

Bauer, Umlas rejoinder to B Lab's Response to

"Do Benefit Corporations Respect Human Rights"

Stanford Social Innovation Review, Fall 2017

October 9, 2017

We appreciate B Lab's constructive comment, above, and its expression of interest in further engagement on issues of human rights. We hope that this can be the start of an ongoing dialogue that brings the B Corp and BHR movements together to improve corporate responsibility standards and conduct.

In its comment, B Lab asserts that the B Impact Assessment (BIA) contains "aspirational and positive practices" and that the "score is not about compliance." The statement begs the question: "compliance" with what? We agree, as we noted in the article, that the BIA contains some good metrics for human rights. But the BIA cannot be said to respect human rights if it does not meet the standards of international human rights law or if it permits companies that may be involved in serious human rights violations, for example, through their sourcing practices, to be certified. The BHR movement has rejected the notion that companies should be regarded as responsible if only in selective respects they achieve something positive beyond compliance; in fact, this rejection is what gave rise to the BHR movement in the first place. The UN Guiding Principles on Business and Human Rights state that, "the responsibility to respect human rights is a global standard of expected conduct for all business enterprises, wherever they operate...it exists over and above compliance with national laws and regulations protecting human rights." Even in advanced democratic regimes, compliance with domestic law does not necessarily meet international human rights standards. For example, in the United States, which has not ratified ILO Convention 87 on Freedom of Association or the International Covenant on Economic, Social and Cultural Rights, protections for workers' organizing rights are weak and fall far below international standards.

B Lab contends that human rights harms are covered in the BIA's Disclosure Questionnaire (DQ), which is "unscored and is focused on the sensitive, controversial, and potentially negative impacts of a business's performance and impact." As we note in the article, there are good questions in the DQ that can potentially capture a number of human rights concerns. What we take issue with is not only that the DQ does not explicitly cover all internationally recognized human rights, but also that these violations are not scored or weighted. We share B Lab's concern that the positive points from the scored portion of the BIA not be used to offset the harms that show up in the DQ, yet as we maintain in our article, the decision not to score the DQ can mask poor corporate conduct.

There are two problems with the way the DQ is currently treated. First, it relies on self-reporting by the company. Meaningful self-reporting requires that the company demonstrate it has conducted human rights due diligence throughout its supply chain, and that it then reports accurately. This is an issue the BHR movement has grappled with, which has led to the enactment of laws in France and elsewhere that mandate human rights due diligence. To ensure that companies even know their human rights impacts, B Lab should emphasize the requirement that candidate companies conduct human rights impact assessments, and it can point to the abundant guidance generated by BHR practitioners on how to do so. We note that the main part of the BIA contains a question on whether the company has conducted a "local community impact assessment activity." The candidate company has the option of ticking "No assessment undertaken" without penalty and without raising questions about the accuracy of what the company has reported in the DQ. Moreover, this question refers to whether the company has conducted a social impact assessment (SIA), but as the Guiding Principles note, a social or environmental impact assessment is not the same as a human rights impact assessment. Human rights impact assessments should not be optional for certified B Corps.

Related to this, the unscored DQ is reviewed by B Lab and its Standards Advisory Council, without disclosing these self-reported harms publicly. The review therefore relies on company self-reporting and the assessor's check, and customers and consumers of B Corps are asked to take their word for it that whatever showed up on the DQ, including potentially serious human rights harms, has been cleared. Moreover, when B Lab's review of the DQ turns up serious harms the company is asked to take "incremental" actions, "including incremental transparency of the issue." Therefore, a candidate company is permitted to go at its own pace in addressing human rights concerns in its operations, which remain hidden from the public eye. Such opacity potentially undermines the certification process by raising questions in the mind of a customer or consumer: How do we know that a company that has caused, contributed to or is linked to human rights violations didn't get through?

B Lab points to the public complaint process that backs up its independent review of a company. It would be helpful to know how often it has been used, how accessible it is, and how often it has led to a candidate company's being rejected for certification.

A more robust approach would be to score the DQ separately, create greater transparency around it and the complaints process, and make demonstration of human rights due diligence a pre-condition for certification.