THE POTENTIAL CONTRIBUTION OF CREDIT RATING AGENCIES (CRAS) IN THE ENHANCEMENT OF COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW, RULES AND STANDARDS BY RATED COMPANIES

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RESUMEN: Partiendo de la idea de que los informes de las agencias de calificación tienen repercusión en el ámbito de los derechos humanos, este artículo tiene como objeto determinar si un enfoque de derechos humanos mejoraría la calidad de los mercados bursátiles. La hipótesis es que incorporar un enfoque

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de derechos humanos a los índices de sostenibilidad utilizados por las agencias de calificación mejoraría la calidad de sus calificaciones, ya que ayudaría a comprender mejor sus beneficios y costos y cómo éstos pueden afectar a las diferentes partes interesadas. Partiendo de la observación de la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos (ACNUDH) de que en el 41% de los 320 casos identificados se producen formas indirectas de participación empresarial en diversas violaciones de derechos humanos, este estudio se centra en un fenómeno aún poco estudiado: el potencial papel de las agencias de calificación como facilitadores del respeto de los derechos humanos por parte de las empresas privadas. Este estudio está estructurado de la siguiente manera: la Parte I define su objeto e incluye breves descripciones de las agencias de calificación y los estándares internacionales de derechos humanos aplicables a las mencionadas empresas, no sin antes analizar la importancia que tiene para éstas el respeto de los derechos humanos. Igualmente analiza los estándares internacionales de derechos humanos utilizados en este artículo. La Parte II, mediante diferentes ejemplos, describe las diferentes tipologías de participación empresarial en violaciones de derechos humanos. La Parte III analiza la responsabilidad de las agencias de calificación y la labor de las entidades que supervisan los derechos humanos. La cuarta parte se centra en la aplicación de los derechos humanos a los índices de desarrollo sostenible de dos agencias de calificación y proporciona algunos ejemplos de sus principales deficiencias. La Parte V plantea una serie de recomendaciones de cara al futuro.

PALABRAS CLAVE: evaluaciones; agencias de calificación crediticia; derechos humanos; índices de desarrollo sostenible; empresas privadas.

LABURPENA: Kalifikazio agentzien txostenek giza eskubideen eremuan eragina duten ideiatik abiatuz, artikulu honen helburua da giza eskubideen ikuspuntuak burtsa-merkatuen kalitatea hobetuko lukeen edo ez zehaztea. Hipotesia zera da: kalifikazio agentziek erabiltzen dituzten jasangarritasun indizeetan giza eskubideen ikuspuntu bat barneratzeak beraien kalifikazioen kalitatea hobetuko luke, lagundu egingo bailuke onurak eta kostuak hobeto ulertzen eta baita hauek nola eragin diezaieketen alderdi interesatu ezberdinei. Giza Eskubideen aldeko Nazio Batuen Goi-komisarioaren Bulegoaren oharretik abiatuz, zeinaren arabera identifikaturiko 320 kasuen %41ean enpresaren zeharkako parte-hartzeak ematen baitira giza eskubideen zenbait urraketetan, azterketa honek oraindik gutxi azterturiko fenomeno batean jartzen du arreta: enpresa pribatuek giza eskubideak errespeta ditzaten errazteko kalifikazio agentziek joka dezaketen paperean. Lan honen egitura hurrengoa da: I. Zatiak bere objektua definitzen du eta kalifikazio agentzien eta aipaturiko enpresei aplikatzen zaizkien giza eskubideen nazioarteko estandarren deskribapen laburrak jasotzen ditu. II. Zatiak, adibide ezberdinen bitartez, giza eskubideen urraketetan enpresak izan ditzakeen parte-hartze mota ezberdinak deskribatzen ditu. III. Zatiak kalifikazio agentzien erantzukizuna eta giza eskubideak gainbegiratzen dituzten entitateen lana aztertzen du. Laugarren zatia bi kalifikazio agentzien garapen jasangarriari buruzko indizeei giza eskubideak aplikatzen kontzentratzen da eta hauen gabezia nagusien zenbait adibide ematen ditu. V. Zatiak etorkizunari begira zenbait gomendio proposatzen ditu.

HITZ GAKOAK: ebaluazioak; kreditu-kalifikazio agentziak; giza eskubideak; garapen jasangarriko indizeak; enpresa pribatuak.

ABSTRACT: Starting from the premise that ratings by CRAs raise human rights issues, this article aims at considering whether a human rights perspective would improve the quality of stock markets. Its hypothesis is that embodying a human rights analysis into the sustainable development indexes that are used by CRAs would increase the quality of their ratings, in the sense that it would help in developing a better idea of their benefits and costs and how these costs and benefits will be distributed among their different stakeholders. Moving from the observation by the Office of the High Commissioner for Human Rights (OHCHR) that 41% of the 320 cases collected alleged indirect forms of company involvement in different human rights violations, the article focuses on a phenomenon that is still scarcely studied within the context of the relationship between human rights and corporations: the potential role of the CRAs as facilitators of human rights compliance by private companies. In so doing, the article is framed as follows: Part I defines the scope and includes brief overviews of the CRAs and the international human rights standards for companies that are the focus of the present article, but not before having indicated why human rights are relevant to business. It also illustrates the international human rights standards used in this article. Part II uses examples to describe the different typologies of corporations' involvement in human rights abuses. Part III focuses on the nature of the human rights responsibilities of the CRAs and of the entities that they supervise. Part IV focuses on the application of human rights to two CRAs' sustainable development indexes and provides some examples of the main shortcomings of these indexes. Part V concludes and elaborates some recommendations for future action.

KEYWORDS: ratings; credit rating agencies; human rights; sustainable development indexes; private companies.

RÉSUMÉ: Partant du principe que les notations des agences de notation soulèvent des questions relatives aux droits de l'homme, cet article vise à déterminer si une perspective des droits de l'homme améliorerait la qualité des marchés boursiers. Son hypothèse est qu'incorporer une analyse des droits de l'homme dans les indices de développement durable utilisés par les agences de notation augmenterait la qualité de leurs notations, en ce sens que cela aiderait à mieux cerner leurs avantages et leurs coûts et comment ces coûts et avantages seront répartis entre leurs différentes parties prenantes. Partant de l'observation du Haut-Commissariat aux droits de l'homme (HCDH) selon laquelle 41% des 320 cas recensés concernaient des formes indirectes d'implication de sociétés dans différentes violations des droits de l'homme, l'article se concentre sur un phénomène encore peu étudié: le rôle potentiel des agences de notation en tant que facilitateurs du respect des droits de l'homme par les entreprises privées. L'article est ainsi structuré comme suit: La partie I définit le champ d'application et comprend de brefs aperçus des agences de notation et des normes internationales des droits de l'homme applicables aux sociétés sur lesquelles porte le présent article, mais pas avant d'avoir expliqué en quoi les droits de l'homme sont pertinents. aux entreprises. Il illustre également les normes internationales relatives aux droits de l'homme utilisées dans cet article. La partie II utilise des exemples pour décrire les différentes typologies d'implication de sociétés dans des violations des droits de l'homme. La troisième partie porte sur la nature des responsabilités des agences de notation et des entités qu'elles supervisent en matière de droits de l'homme. La quatrième partie porte sur l'application des droits de l'homme aux indices de développement durable de deux agences de notation et fournit quelques exemples des principales lacunes de ces indices. La partie V conclut et développe des recommandations pour des actions futures.

MOTS-CLÉS: évaluations; agences de notation de crédit; droits de l'homme; indices de développement durable; entreprises privées.

1. INTRODUCTION: FRAMING THE DISCUSSION

Institutionally, the purpose of credit rating agencies ('CRAs') has been to provide an independent assessment of the creditworthiness of debt securities issued by corporations and governments[1]. Or to say it

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1 See e.g. Timothy J. Sinclair, 'Credit Rating Agencies', in Thomas G Weiss, Rorden Wilkinson (eds), International organization and global governance (Abingdon, Oxon: Routledge, 2018), ch. 27; Francesco De Pascalis, 'Credit ratings and market over-reliance : an international legal analysis', in Francesco De Pascalis (ed.), Taking position from the recent 2007-2009 financial crisis, 'Credit Ratings and Market Over-reliance: An International Legal Analysis (Leiden; Boston: Brill Nijhoff, 2017), p. 10 ff; Phoebus Athanassiou, Aikaterini Theodosopoulou, 'Reducing Over-Reliance on credit Rating Agencies : State of Play and Challenges Ahead' (2015) 22 Maastricht journal of European and comparative law, p. 656 ff; Elisabetta Cervone, 'Credit Rating Agencies: the Development of Global Standards', in International economic law after the global crisis : a tale of fragmented disciplines (Cambridge: CUP, 2015), pp. 46-71; Kuan-Chun Johnny Chang, 'An Optimal Global Regime for Regulating Credit Rating Agencies in the Post Financial Crisis Era - From the Perspective of the Appropriate Role of the Rating Agencies in the Capital Market', in Freya Baetnd José Caiado (eds.), Frontiers of international economic law: legal tools to confront interdisciplinary challenges (Leiden; Boston: Brill Nijhoff, 2014), pp. 22-41.

alternatively: to promote credit culture, increase transparency in the capital markets on which they impact both the 'suppliers' and 'buyers' of credit, allow borrowers to easily borrow money from the public debt market or financial institutions at a lower interest rate and reduce information asymmetry between lenders and borrowers, thereby supporting capital and financial markets to contribute to economic growth. In this way CRAs help in making societies wealthier and contribute to their stability and resilience. [2]

Nevertheless, over the past decade the CRAs (e.g., the three leading global CRAs —Moody›s, Standard & Poor›s and Fitch) have come to dominate both the global financial markets[3] and the market for information in a broad sense.[4] Although not easy to understand in consideration of the large number of competing institutions like export rating agencies and investment banks that produce credit-related information, CRAs have turned to monopolize the cognitive constitution of the credit relationship.[5]

Despite their dominance, it is unclear whether globally leading CRAs are effectively contributing to making societies wealthier and more resilient in Western Europe and North America — and, in fact, they have been accused of having exacerbated the Eurozone crisis by downgrading the sovereign ratings of Ireland, Greece and Portugal too far and too fast.[6]

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2 Amplius, see Enrique R. Carrasco, 'The global financial crisis and the financial stability forum: the awakening and transformation of an international body' (2010-2011) 19 *Transnat'l L. & Contemp. Probs*, p. 203 ff.

3 See John Ryan, 'The Negative Impact of Credit Rating Agencies and Proposals for Better Regulation', available at: https://www.swp berlin.org/fileadmin/contents/products/arbeitspapiere/The_Negative_Impact_of_Credit_Rating_Agencies_KS.pdf; See also Richard Cantor, Frank Packer. 'The Credit Rating Industry' (1995) 5 *Journal of Fixed Income*, pp. 10–34, stressing that the credit rating industry is dominated by three big agencies, which control 95% of the rating business'.

4 See Tony T. Tang, 'Information asymmetry and firms' credit market access: Evidence from Moody's credit rating format refinement0 (2009) 93 *Journal of Financial Economics*, pp. 325-351; Lars Nordena, Martin Weber, 'Informational efficiency of credit default swap and stock markets: The impact of credit rating announcements' (2004) 28 *Journal of Banking & Finance,* pp. 2813-284.

5 Amplius, see Benjamin Taupin, 'Perpetuating the Regulatory Order in the Credit Rating Industry', in Isabelle Huault, Chrystelle Richard (eds.), *Finance: The Discreet Regulator* (Amsterdam: Springer, 2012), p. 85 ff.

6 See *ex multis* Rasha Alsakka Owainap Gwilym Tuyet Nhung Vu, 'The sovereign-bank rating channel and rating agencies' downgrades during the European debt crisis' (2014) 49 *Journal of International Money and Finance,* p. 235 ff; 'Manfred Gärtner, Björn Griesbach, Florian Jung, 'PIGS or lambs? The European sovereign debt crisis and the role of rating agencies' (2011) 17 *International Advances in Economic Research,* p. 288 ff.

Moreover, they have also been accused by a U.S. Senate investigations panel of having given top ratings to mortgage-backed securities months after the housing market started to collapse.[7] Furthermore, they have been criticized for having introduced an oligopoly in the market, that lead to the homogenization of information.[8]

This divergence between the profitability of the credit rating agencies both in the EU and U.S. and the results they have delivered and are delivering in economic terms raises issues about whether or not the regulatory frameworks that apply to their activities and the decisions of those who are responsible for designing and implementing them have adapted appropriately to the transformations of the capital and financial markets.[9] The experience both during and since the subprime financial crisis shows that inadequate attention has been given to understanding all the consequences and impacts of credit rating agencies' decisions on stock markets with the result that they may have significant externalities.[10]

An example can help to explain this. During the 2008 financial crisis, a lot of worthless mortgage-related securities were given AAA ratings in the U.S: the highest and safest investment grade.[11] This led to a series of events that contributed to the global financial crisis. The credit ratings agencies aimed for increasing profits and market share by giving inaccurately strong

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7 See Mark Carl Rom, 'The Credit Rating Agencies and the Subprime Mess: Greedy, Ignorant, and Stressed?' (2009) 69 *Public Administration Review*, p. 640 ff; Huffington Post, 'Credit Rating Agencies Triggered Financial Crisis', *U.S. Congressional Report Finds*, April 13, 2011, as reported by John Ryan, above n. 3.

8 See Matej Avbelj, *The European Union under Transnational Law: A Pluralist Appraisal* (Oxford; Portland, Oregon: Hart Publishing, 2018), p. 100 ff.

9 See e.g. Karel Lannoo, 'Comparing EU and US Responses to the Financial Crisis' (2010) 6 *ECMI Policy Briefs,* available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1603949 See also Piero Cinquegrana, 'The Reform of the Credit Rating Agencies: A Comparative Perspective', May 2009, available at: www.eurocapitalmarkets.org.

10 See e.g. Carol Ann Frost, 'Credit Rating Agencies in Capital Markets: A Review of Research Evidence on Selected Criticisms of the Agencies' (2007) *22 Journal of Accounting, Auditing & Finance*, pp. 469-492; Roman Kräussl, 'Do credit rating agencies add to the dynamics of emerging market crises?' (2005) 1 *Journal of Financial Stability*, p. 355 ff.

11 See Yılmaz Bayar, 'Recent financial crises and regulations on the Credit Rating Agencies' (2014) 5 *Research in World Economy*, available at: https://www.researchgate.net/profile/Yilmaz_Bayar2/publication/290484450_Recent_Financial_Crises_and_Regulations_on_the_Credit_Rating_Agencies/links/5919639f4585152e19a257d2/Recent-Financial-Crises-and-Regulations-on-the-Credit-Rating-Agencies.pdf

ratings to underperforming assets.[12] This conduct fueled the crisis that ultimately led to tens of thousands of foreclosures.[13] The leading credit ratings agencies were blamed for conflicts of interest and the flawed methodologies they used to rate financial products during the so-called ‹Great Recession›.[14]

As this example shows, the ratings of the credit rating agencies have an important role in how the lives of human beings are impacted by the financial and capital markets. The way in which financial ratings are expressed can influence the nature and extent of these impacts but they cannot avoid producing an effect on the lives of human beings who have access to financial and capital markets.[15] Therefore, ratings by CRAs unavoidably raise human rights issues. This leads to the question whether a human rights perspective would improve the quality of stock markets.

This article aims to answer this query in regard to the CRAs and their financial ratings. Its hypothesis is that embodying a human rights analysis into the sustainable development indexes that are used by CRAs would increase the quality of their ratings, in the sense that it would help in developing a better idea of their benefits and costs and how these costs and benefits will be distributed among their different stakeholders. It would reduce the risk of unintended consequences deriving from the rating, including the risk that the costs fall on those least able to bear them.

Moving from the observation by the Office of the High Commissioner for Human Rights (OHCHR) that 41% of the 320 cases (from across the world and including all production sectors) collected alleged indirect forms of company involvement in different human rights violations.[16] the article focuses on a phenomenon that is still scarcely studied within the context of the relationship between human rights and

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12 See e.g. Lawrence J. White, 'The credit-rating agencies and the subprime debacle' (2009) 21 *Critical Review: A Journal of Politics and Society,* pp. 389-399.

13 See Joseph E. Stiglitz, 'The financial crisis of 2007-2008 and its macroeconomic consequences' (2009) *Columbia Accademic Commons*, available at: https://academiccommons.columbia.edu/doi/10.7916/D8QZ2HSG

14 See Frank Partnoy, 'Rethinking regulation of credit rating agencies: An institutional investor perspective' (2009) 9 *San Diego Legal Studies Paper*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430608

15 See e.g. Uwe Blaurock, 'Control and Responsibility of Credit Rating Agencies' (2007) 6 *Electronic Journal of Comparative Law*, available at: https://www.ejcl.org/113/article113-16.pdf

16 Amplius, see Marta Bordignon, 'The Compliance to Human Rights in Business Sector: Focusing on Banks' (2013) 1 *Journal of Global Policy and Governance*, pp. 217-225.

corporations: the potential role of the CRAs as facilitators of human rights compliance by private companies. In so doing, this article is framed as follows: Part I defines the scope and includes brief overviews of the CRAs and the international human rights standards for companies that are the focus of the present article, but not before having indicated why human rights are relevant to business. It also illustrates the international human rights standards used in this article. Part II uses examples to describe the different typologies of corporations' involvement in human rights abuses. Part III focuses on the nature of the human rights responsibilities and obligations of the CRAs and of the entities that they supervise. Part IV focuses on the application of human rights to two CRAs' sustainable development indexes (the Dow Jones Sustainability Index and the FTSE4 Good). It provides some examples of the main shortcomings and inadequacies of these indexes. Part V concludes and elaborates some recommendations for future action.

2. CLARIFYING THE SCOPE OF THE ARTICLE: CRAS AND HUMAN RIGHTS

This paragraph clarifies the scope of the present article. It begins with an overview of CRAs and the sustainable development indexes that are the focus of this paper. This is followed by a succinct discussion of the notion of human rights as employed in this article.

2.1. The International Credit Rating Agencies and Selected Sustainable Development Indexes: A Brief Overview

There are currently more than a hundred CRAs in the world.[17] They include international institutions like Moody's, Standard & Poor's, Fitch, DBRS Ratings Ltd and Egan-Jones Rating Company, and entities classifiable as local credit rating agencies like Metropol East Africa Ltd and Credit Safe AB.[18] Some of these CRAs have obtained a registration or certification by the single direct supervisor of Credit Rating Agencies

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17 Wikirating, 'List of credit rating agencies', available at: https://www.wikirating.org/wiki/List_of_credit_rating_agencies)

18 Examples of local credit rating agencies in some of the emerging market countries are found in Roy C. Smith, Ingo Walter, 'Rating Agencies: Is There an Agency Issue?', in Richard M. Levich, Giovanni Majnoni, Carmen Reinhart (eds), *Ratings, Rating Agencies*

(CRAs) within the EU, the European Securities and Markets Authority (ESMA),[19] in accordance with Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (the Credit Rating Agencies Regulation).[20]

This article is not a comprehensive evaluation of all CRAs—not even of those that have an international dimension — and the sustainable development indices that they have used and are using for their ratings. It only focuses on a subset of three CRAs, the so-called 'big three' (Standard's & Poor's, Moody's Investor Services and Fitch Ratings), and two sustainable development indexes (the Dow Jones Sustainability Indexes and the FTSE4 Good). Each of these CRAs and the two above-named indexes in the area of sustainability are succinctly illustrated below.

2.1.1. Standard & Poor's Financial Services LLC

Standard & Poor's Financial Services LLC (S&P) is a U.S. based company operating in the financial services sector. It is a division of S&P Global that publishes financial analysis and research on capital markets, commodities and bonds.[21]

As a credit-rating agency, S&P issues credit ratings for the debt of public and private companies, and other public borrowers such as governments and governmental entities. It is one of several CRAs that have been

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and the Global Financial System (New York: Springer Science Business Media, 2002), p. 302 ff..

19 On the ESMA, see Dorothee Fischer-Appelt, 'The European Securities and Markets Authority: the beginnings of a powerful European securities authority?' (2011) 5 *Law and Financial Markets Review*, pp. 21-32.

20 *Official Journal of the European Union* L 302, 17.11.2009, pp. 1–31. For a commentary, see Fabian Amtenbrink, Jakob De Haan, 'Regulating credit ratings in the European Union: A critical first assessment of Regulation 1060/2009 on credit rating agencies' (2009) 46 *Common market law review*, pp. 1915–1949. See also Chiara Picciau, 'The Evolution of the Liability of Credit Rating Agencies in the United States and in the European Union: Regulation after the Crisis' (2018) 15 *European Company and Financial Law Review*, pp. 339-402.

21 On the topic, see Akos Rona-Tas, Stefanie Hiss, 'The role of ratings in the subprime mortgage crisis: The art of corporate and the science of consumer credit rating', in Michael Lounsbury, Paul M. Hirsch, *Markets on Trial: The Economic Sociology of the U.S. Financial Crisis: Part A* (Emerald Group Publishing Limited, 2010), available at: https://www.emerald.com/insight/content/doi/10.1108/S0733-558X(2010)000030A008/full/html

designated a nationally acknowledged statistical rating organization by the U.S. Securities and Exchange Commission.[22]

The recent chronicle shows that S&P paid $1.5 billion to the U.S. Justice Department, various state governments, and the California Public Employees' Retirement System to settle lawsuits claiming its inaccurate ratings defrauded investors in 2015.[23]

2.1.2. Moody's Investor Services

Moody's Investors Service, often referred to as Moody's, is the bond credit rating branch of Moody's Corporation. Its core business is to provide financial research on bonds issued by governmental and non-governmental entities. Like Standard & Poor's and the Fitch Group, Moody's ranks the creditworthiness of borrowers using a standardized ratings scale that measures expected investor loss in the event of default. It rates debt securities in various sectors of the bond market including government, municipal and corporate bonds, managed investments such as money market funds and fixed-income funds and asset classes in structured finance.

2.1.3. Fitch Ratings

Fitch Ratings is the smallest of the 'big three' nationally recognized statistical rating organizations (NRSRO) designated by the U.S. Securities and Exchange Commission in 1975.[24] Although it covers a more limited share of the market than S&P and Moody's, it has grown with acquisitions and frequently positions itself as a "tie-breaker" when the other two agencies have ratings analogous, but not identical, in scale.[25]

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22 See U.S. Securities and Defence Commission, 'Credit Rating Agencies and Nationally Recognized Statistical Rating Organizations (NRSROs)', available at: https://www.sec.gov/fast-answers/answersnrsrohtm.html

23 See Aruna Viswanatha, Karen Freifeld, 'S&P reaches $1.5 billion deal with U.S., states over crisis-era ratings' (2015) 3 *Business News*, available at: https://www.reuters.com/article/us-s-p-settlement/sp-reaches-1-5-billion-deal-with-u-s-states-over-crisis-era-ratings-idUSKBN0L71C120150203

24 See Tony Shale, 'Moody about Moody's' (1990) *Euromoney*, p. 23 ff.

25 See 'Making the grade (Avon Capital Corp.'s debt upgraded by Moody's Investor Services)' (1996) 172 *WWD,* p. 9 ff.

2.1.4. The Dow Jones Sustainability Indexes

The Dow Jones Sustainability Group Index (DJSGI)[26] is the world's best known family of indexes aimed at identifying and tracking the performance of sustainability-driven companies.[27] When the DJSGI was introduced in 1999 as the first global equity index to track the performance of the leading sustainably-run companies world-wide, it was claimed to outperform the more generalized Dow Jones Global Index (DJGI) with respect to market capitalization growth.[28] The DJSGI defines sustainability-driven companies as those that achieve their business goals by integrating economic, environmental and social growth opportunities into their business strategies through proactive, cost-effective and responsible management.[29] The DJSGI defines corporate social responsibility (CSR) as social well being that companies should satisfy in order to be inserted in the DJSGI.[30]

NGOs, corporations and governmental entities often refer to the DJSGI to demonstrate that inserting economic, environmental and social factors into the functioning and management of a company raises shareholder value and business activity transparency.[31] The DJSGI is also adopted by MNCs to justify the efforts they put into sustainability.[32] The DJSGI sustainable principles include Technology, Governance, Shareholders, Industry and Society. [33]

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26 The text of the DJSGI is available at: https://www.robecosam.com/csa/indices/?r

27 On the topic, see e.g. Ivo Knoepfel, 'Dow Jones Sustainability Group Index: A Global Benchmark for Corporate Sustainability' (2001) 8 *Corporate Environmental Strategy*, pp. 6-15.

28 See Cerin Pontus, Robert Peters, 'What does the performance of the Dow Jones Sustainability Group Index tell us?' (2001) *Eco-Management and Auditing*, available at: https://www.researchgate.net/publication/5093403_What_Does_the_Performance_of_the_Dow_Jones_Sustainability_Group_Index_Tell_Us

29 See above n. 26.

30 Amplius, see Nichals N. Igiwe, Eugene Nwadialor, 'EFFECTIVENESS OF CORPORATE SOCIAL RESPONSIBILITY (CSR) REPORTING IN ENHANCING CORPORATE IMAGE' (2015) 4 *European Journal of Business and Social Sciences*, available at: https://pdfs.semanticscholar.org/06b2/7ca28299a40ce5b3015831cb4628ee3607d0.pdf

31 See Cory Searcy, Doaa Elkhawas, 'Corporate sustainability ratings: an investigation into how corporations use the Dow Jones Sustainability Index' (2012) 35 *Journal of Cleaner Production*, pp. 79-92.

32 See Juan Jose Duran, Nuria Bajo, 'Institutions as Determinant Factors of Corporate Responsibility Strategies of Multinational Firms' (2014) 21 *Corporate Social Responsibility and Environmental Management*, pp. 301-317.

33 'CA Technologies ancora una volta inclusa nei Dow Jones Sustainability Indices', available at: https://www.ca.com/it/company/newsroom/press-releases/2017/ca-technologies-again-named-to-dow-jones-sustainability-indices.html

2.1.5. The FTSE4 Good

The FTSE4 Good Index is a series of ethical investment stock market indices introduced by the FTSE Group in 2001. A number of stock market indices are available, for instance covering US shares, UK shares, European markets and Japan, with insertion based on a wide range of CSR criteria. The index excludes companies involved in tobacco production, nuclear weapons, conventional weapon systems, or the coal power industry and rates companies for insertion based on environmental sustainability, relationships with stakeholders, attitudes to human rights, supply chain labour standards and the countering of bribery.[34]

The FTSE4 Good Index Series are supervised by autonomous external committees encompassing experts with experience in the investment community, business, NGOs, unions and academia.[35] The Committees guarantee that the core themes, general principles and criteria of FTSE4Good Index Series will evolve in line with market expectations and that high standards of governance are applied to assessment and construction methodologies.[36]

2.2. International Human Rights Rules and Standards: A Brief Overview

A broad and rather heterogeneous range of international rules and standards on the protection of fundamental rights and freedoms has existed for the international community since early 1945. The historical origins and main features of the rules and standards that are, objectively speaking, the most useful in setting up a possible role of CRAs in the enhancement of compliance with human rights are briefly outlined below.

The first modern international rules and standards for the protection of human rights are contained in the Universal Declaration of Human Rights (UDHR) that was adopted by the General Assembly of the United Nations on 10 December 1948 by a vote of forty eight in favor, none

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34 See Craig Mackenzie, Rob Cartridge, 'Debate: Is FTSE4 good just stock market capitalism dressed in green?' (2001) 31 *The Ecologist*, pp. 20-23.

35 SustainAbility , 'Questionnaire for Raters', available at: https://sustainability.com/wp-content/uploads/2016/07/rt_r5_rater_response_f4_g_index_feb_2013.pdf, also stressing that the independent FTSE4Good Committees supervise the enforcement of the FTSE4Good criteria.

36 Ibidem.

opposed, with eight abstentions.[37] One of the most noteworthy features of the UDHR is its significant expansion and detailed elaboration of a wide range of non-derogable rights, including certain social and economic rights as well as human duties. Furthermore, another noteworthy feature of the Declaration is that it has inspired several international human rights legal instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) that have been ratified by the vast majority of states.[38]

The Office of the United Nations High Commissioner for Human Rights, generally known as the Office of the High Commissioner for Human Rights (OHCHR), is the body within the UN system with a mandate from the international community to promote and protect the human rights that are guaranteed under international law and stipulated in the UDHR, including by setting human rights rules and standards.[39]

Yet, although the protection of business vis-á-vis governmental regulation can hardly be considered as a main concern of international human rights law, it is undisputed that companies in principle enjoy protection under some international human rights treaties and other law-making instruments.[40] A couple of examples would be useful in understanding the direct applicability of human rights standards to enterprises. In General Comment No. 3, the Human Rights Committee confirms that Article 17 of the ICCPR on the right of every person to be protected against arbitrary or unlawful interference should be interpreted as requiring: ' ... to be guaranteed

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37 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html On the historty of the UDHR see e.g. James V. Spickard, 'The Origins of the Universal Declaration of Human Rights', available at: http://bulldog2.redlands.edu/fac/Spickard/OnlinePubs/OriginUDHR.pdf

38 Amplius, see *ex multis* Gudmundur Alfredssson, Asbjørn Eide (eds.), *The Universal Declaration of Human Rights – A Common Standard of Achievement* (The Hague: Kluwer Law International, 1999), p. 10 ff; Hurst Hannum, 'The UDHR in National and International Law' (1995/96) 25 *Georgia Journal of International and Comparative Law,* pp. 287-397, available at: https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2014/04/16-Hannum.pdf

39 Amplius, see *ex multis* Ivan Šimonović, 'Das OHCHR als Prometheus?' (2018) 66 *Vereinte Nationen: Zeitschrift für die Vereinten Nationen und ihre Sonderorganisationen,* p. 260 ff.

40 See e.g. Nicolás Carrillo-Santarelli, 'A defence of direct international human rights obligations of (all) corporations', in Jernej Letnar Černič (ed.), *The future of business and human rights: theoretical and practical considerations for a UN treaty* (Cambridge: Intersentia, 2018), p. 33 ff.

against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons'.[41] Developed by the Special Representative of the Secretary-General (SRSG) John Ruggie, the UN Guiding Principles on Business & Human Rights, informally known as the "Ruggie Principles" or the "Ruggie Framework" due to their authorship by John Ruggie, contain a sophisticated set of guidelines for companies and States that seek to provide an authoritative global standard for preventing and addressing the risk of adverse human rights impacts connected to business activity.[42] The Principles encompass three pillars outlining how states and businesses should implement the framework: The state duty to protect human rights; the corporate responsibility to respect human rights; the access to remedy for victims of business-related abuses. The Principles have received wide support from states, civil society organizations, and even the private sector, this has further solidified their status as the key global foundation for business and human rights. Moreover, the Principles were endorsed by the UN Human Rights Council unanimously on June 16th 2011. Equally importantly, they have been accepted by several international organizations such as the World Bank and the Organisation for Economic Co-operation and Development (OECD), which have consequently adopted or reformed global human rights standards for companies like the OECD Guidelines for Multinational Enterprises, the Global Compact and the Equator Principles. Although not legally binding, these guidelines and standards are of considerable importance since they originate from those authoritative international bodies.

2.3. Why Are Human Rights Relevant to CRAs?

If we accept the two premises that only human rights can provide international companies with the bedrock of internationally acknowledged

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41 Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, Twenty-third session, 1988, U.N. Doc. HRI\GEN\1\Rev.1 at 21, para. 1 (1994), as quoted by David Weissbrodt, 'Corporate Human Rights Responsibilities' (2005) 6 *Zeitschrift fur Wirtschafts-und Unternehmensethik*, pp. 284 at n. 19.

42 The text of the Principles are available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf For a commentary, see e.g. Radu Mares (ed.), *The UN guiding principles on business and human rights :foundations and implementation* (Leiden; Boston: Martinus Nijhooff, 2012); Marco Fasciglione, 'The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the Legal Systems of EU Countries' (2016) 10 *Human Rights & International Legal Discourse,* pp. 94-116;

principles on which to base their social conduct[43] and that a human rights approach to business and financial regulation and markets is indispensable given the heavy impact of business and financial activities on all human rights,[44] it is not difficult to conclude that human rights standards and rules should be used by global CRAs in order to rate companies. This claim is corroborated by the applicable rules and principles for the assessment of creditworthiness by CRAs such as the one that provides that creditworthiness assessments should meet the double policy goals of the reduction of financial distress and the promotion of sound credit risk management practices in compliance with responsible lending requirements, and the other principle that states that the creditworthiness assessments shall be grounded on all data that arises from all relevant data sources indirectly.[45]

Therefore, it is clearly no longer a question of *whether* and *why*, but *how*, human rights (e.g., the UDHR, the ICCPR, the ICESCR and the UN Guiding Principles on Business and Human Rights) can be used by global CRAs in their rating process and be incorporated in the above-described sustainable development indexes (SDIs).

3. HUMAN RIGHTS, THE CRAS AND RATED ENTITIES AND ORGANIZATIONS

Human rights issues derive in two different ways in regard to the CRAs and the international indexes and standards that are the main focus of this work. The first is whether or not the CRAs themselves and the entities that they rate have either binding or non-binding human rights responsibilities or duties. The second concerns the human rights implications of the content of the sustainable development indexes and standards. Each of these sets of issues are analyzed below.

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43 See Judith Hennigfeld, Manfred Pohl, Nick Tolhurst (eds), *The ICCA Handbook on Corporate Social Responsibility* (Chichester, Hoboken, NJ: J. Wiley & Sons, 20066), p. 72 ff.

44 Amplius, see Daniel D. Bradlow, 'A Human Rights Based Approach to International Financial Regulatory Standards' (2008) 171 *SouthViews*, available at: https://ssrn.com/abstract=3262463, also stressing that: 'human rights can add value to international financial standard setting in a number of different ways'.)

45 See Association of Consumer Credit Information Suppliers, 'PRINCIPLES ON CREDITWORTHINESS ASSESSMENTS - A perspective from the credit reference industry', available at: https://accis.eu/wp-content/uploads/2018/11/Final-Proofread-Principles-on-Creditworthiness-Assessments-and-the-Role-of-CRAs.pdf

3.1. The Human Rights Duties and Responsibilities of the CRAs

None of the global CRAs mentioned in this article are subjects of the international legal order. Standard & Poor's is a U.S. financial services company, and the same is also true of Moody's Investor Services and Fitch Ratings, the other two global credit rating agencies.

Considering the fact that none of these organizations possess an international legal personality, they cannot conclude and sign treaties. This implies that none of them are legally bound by the UN international human rights treaties. They also have no formal duties under general international law. This implies that CRAs do not have any binding implementable international human rights duties. However, they do have human rights duties and responsibilities. These duties and responsibilities, even though not legally binding and implementable, do exert a de facto pull toward compliance given their direct impact on the CRA's reputation and legitimacy.

The Universal Declaration of Human Rights (Declaration or UDHR)[46] that is almost universally 'recognized as forming part of Customary International Laws' states,[47] in its Preamble, that 'every organ of society shall strive to promote respect' for the rights set out in the UDHR and to guarantee their 'universal and effective recognition and observance'.[48] The authority of the UDHR deriving from the circumstance that this Declaration was the first step in the creation of the so called 'International Bill of Rights'[49] means that all responsible

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46 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html

47 See John Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Judicial Character', in Bertrand G. Ramcharan (ed.), *Human Rights. Thirty Years after the Universal Declaration* (The Hague; Boston: M. Nijhoff, 1979), n. 41, pp. 21-37. See also Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 *EJIL*, p. 905 ff.
21–37.

48 On the topic, see Adam McBeth, Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights (2008) 12 *Hamline Journal of Public Law and Policy*, Vol. 30, No. 1, 2008, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345974

49 For an account of the origins of this expression, see Thomas Buergenthal, Daniel Thürer, *Menschenrechte. Ideale, Instrumente, Institutionen* (Baden-Baden: Nomos, 2010), p. 29 (fn. 4). See also John P. Humphrey, 'The International Bill of Rights: Scope and Implementation' (1976) 17 *Wm. & Mary L. Rev.*, p. 527ff, available at: http://scholarship.law.wm.edu/wmlr/vol17/iss3/6, explaining that what is known

organizations and entities operating in the international community, even if they do not possess an international legal personality, must pay due regard and attention to the UDHR.[50] Organizations like the CRAs, that can be considered 'organs of society' that purport to contribute to the shaping and evolution of the global financial order,[51] therefore, have a moral duty and obligation to protect the human rights and fundamental freedoms of rated entities. This includes not weakening the efforts of the rated companies to comply with their own human rights responsibilities.

3.2. The Human Rights Responsibilities of the Rated Organizations and Entities

Not all securities rated by the CRAs are issued by entities that are parties to human rights conventions. If this is true, it is also true that all rated securities are issued by entities that should be qualified as organs of society and thus have a responsibility to protect human rights and freedoms, even when they do not possess an international legal personality. The scope and character of this responsibility has been elucidated by the United Nations Guiding Principles on Business and Human Rights (UNGPs) in the following terms: the responsibility entails undertaking human rights due diligence obligations towards the stakeholders to prove that they are managing the human rights risks arising from their own business relationships. The rated entities also have an additional responsibility, according to the United Nations Guiding Principles on Business and Human Rights (Pillar 3), to initiate processes and procedures to redress negative human rights impacts with which they are involved.[52]

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as the International Bill of Human Rights is made up of: Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Optional Protocol to the International Covenant on Civil and Political Rights; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

50 See e.g. William Korey, *NGOs and the Universal Declaration of Human Rights* - "A Curious Grapevine" (New York: St. Martin's Press, 1998), p. 249 ff.

51 Amplius, see Mikko Huotari, Thilo Hanemann, 'Emerging Powers and Change in the Global Financial Order' (2014) 5 *Global Policy*, p. 298 ff.

52 Amplius, see the 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/let ter_from_ohchr_to_banktrack_on_application_of_the_un_guiding_principles_in_the_banking_sector_1/ph_banktr ack_response_13_june_2017.pdf; see also OHCHR

The conclusion to be inferred from the above is that rated entities have at least a moral duty to protect human rights and freedoms in their activities and operations. CRAs shall take this responsibility into account as they develop their standards of business conduct and sustainable development indexes because they should not, as responsible organs of society, do anything that could compromise the ability of the rated entities to accomplish their own human rights duties and obligations.

4. APPLYING HUMAN RIGHTS AND FREEDOMS TO THE CRAS STANDARDS AND INDEXES THROUGH THE LENS OF THE FUNCTIONS OF CREDIT RATING AGENCIES

The considerations above suggest that global CRAs have a duty and responsibility to respect human rights and freedoms when setting standards for their creditworthiness ratings on governments and private businesses. This part deals with the human rights issues that arise from the substance of the CRAs standards and sustainable development indexes. It is articulated into two sections. The first section illustrates the functions of credit rating agencies. The second indicates, in general terms, the international standards that are applicable to each function and offers examples of human rights issues deriving from the substantive rules of the relevant standards and indexes.

4.1. The Main Functions of Global Credit Rating Agencies

Any global CRAs shall perform at least the below-indicated tasks[53]:

1) Business Analysis: A credit rating agency should analyze the business condition of the borrowing company not entirely by the profits the borrowing concern has achieved, but also by the employ of capital in a more productive purpose. The return on capital and the cost of capital should therefore be analyzed.

2) Evaluation of industrial risks: It is the responsibility of a credit rating agency to consider the risks that every rated company and industry are exposed

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response to the non-governmental organisations SOMO and OECD Watch, 26 April 2013, available at: www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf

[53] The functions which are described in this paragraph are mainly derived from information, which is described in the post ‘Functions of Credit Rating Agencies’, available at: https://accountlearning.com/functions-of-credit-rating-agencies/

to, including competition. The extent of measures and risks to overcome will be considered while assessing the creditworthiness of the company.

3) Market position of the borrowing company within the industry: This involves considering the market share of the company seeking a credit rating. A higher market share will increase risks since the company must be vigilant to preserve its share. Therefore a CRA will provide proper weighting for the market share of the borrowing concern.

4) Operating efficiency: This is considered from the perspective of the utilization of capacity, in the sense that when full capacity is used, the borrowing company has an advantage over others. And this is an element that should also be looked into by the credit rating agency.

5) Legal position in terms of prospectus: The allegations contained in the prospectus, must be correct and factual. If disproven allegations are included, they will hinder the growth of the company and the credit rating agency will not use the prospectus of the company for its evaluations. It can also be framed as a willful fraud to attract additional resources. Therefore, the contents of prospectuses will constitute a key element for credit rating evaluations.

6) Financial flexibility: It is inherent in the nature of the company to arrange for alternative plans for raising its financial resources if its existing idea does not work out satisfactorily. CRAs must consider the financial flexibility of borrowing companies.

7) Ability to overcome adverse catastrophe management: CRAs should also scrutinize the available mechanism for recovery with the borrowing company for overcoming any unforeseen catastrophes.

8) Company's Goals and Strategies: Company's goals and strategies must be core elements in the assessment of the creditworthiness of business entities.

9) Employment turnover: The extent of punctuality and discipline of the labor force and retention rate of labour (or of employees) in the company are further elements that shall be taken into account by global CRAs in their financial ratings.

10) Asset quality: These and similar considerations should be made about the price of the assets according to the market conditions and their performance in the market.

Global CRAs are responsible for guaranteeing that rated entities sustainably accomplish all the above-mentioned tasks. This leads to conclude that CRAs must take into account among other things the prudence with which the rated entities work so that they do not compromise their own soundness and how well these entities meet the needs of the relevant stakeholders in their sector of activity.

4.2. The Application of Human Rights to the Above-Indicated Functions of Global Credit Rating Agencies and the CRAs Standards and Indexes

The way in which a credit rating agency performs each of its functions will help promote or obstruct the interests of the rated entities.[54] This implies that the regulations that shape the functioning and structure of CRAs will affect the interests of the private business entities and sovereign governments that are subject to rating.[55] Therefore, these regulations, and the international regulatory standards and indexes that may guide them, will inevitably have human rights impacts. Those who elaborate these standards, indexes and regulatory frameworks, thus, may either explicitly decide to incorporate these human rights impacts into their regulatory design or they may decide, though maybe only implicitly, to leave the locus of these human rights impacts to chance and the functioning of the rating process.[56]

In the first case, the CRAs will be called upon to evaluate the likely human rights impacts of specific regulatory decisions. This will require them to assess how the proposed action impacts on the various sub-groups of regulated entities. Moreover, this will also require them to examine how their proposed standard or regulation may be elaborated to circumvent or lessen negative impacts and improve positive ones. If CRAs rather leave the impacts up to chance, the risk is that the identity of the actual losers and winners in the rating process will be largely a matter of the power dynamics in the process of financial rating calculation. Considering that the rated entities that enjoy most financial resources are best able to

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54 See e.g. Matthias Goldmann, 'The role of credit rating agencies in sovereign debt markets', in Ilias Bantekas and Cephas Lumina (eds.), *Sovereign Debt and Human Rights* (Oxford: OUP, 2019), ch. 8.

55 See Lawrence J. White, 'The Credit Rating Agencies and Their Role in the Financial System', in Eric Brousseau, Jean-Michel Glachant, and Jérôme Sgar (ed.), *Oxford Handbook on Institutions, International Economic Governance, and Market Regulation* (Oxford: OUP, 2015), p. 30 ff.

56 Amplius, see Motoko Aizawa, Daniel Bradlow, Margaret Wachenfeld, 'International Financial Regulatory Standards and Human Rights: Connecting the Dots' (2018) 15 *Manchester Journal of International Economic Law*, pp. 2 ff.

deflect any negative consequence away from themselves, the most likely outcome is that negative human rights impacts will be on those who are least able to support them.

This implies that if the human rights impacts of the CRAs' standards of business conduct and of their sustainable development indexes are not explicitly assessed and addressed, the outcome is likely to be a reduction of any positive human rights impacts and an aggravation of any negative impacts.

Three specific human rights can be adversely affected by all the described functions and roles of global CRAs. These human rights are, respectively, the right to property, the right to privacy and the right to non-discrimination.

The human right to property: this right can be infringed, either directly or indirectly, by the exercise of any of the above-indicated functions. In order to understand this, one can recall the adverse effects that a negative rating can produce on a company's business. The right to private property is addressed in the UDHR.[57]

The right to privacy: because information plays a critical role in rating decision making there is a risk that CRAs mismanage or misuse the information that they receive.[58]

The human right to non-discrimination: this applies to questions of business analysis, operating efficiency and market position of the borrowing company within the industry. This principle is set out, amongst other places, in the UDHR,[59] the ICESCR and the ICCPR.[60]

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57 UN General Assembly, Universal Declaration of Human Rights, above n. 47, Article 17. On the absence of the right to property from the two UN Covenants adopted in 1966, see e.g. C. Krause, 'The Right to Property', in A. Eide, C. Krause, and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook.* (2nd revised ed., The Hague, Martinus Nijhoff, 2001), pp. 192-193.

58 On the right to privacy as a human right, see e.g. Oliver Diggelmann, Maria Nicole Cleis, 'How the Right to Privacy Became a Human Right' (2014) 10 *Human Rights Law Review*, pp. 441-58.

59 Article 2 of the UDHR provides a right to non-discrimination attaching to all other human rights recognized in the UDHR: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, , national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'.

60 Article 2 ICESCR/ICCPR contains a general non-discrimination clause that forbids discrimination in the enjoyment of the rights in both Covenants.

4.3. The Costs and Benefits of a Human Rights-Based Approach

A human rights based approach (HRB) may benefit the rating of companies by contributing to a more comprehensive assessment of the socio-economic costs and benefits associated with the debt securities issued by them.

Nevertheless, by adding additional tasks to the rating process, a HRB will increase the costs of assessing companies' credit-worthiness.

4.3.1. The Benefits of a Human Rights Approach

Human rights can enhance the importance of corporate credit rating in a number of different manners.

First, a human rights approach will demand global CRAs to engage more actively with all the stakeholders who may be affected by the rating results. This increased engagement must supply the CRAs with new information that makes it easier for them to identify and address any unintended consequences of their ratings.

Second, a human rights-based approach helps the CRAs to develop a disaggregated understanding of the adverse and positive effects of any rating on the different groups of stakeholders of the rated company. This should aid them to develop financial rating standards that optimize the positive and minimize the negative effects of the rating results on stakeholders. This information must allow CRAs to more accurately assess the fairness and the sustainability of the rated organization. Such a perspective, for instance, will guarantee that the CRAs capture the impact of the sustainable development indexes and standards on the ICESCR requirement that states and their organs allocate maximum available resources to the progressive achievement of socio-economic rights. This information may only be garnered from a human rights assessment.

4.3.2. The Costs of the Human Rights Approach

A human rights-based approach to financial rating has two major disadvantages. First, it is unavoidable that the cost of credit rating checks will increase if the CRAs should insert environmental, social, and human rights criteria into credit rating analysis. Moreover, the costs of supervising and assessing the enforcement and effectiveness of these criteria will rise.

Second, there is the danger that demanding CRAs to insert human rights related tasks into their functioning and operations might potentially prejudice their independence. Considering that human rights impacts are hard to quantify, CRAs should exercise some discretion in determining how to manage these impacts. The way in which they exercise their discretion may subject them to increased pressure and supervision, possibly leading them to have less autonomy.

4.3.3. The Advantages Outweigh the Disadvantages

As mentioned above, adverse human rights impacts will occur regardless of the insertion of environmental, social, and human rights criteria into credit rating analysis.

This signifies that presently the CRAs are erroneously quantifying the costs and benefits associated with their activities. This leads to distortions in the operation and functioning of the rating process and prescribes opportunity costs, measured in human rights and economic terms, on all the stakeholders of the rated entities.

Taking into account human rights costs will drastically diminishes these disadvantages and distortions. This, in turn, will have positive effects on the financial rating markets and the overall efficiency of ratings as tools of governance.

It is worth noting in this regard, that global CRAs might reduce the costs of adopting a human rights-based approach by using the United Nations Guiding Principles on Business and Human Rights and the Principles for Responsible Investment (PRI)[61] as sources of inspiration for the revision of their sustainable development indexes.

Sustainable development indexes encounter a number of criticisms as currently drafted. These criticisms can be usefully summarized as follows: 1. Sustainable development indexes such as the FTSE4 Good measure process, policies and management systems, rather than impacts, outcomes and performance;[62] 2. Indices relating to sustainability and corporate ethical issues, in particular the Dow Jones Sustainability Index, are rightly said by various observers to give companies too easy a ride in terms of what they ask

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61 The text of the Principles for Responsible Investment (PRI) is also available at: https://www.unpri.org/signatories/what-are-the-principles-for-responsible-investment

62 See 'FTSE4Good', available at: https://www.theguardian.com/business/2001/nov/27/ftse.ethicalmoney

from them in order to be listed;[63] 3. Indices relating to sustainability and corporate ethical issues, in particular the Dow Jones Sustainability Index, have also been criticized for essentially rewarding companies with greatest capacity to respond to SAM's questionnaires and information requests rather than those with the best socially responsible practices;[64] 4. A fourth criticism is that by relying on self-reported data, these indices encounter the risk that the information received from the listed companies is not wholly credible;[65] 5. A fifth point of criticism concerns the fact that companies with challenging corporate environmental and social issues are more likely to devote public relations resources to minimize the perception of risk within their activities and operations;[66] 6. A sixth and last criticism is that in the Dow Jones Sustainability Index the three dimensions of sustainability are not considered in a balanced manner, being biased towards economic criteria to the disadvantage of social and environmental ones and, mutatis mutandis, the same is also true of the FTSE4 Good.[67]

5. CONCLUDING REMARKS ON THE CRAS' FUTURE ROLE AS FACILITATORS OF HUMAN RIGHTS COMPLIANCE BY COMPANIES

CRAs' ratings are an important tool for risk management. Considering this, CRAs should, therefore, develop a cooperation

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63 For an account of these criticisms, see Stephen J. Fowler, C. Hope, 'A Critical Review of Sustainable Business Indices and Their Impact' (2007) 76 *Journal of Business Ethics,* pp. 243-52.

64 See e.g. Klaus Michael Menz, 'Corporate Social Responsibility: Is it Rewarded by the Corporate Bond Market? A Critical Note' (2010) 96 *Journal of Business Ethics*, pp. 117-134.

65 See e.g. Hajnalka Ván, Judit Gébert, György Málovics, 'Critical evaluation of sustainability indices', available at: www.eco.u-szeged.hu/download.php?docID=40454; Stephan Klasen, 'Human Development Indices and Indicators: A Critical Evaluation', available at: http://hdr.undp.org/sites/default/files/klasen_final.pdf

66 See e.g. Daniel M. Franks, Rachel Davis, Anthony J. Bebbington [and others], 'Conflict translates environmental and social risk into business costs' (2014) 27 *Proc Natl Acad Sci U S A,* available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4040549/; Jun-Yen Lee, Ching-Hsing Chang, 'Efforts toward Creating a Sustainable Business Model: An Empirical Investigation of Small-Scale Certified Forestry Firms in Taiwan' (2019) 11 *Sustainability*, available at: https://www.mdpi.com/2071-1050/11/9/2523/htm

67 See Ivo Knoepfel, 'Dow Jones Sustainability Group Index: A Global Benchmark for Corporate Sustainability' (2001) 8 *Corporate Environmental Strategy*, available at: https://www.researchgate.net/publication/248541323_Dow_Jones_Sustainability_Group_Index_A_Global_Benchmark_for_Corporate_Sustainability

network to exchange information and experience amongst themselves, in particular with the view of reducing the weight of self-reported information from rated entities in the measurement and assessment of their own corporate sustainability. Moreover, and equally significant, CRAs should also develop standards that respond to the changing impact of the credit rating process on social welfare and economic and social resilience. Nonetheless, CRAs› standards of business conduct will produce human rights effects regardless of whether or not they account for them. Such costs are elevated when they fall on those who cannot bear them. Therefore, it is more advisable that CRAs embrace a human rights perspective into their standards of business conduct and sustainable development indexes and indicators used so far to monitor the sustainability of rated entities. This will not only make the advantages associated with the proposed standards, indexes and indicators more evident but will also strengthen the capacity of the CRAs to guarantee that the standards, indexes and indicators do not put excessive burdens on some of the more vulnerable stakeholders in their activity.

There are good precedents for the insertion of environmental, social, and human rights criteria into credit rating analysis. A recent report published by Moody's on 1 December 2017 outlines how global CRAs should evaluate the impact of climate change in their ratings for bond issuers. While this is a most welcome development, it cannot be regarded as obviating the necessity for a human rights-based approach to financial ratings.[68]

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68 Moody's Investor Service, 'How Moody's Assesses the Physical Effects of Climate Change on Sovereign Issuers', available at: https://www.eticanews.it/wp-content/uploads/2017/01/Moodys-climate-change-and-sovereigns-November-7.pdf