶⁹, the financial community and its various stakeholders have developed a number of international non-binding standards dealing with the treatment of such information, thereby indicating an acknowledgment of the relevance of this information to finance.

It would be helpful if the BCBS and the other SSBs utilized these standards in promoting greater transparency in their own standards. This would help SSBs better serve the informational needs of all participants in the financial value chain. Such disclosures could have the added benefit of imposing greater discipline on financial institutions, thereby contributing to more safe and sound financial institutions.

6.4.2. Regulatory impact assessments

The SSBs should utilize impact assessments that include assessments of human rights impacts for all their proposed regulatory standards. These studies would reveal the impact of their proposed regulatory decisions on the human rights of all their stakeholders. These assessments should also consider whether possible negative impacts on particular vulnerable groups could be avoided or mitigated. This approach can be useful not only at the outset of the standard setting or rule making process (*ex ante*), but also when SSBs and regulators assess whether the existing regulations are having the intended effect or not (*ex post*). It could also help promote a healthy dialogue among stakeholder groups, including the financial regulatory and the human rights communities, on the merits of proposed standards or regulations.

There are precedents of regulatory authorities, including the SSBs, conducting impact assessments of new regulatory requirements. The BSBC conducted a comprehensive quantitative impact study (QIS) based on data collected by national banking supervisors to ascertain the impact of its new Basel III requirements. However, this was limited to the numerical aspects of the capital adequacy rules, and did not look at the broader impacts of Basel III on society. In addition, regulatory authorities in New Zealand and South Africa conducted regulatory impact assessments of proposed national financial regulatory and statutory reforms.¹⁷⁰

¹⁶⁹ BCBS (2017), *supra* note 21.

¹⁷⁰ A few countries managed to carry out regulatory impact assessment of Basel III. For example, New Zealand's Central Bank conducted a Regulatory Impact Assessment of Basel III, and used the process to justify the proposed deviation from Basel III based on specific national circumstances. It did note the possibility that 'bank lending rates may increase in the short-term as banks seek to maintain their return on capital' but it 'assumed this effect will be temporary (i.e. it will reduce to zero after 10 years)'. It did not further analyse the possible consequence of higher lending rates on people, such as those who would have been squeezed out of the formal financial system due to the temporarily high cost of capital being prohibitive, nor did it consider whether the government should step in with any specific social protection measures for the groups that would have been more severely affected.

More recently, South Africa's National Treasury published the Impact Study of the Twin Peaks Reforms, proposed under the Financial Sector Regulation Bill which will establish the Twin Peaks institutional framework for financial regulation and supervision in South Africa. The study used the methodology of Socio-Economic Impact Assessment (SEIA) required for draft policies, bills and regulations submitted to Cabinet since October 2015. This is the most advanced kind of regulatory impact assessment from a human rights perspective reviewed in this study. Although relatively brief, it systematically analyses costs and benefits of the proposed regulation through a socio-economic lens. Parts of the assessment were based on a limited methodology, such as a questionnaire to 16 financial institutions about potential costs and benefits of the proposed regulation, without similar engagement with the directly affected

6.4.3. Suggested research agenda

This paper has been focused on exploring whether a human rights analysis can add value to international financial regulatory standards. The issue is both technical and broad-ranging. It is also one that has not been explored in great detail before. Consequently, the findings of this paper should be viewed as initial findings that need to be further tested. For example, a study of the ten other SSBs that this study did not cover could enrich our understanding of the human rights issues raised by the international financial regulatory standards. In addition, the findings raise a number of other questions that merit further research. They include:

- What should SSB governance look like from a human rights perspective? Relevant issues include the governance structure; SSB membership; influence of commercial stakeholders in the rule making process; and the lack of discourse with civil society. An additional issue related to this topic is whether or not there is any correlation between SSB governance and SSB objectives, modalities and outputs.
- What are the human rights responsibilities and obligations of SSBs and their members in connection with the standard setting or rule making process (as opposed to the substance of standards of rules themselves)?
- What is the role of financial sector supervisory structures (FSB, World Bank, IMF) in promoting a human rights approach in SSBs?
- What should SSB accountability and remedy look like in regard to dealing with the consequences of negative human rights impacts?
- What is the right balance to be achieved between SSB and national regulatory authorities in addressing human rights?

groups or their representatives. And even though coordination with government agencies to achieve policy objectives is mentioned, it appears that coordination is contemplated only within the financial sector. Notwithstanding these areas of improvement, it is a remarkable template that other national institutions as well as the SSBs should aspire to standardise.