Corporate Social Responsibility
BUSLW 951
Penn State Law – Coalition for Peace & Ethics
Fall 2020
Larry Catá Backer

Extra Credit Project
Building a Rating System for Non-State Non-Judicial Remedies Under the UN Guiding Principles for Business and Human Rights

Background

Ratings, and ratings systems, have emerged as a powerful means of accountability. Ratings systems serve as a means through which compliance with rules or expectations can be measured for individual actors, such as a business. Those measurements, when aggregated, produced a means of assessing compliance among groups of actors subject to the same compliance rules and expectations. The tool becomes even more powerful when such individual and aggregated measures are assessed, in turn, against an ideal or perfect form. That ideal can be expressed as a principle of conduct, as a rule, or as a set of expectations around which there is some sort of social, political, legal, or cultural consensus.

The essence of ratings consists of two quite distinct projects. The first is a *project of translation*. The second is a *project of reduction*. Third it is a *project of assessment and consequence*.

The project of translation requires the objectives, principles or expectations to be measured to be translated into concrete actions. The object is to find concrete actions or events or occurrences that can be measured. That, in turn, requires the creation of a system of measurement. Measurement can range from the simplest form (a binary e.g. yes – no), to more complex measurements. However done, the essence of this aspect of rating is to provide the universe of activity that defines the principles, objectives, etc. as one would expect them to be manifested. A key element of that exercise is to determine whether there is access to the information necessary to know if the action occurred. Relates to that is the challenge of assuring that that measure is accurate, and that all measurements capture all of the manifestation of the actions to be measured or noted. One can think about this part of the construction of ratings as the *generation of data and its harvesting*.

The project of reduction then takes these measurements and reduces them to a conclusion. The project of reduction creates the measure against which the actions or events that are collected can be understood. This is the project of analytics. To measure, however, requires that a system of measurement–a systematization of valuing the inputs (the actions r events that serve as the raw materials for the ratings) can be "properly" understood and placed within a spectrum of measurement. That spectrum of measurement is a fancy way of saying that one cannot measure something without having something against which to measure. In this case, measurement can be against time (measuring the growth of children once a month); it can be against others similarly situated (e.g., measuring a class of children with similar characteristics (like age, sex/gender, etc.); and against other groups (e.g., measuring the heights of 5th grade students in Chicago and Berlin). Most powerfully, actions can be measured against an ideal (e.g., an

ideal 10 year old female should be 48 inches tall). One can think of this part of the construction of ratings as its *analytics* that reduces a sometimes large cluster of data to a simple(r) set of meanings.

Lastly, the project of assessment looks to consequences. Ratings is an accountability measure. But it is more than that. Ratings are the means through which normative principles and political-societal objectives (especially those written into domestic and international law) may be fleshed out and applied with direct consequence. In this later sense one can understand the process of rating (its translation and reduction functions) as a form of law making that is precisely applied to the subjects of ratings. Accounting, however, ought to be understand in two quite distinct ways. The first is accounting to self (e.g., "how did I measure up to my own standards and expectations"). It is a means of self-discipline and self-improvement. The second is accounting to others. To answer the question, "how did I do in relation to others in the same grouping" is to acknowledge that the rules against which a measure is taken and accountability is based imply a convergence of action. In its ideal form all ratings should converge . But it also suggests a convergence toward an ideal–the ideal implied in the construction of the measure itself. So the ultimate question to be answered by a rating is, "how did I measure up against an ideal." What is that ideal? In a rating system that assigns measures form a low of 1 to a high of 10, those actions and factors valued in a way to achieve a score of 10 indicate the ideal of rule-norm compliance expressed through actions that produce the highest valuation. Where there are consequences for one's position on a rating scale, then ratings move from a system of accountability to one of managing behavior. It serves as the equivalent of civil fines for conduct that crosses a regulatory line from that permitted to that prohibited, but in a much more graduated and specific way. Those consequences may be left to the discretion of market actors (consumers, lenders, stakeholders, insurers, etc.) or they may be exacted by the state (a loss of privileges, fines, etc.).

As such, ratings provide a powerful tool for transposing normative objectives and principles (and sometimes legal obligations) into specific assessments of actions. These serve simultaneously to define (and thus to more closely control) the persons and entities subject to rating while at the same time assessing the extent to which those with responsibility have complied (as such compliance is defined by the parameters of the rating analytics themselves.

Challenge:
Rating Business Compliance with their Obligation to Provide Non-State, Non-Judicial Grievance Mechanisms

The Third Pillar of [the UN Guiding Principles for Business and Human Rights](url) (¶¶ 25-31) focuses on the duty of states and the responsibility of business to provide a means of redress to those whose rights have been affected by economic activity. Principle 28 provides that "States should consider ways to facilitate access to effective non-State- based grievance mechanisms dealing with business-related human rights harms." The Commentary specifies that non-state based grievance and similar mechanisms include those administered by a business enterprise, by stakeholder groups or by multi-stakeholder groups. "They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach." (UNGP ¶ 28 Commentary). Among the various mechanisms available, the UNGP speaks to the utility of operational level grievance mechanisms to provide

direct access to remedy for individuals and communities "adversely impacted by a business enterprise." (UNGP § 29 Commentary). These grievance mechanisms "support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence. . . . [and] these mechanisms make it possible for grievances. . . to be addressed and for adverse consequences to be remediated early and directly." (Ibid.)

Building in part on these principles, on 6 July 2018, the Human Rights Council adopted resolution 38/13 by consensus, requesting the Office of the High Commissioner for Human Rights (OHCHR)

> "to identify and analyse challenges, opportunities, best practices and lessons learned with regard to **non-state-based grievance mechanisms** that are relevant to the respect by business enterprises for human rights, . . . and to submit a report thereon to the Human Rights Council for consideration at its forty-fourth session." (OP 9, emphasis added)

The OHCHR responded with the launch of Part III of the Accountability and Remedy Project (ARP III). The *ARP III Final Report* was distributed 19 May 2020 and may be accessed HERE (https://undocs.org/A/HRC/44/32) along with the *ARP III Addendum: Explanatory Notes to Final Report*, 3 June 2020 (may be accessed HERE: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/44/32/add.1). The Final Report described the universe of non-state non-judicial remedial mechanisms and recommended steps to be taken by states and businesses to implement a series of actions described in Parts II and III of the Annex (Report pp. 11-19) *in the form of 16 policy objectives*. Paragraph 7 of the ARP III Report concluded that at "present, however, few non-State-based grievance mechanisms are fulfilling their envisaged role. While there have been welcome attempts to design and operate various kinds of mechanisms, and while there have been valuable contributions by such mechanisms to accountability and remedy, rights holders continue to report significant problems with identifying, accessing and using such mechanisms in practice."

It seems to us that these policy objectives provides a clearly articulated and robust basis for the construction of a rating system through which one can assess the progress both businesses and states have been making toward the policy and normative goals of the UNGP and its development through the ARPIII Project.

The Project:
Creating an ARP III-Based Remedy Rating Mechanism

Using the 16 Policy Objectives as a framework, the task for students interested in this project (our Penn Sate CSR Lab 2020), will be to construct a ratings systems to assess the extent to which specific enterprises (and in phase 2–states) have developed and implemented non-state non-judicial grievance mechanisms that work toward the ARP III policy objectives.

Students will be working with me and my TA Matthew McQuilla, to put together the methodology to be used to construct the rating system. This will include: (1) setting the premises and baselines for measurement; (2) identifying specific conduct and actions that are embraced within those premises and baselines; (3) determining the character and form of data to be harvested; (4) identifying the class of actors

form which data is to extracted; (5) developing the form of measurement and organization of the data (the analytics and quantification aspects of rating); (6) determining the meaning that attaches to specific ratings; (7) determining the scope of suggestions for improvement of ratings in the various categories used for rating; (8) determining the scope of transparency and reporting (to the enterprise and then publicly); and (9) development of consequential recommendations including recommendations for rewards for higher ratings (reduced costs of capital, etc.) and disabilities for low ratings (e.g., reporting requirements, submissions of plans for improvement, etc.).

By the completion of the project, Penn State's CSR Lab 2020 will (1) develop a concept paper touching on the need for, construction, methodology and use of an ARP III rating system for enterprises; (2) Produce a methodology justified by and through the great principles of the UNGP; (3) describe the way in which data warehouses will be managed and used; (4) apply the rating system to an initial group of enterprises; (5) produce a Report detailing the results of that first rating application along with recommendations for internal improvement and external responses to the rating; and (6) consider recommendations for strengthening the public and private law systems with respect to which the key factors that produce the ratings are based.

It is our hope that in the process of developing the rating system and then using it to assess compliance with the ARP III policy objectives, the Penn State CSL Lab 2020 can also advance the principles of the UNGP, especially with respect to human rights, sustainability, and transparency. More important, it is our hope that the rating system can better align the sensibilities and practices of law—especially in the context of protecting the legitimacy and core norms of political systems in accordance with human rights principles that advance civil and political rights (normalized within the national contexts in which it is applied)—with the core characteristics of data driven governance. In this way the Penn State CSR Lab 2020 will hope to contribute to the emerging interlinking between legal systems, which serve as the normative foundation for ARP III's remedial principles, and data based algorithmic systems, which serve to translate the great principles and objectives of law into those actions that express it.