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# The Implications of the B Corp Movement in the Business and Human Rights Context

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## **Cover Page Footnote**

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# The Implications of the B Corp Movement in the Business and Human Rights Context

Cindy S. Woods<sup>†</sup>

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## Abstract

In recent decades, issues of corporate accountability and social responsibility have risen to the forefront in international debates. The U.N. Guiding Principles on Business and Human Rights (Guiding Principles), unanimously endorsed by the U.N. Human Rights Council in June 2011, authoritatively lay out the State duty to protect and the corporate responsibility to respect human rights. In an effort to operationalize the Guiding Principles, the U.N.

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Human Rights Council called on all States to develop National Action Plans (NAPs) for domestic implementation of the Guiding Principles. A key first step in the creation of a NAP is the completion of a national baseline assessment of the current frameworks and conditions affecting the protection and promotion of human rights by the State and businesses alike. With over thirty-five countries now committed to the creation of a NAP, it is increasingly important to evaluate existing corporate structures that claim to be socially and ethically motivated. The “B Corp” movement began in earnest in 2006, through the work of U.S.-based non-profit B Lab. A B Corp is a business certified by B Lab as a corporation committed to creating and supporting social and environmental rights. The B Corp movement has grown in size and stature, spreading into over thirty countries and garnering a reputation for excellence. Boosts to the movement have recently come from the certification of large multinational companies and the interest of businesses that followed. As the B Corp movement continues to proliferate, its technical and normative value within the business and human rights field merits close consideration. Through a comparative analysis between the B Corp certification requirements and the Guiding Principles, this paper seeks to answer the following questions: Do B Corps fulfill the Guiding Principles’ corporate responsibility standards to respect human rights? Are they a desirable normative shift in the business and human rights context?

## A INTRODUCTION

For decades, human rights advocates have called for greater corporate accountability in relation to the harmful impacts business operations can, and often do, have on individuals, communities, and societies throughout the world. As high profile cases of large multinational corporations complicit in human rights abuses have increasingly come to the fore, the need to clarify both the role of States to effectively regulate multinational corporations (MNCs) and the standards of corporate responsibility and accountability with regards to human rights has become stark.<sup>1</sup> The work of the Special Representative of the U.N. Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprise, John Ruggie, aimed to address this gap. Over the course of his six-year mandate, Ruggie established the U.N. Guiding Principles on Business and Human Rights (Guiding Principles), a three-pillared framework outlining the State duty to protect human rights, the corporate responsibility to respect human rights, and the need for access to remedy in relation to business-related human rights harms.<sup>2</sup> The Guiding Principles, comprised of thirty-one founda-

<sup>1</sup> Probably the most cited case of corporate complicity in human rights abuse is the Bhopal gas tragedy of 1984, though calls for an international code of conduct for multinational corporations began in the mid-seventies. See United Nations Conference on Trade and Development, *Address Delivered by Mr. Salvador Allende Gossens, President of Chile, at the Inaugural Ceremony on 13 April 1973*, Apr. 13–May 21, 1972, ¶ 62, U.N. Doc. TD/180 (Vol. 1), Annex VIII (1973).

<sup>2</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Annex, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

tional and operational principles, lay out in authoritative detail, *inter alia*, the obligations and responsibilities of State and corporate actors in regards to business impacts on human rights.<sup>3</sup> The U.N. Human Rights Council unanimously adopted the Guiding Principles in 2011 and thereafter called on countries in 2014 to develop National Action Plans (NAPs) to promote further implementation of the Guiding Principles on a domestic scale.<sup>4</sup> A key first step in the creation of a NAP is the completion of a National Baseline Assessment (NBA).<sup>5</sup> The NBA is intended to assess, principle by principle, a State's current implementation of the business and human rights framework, highlighting current legal and policy developments and illustrating gaps that the NAP's content should address.<sup>6</sup>

Over thirty-five countries have committed to promulgating a NAP, and of those, seven have already completed the process.<sup>7</sup> As countries begin taking stock of existing legislative and voluntary measures related to regulating business impacts on human rights, it is increasingly important to analyze the effects of a growing trend in corporate accountability—the “B Corp” movement. The B Corp movement began in 2006 with the work of B Lab, a U.S.-based non-profit.<sup>8</sup> B Lab promotes three interrelated initiatives: (1) certifying companies as “B Corps”; (2) lobbying for benefit corporation legislation; and (3) managing a social impact reporting platform and database.<sup>9</sup> B Corps are certified by B Lab based on “social and environmental performance, accountability, and transparency” and carry with them an increasingly recognizable designation as a business dedicated to doing better.<sup>10</sup> B Corps also continue to propagate, through their legal form, however, the shareholder wealth maximization norm—reinforcing what many human rights activists see as an unsavory dichotomy between B Corps and ordinary corporations, which helps non-B Corps undermine the corporate accountability movement as a whole.

Nonetheless, the B Corp movement continues to expand, garner widespread support, and gain popularity and visibility. Presently, there are over a thousand

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<sup>3</sup> *Id.*

<sup>4</sup> U.N. Human Rights Council, 23rd Sess., U.N. Doc. A/HRC/23/32, ¶ 5 (Mar. 14, 2013).

<sup>5</sup> The Danish Institute for Human Rights [DIHR] & The International Corporate Accountability Roundtable (ICAR), *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*, 16–17 (2014) [hereinafter *NAPs Toolkit*].

<sup>6</sup> *Id.*

<sup>7</sup> See *National Action Plans*, BUSINESS & HUMAN RIGHTS RESOURCE CENTER, <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (last visited Oct. 9, 2015). Although the Spanish government drafted a NAP in 2014, it has yet to be approved by the Spanish Council of Ministers. *State National Action Plans*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONERS FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Feb. 21, 2015).

<sup>8</sup> *Our History*, B CORPORATION, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history> (last visited Feb. 23, 2015).

<sup>9</sup> *The Non-Profit Behind B Corps*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Feb. 18, 2015).

<sup>10</sup> *Id.*

certified B Corps from more than thirty countries.<sup>11</sup> As the movement continues to proliferate, and larger corporations begin expressing interest in certification, it is important to question whether the B Corp is truly the “highest standard for socially responsible businesses.”<sup>12</sup> This comparison is particularly important in relation to operative international standards and the normative effects of the movement’s continued proliferation of the shareholder wealth maximization norm.

This paper seeks to discuss the technical and normative implications of the B Corp movement, focusing specifically on whether B Corp certification is a tool States should embrace during the NAP process or a program that undercuts the broader corporate accountability movement by failing to promote the Guiding Principles on a high level or by allowing non-participating companies to shirk human rights responsibilities through citation of liability risks. Part II introduces in greater detail the Guiding Principles, discussing the history of U.N. attempts to regulate corporate human rights impacts, the two pillars of the State duty to protect and the corporate responsibility to respect, and the NAP process. Part III will examine the B Corp movement in light of both its technical and normative effects on the business and human rights movement. This section will first discuss the requirements for B Corp certification before analyzing whether and how certification seeks to hold corporations accountable to existing human rights standards espoused by the Guiding Principles. It will then shift focus to the normative issues implicated by the B Corp movement, explaining the prevailing arguments on both sides of the shareholder wealth maximization debate and the norm’s effect on future proliferation of corporate consideration for human rights. Part IV concludes with the presentation of key reflections and closing thoughts on future promotion of the B Corp movement within the NAP process.

## B U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The U.N. Human Rights Council unanimously adopted the Guiding Principles in 2011, which have since served as the authoritative guide on the existing rights and duties under international law that both States and corporations have toward protecting, respecting, and promoting human rights. Since their adoption, the Guiding Principles have served as a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity based on three fundamental pillars: “[1] the State duty to protect against human rights abuses by third parties; [2] the corporate responsibility to respect human rights; and [3] greater access by victims to effective remedy, both judicial and non-judicial.”<sup>13</sup> The Guiding Principles expound upon the three pillars by pro-

<sup>11</sup> *What are B Corps?*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps> (last visited Feb. 18, 2015).

<sup>12</sup> *How a Business Can Change the World: A Special Report on the Innovative Business Models Social Entrepreneurs Are Inventing*, INC., <http://www.inc.com/magazine/20110501/how-a-business-can-change-the-world.html> (last visited Feb. 18, 2015).

<sup>13</sup> *UN Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights*, UN NEWS CENTRE (June 16, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38742#>

viding thirty-one foundational and operational principles, which further develop and define the respective obligations and responsibilities of State and corporate actors in relation to protecting, respecting, and promoting human rights.

### B.1 THE STATE DUTY TO PROTECT

The State duty to protect human rights is explicated in two foundational principles. First, the State “must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”<sup>14</sup> Second, the State “should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”<sup>15</sup> In providing operational guidance for the implementation of these key principles, the Guiding Principles state that, in meeting its duty to protect, the State should, *inter alia*, ensure that “laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights ...[p]rovide effective guidance to business enterprises on how to respect human rights throughout their operations,” and “[e]ncourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.”<sup>16</sup> The Guiding Principles recognize that the human rights implications of corporate and securities laws, which directly shape business behavior, are “poorly understood,” leading corporate officers to question what they are both permitted and required to do regarding human rights.<sup>17</sup> As such, States should ensure that the laws and policies in this area of corporate law provide “sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.”<sup>18</sup> Effective guidance should both indicate expected outcomes and help disseminate best practices.<sup>19</sup> Communication and disclosure of a corporation’s human rights impacts and policies can range from informal communications with affected stakeholders to formal public reporting.<sup>20</sup> While these communications and disclosure requirements can be mandatory or permissive, or a mix of the two, they are important tools for fostering respect for human rights and should be utilized by States to do so.<sup>21</sup>

.V0YeK1PF\_NU; U.N. Human Rights Council, 8th Sess., U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

<sup>14</sup> *Guiding Principles*, *supra* note 2, princ. 1.

<sup>15</sup> *Id.* at princ. 2.

<sup>16</sup> *Id.* at princ. 3.

<sup>17</sup> *Id.* at princ. 3. cmt.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

## B.2 THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

Under the second pillar of the Guiding Principles, business enterprises should respect human rights, meaning they should “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>22</sup> This fundamental responsibility is espoused in five foundational principles. The responsibility to respect human rights, a “global standard of expected conduct for all business enterprises wherever they operate,” applies “regardless of size, sector, operational context, ownership, and structure.”<sup>23</sup> It requires that businesses undertake adequate measures for the prevention, mitigation, and remediation of human rights abuses and exists independently both from a home State’s ability or willingness to uphold its duty to protect and from compliance with national human rights laws and regulations.<sup>24</sup> Corporations are responsible for respecting human rights that have been internationally recognized, which is understood, at a minimum, to encompass the rights expressed in the International Bill of Human Rights (composed of the Universal Declaration of Human Rights,<sup>25</sup> the International Covenant on Civil and Political Rights,<sup>26</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>27</sup>) and the principles concerning fundamental rights as set out in the International Labor Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work.<sup>28</sup> Under certain circumstances, however, businesses may also need to consider additional human rights standards, for example, U.N. instruments that further explicate the rights of women, children, indigenous peoples, persons with disabilities, and migrant workers.<sup>29</sup> More specifically, the responsibility to respect requires that businesses “(a) [a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur’ and ‘(b) [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”<sup>30</sup> In order to meet this responsibility, business enterprises should establish appropriate policies and processes, including: “(a) [a] policy commitment to meet their responsibilities to respect human rights; (b) [a] human rights due—diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and (c) [p]rocesses to enable the remediation of any adverse

<sup>22</sup> *Id.* at princ. 11.

<sup>23</sup> *Id.* at princ. 11 cmt.; *id.* at princ. 14.

<sup>24</sup> *Id.* at princ. 11 cmt.

<sup>25</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>26</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>27</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

<sup>28</sup> International Labour Organization, 88th Sess., *ILO Declaration on Fundamental Principles and Rights at Work* (1998).

<sup>29</sup> *Guiding Principles*, *supra* note 2, princ. 12 cmt.

<sup>30</sup> *Id.* at princ. 13.



human rights impacts they cause or to which they contribute.”<sup>31</sup> The Guiding Principles also lay out nine operational principles to provide more context and direction to the implementation of appropriate policies and processes, which will be reviewed in further detail in Part III.

### B.3 ACCESS TO REMEDY

Encompassed in the third pillar is the need for States to take appropriate steps to ensure “through judicial, administrative, legislative or other appropriate means” that those affected by corporate human rights abuses occurring within their jurisdiction have access to effective remedies.<sup>32</sup> This remedy requirement can be effectuated both procedurally and substantively through either State-based judicial or non-judicial mechanisms or non-State-based grievance mechanisms.<sup>33</sup> While States have a duty to ensure access to effective remedy through state-based means and to facilitate access to non-State grievance processes, businesses should also establish or participate in “effective operational-level grievance mechanisms” to address complaints early and remedy them directly, if possible.<sup>34</sup> Operational grievance mechanisms are accessible directly by affected individuals or communities and are usually administered, at least in part, by the businesses implicated in the grievance. These mechanisms provide affected persons with the ability to engage the business directly. Grievances need not equate to human rights abuse to access these operational-level mechanisms; as such, these mechanisms can be useful tools in deescalating disputes and abuses.<sup>35</sup> Additionally, according to the Guiding Principles, “industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.”<sup>36</sup>

### B.4 NATIONAL ACTION PLANS

A promising means for implementation of the Guiding Principles is the creation by each State of a NAP. While the Guiding Principles are universally applicable, they are not a one-size-fits-all approach, “simply to be taken off the shelf and plugged in.”<sup>37</sup> Instead, they must be operationalized by each State according to its own unique political, economic, and social situation. Following the adoption

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<sup>31</sup> *Id.* at princ. 15.

<sup>32</sup> *Id.* at princ. 25.

<sup>33</sup> *Id.* at princ. 25–27. & cmt.

<sup>34</sup> *Id.* at princ. 29.

<sup>35</sup> *Id.* at princ. 29 & cmt.

<sup>36</sup> *Id.* at princ. 30.

<sup>37</sup> *Id.* ¶ 15; *see also id.* at ¶ 14 (As Ruggie expressed in his presentation to the Human Rights Council of the Guiding Principles, the principles’ “normative contribution lies not in the creation of the new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.”).

of the Guiding Principles,<sup>38</sup> the U.N. Human Rights Council established the U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Working Group) to, *inter alia*, promote the “effective and comprehensive dissemination and implementation” of the Guiding Principles. In upholding its mandate, the Working Group has encouraged States to develop NAPs in the field of business and human rights as a means of accelerating implementation.<sup>39</sup> Furthermore, the U.N. Human Rights Council itself called on all Member States to develop NAPs in a June 2014 resolution.<sup>40</sup> In this context, an NAP is defined as “an evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the U.N. Guiding Principles.”<sup>41</sup> Its fundamental purpose is to strengthen the prevention of and protection against human rights abuses by corporations through “an inclusive process of identifying needs and gaps and practical and actionable policy measures and goals.”<sup>42</sup>

Many States have committed to or completed an NAP since early calls for their creation in 2013. As of October 2015, seven States have completed NAPs.<sup>43</sup> An additional twenty-eight States have officially committed to developing NAPs, and are in differing stages of completion, while in an additional six States, civil society or national human rights institutions have begun the drafting processes without official State commitment.<sup>44</sup> While important information can be gleaned from these early NAPs regarding how States approach their duty to ensure that corporations respect human rights in their operations (as will analyzed later in this paper), many of these first cut NAPs received substantial criticism, in part for not taking adequate stock of the existing legal and regulatory frameworks in each country.<sup>45</sup> According to the available guidance on the development of

<sup>38</sup> Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RTS., <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last visited Feb. 21, 2015).

<sup>39</sup> U.N. Human Rights Council, *supra* note 4.

<sup>40</sup> G.A. Res. 26/22, U.N. Doc. A/HRC/RES/26/22 (July 15, 2014).

<sup>41</sup> U.N. WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS, ii (2014) [hereinafter *Working Group Guidance*]; See also *NAPs Toolkit*, *supra* note 5.

<sup>42</sup> U.N. Secretary-General, *Human Rights and Transnational Corporations and Other Business Enterprises, Note by the Sec’y General*, ¶ 2, U.N. Doc. A/69/263 (Aug. 5, 2014).

<sup>43</sup> *National Action Plans*, *supra* note 7.

<sup>44</sup> *Id.*, *supra* note 7 (The State governments committed to developing NAPs include: Argentina, Azerbaijan, Belgium, Brazil, Chile, Colombia, France, Germany, Greece, Indonesia, Ireland, Italy, Jordan, Latvia, Lithuania, Malaysia, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Norway, Portugal, Scotland, Slovenia, Spain, Switzerland and the United States. Civil society or national human rights institutions in Ghana, Poland, Kazakhstan, South Africa, South Korea and Tanzania have also begun drafting NAPs).

<sup>45</sup> See generally NETHERLANDS INSTITUTE FOR HUMAN RIGHTS, *ADVICE: RESPONSE TO THE NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS “KNOWING AND SHOWING”* (2014); CORE, *GOOD BUSINESS? ANALYSIS OF THE UK GOVERNMENT ACTION PLAN ON BUSINESS & HUMAN RIGHTS* (2013); INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE & EUROPEAN COALITION FOR CORPORATE JUSTICE, *ASSESSMENT OF EXISTING NATIONAL ACTION PLANS (NAPs) ON BUSINESS AND HUMAN RIGHTS* (2014); Damiano de Felica & Andreas Graf, *The Potential of National Action Plans*

NAPs,<sup>46</sup> an important initial step in the creation of an NAP is the completion of a National Baseline Assessment (NBA) of the State's current implementation of business and human rights frameworks. As such, the NBA is a useful tool for evaluating a State's current application of the Guiding Principles and identifying gaps in both State and business implementation. They are seen by many as a prerequisite to the successful development and implementation of an NAP.<sup>47</sup> As part of the NBA, governments are advised to outline the applicable laws, regulations, and policies in relation to each Guiding Principle.<sup>48</sup> However, unlike internal mapping done by State agencies, which a few early NAPs relied on, NBAs should proceed with heavy, but thoughtful and transparent, stakeholder consultation.<sup>49</sup> By interfacing with, *inter alia*, businesses, civil society, and international and regional actors, governments are more likely to be attuned to the successes and challenges faced by business and human rights stakeholders, whose rights and responsibilities are directly affected by the Guiding Principles.

### C THE B CORP MOVEMENT'S TECHNICAL AND NORMATIVE IMPLICATIONS IN RELATION TO THE U.N. GUIDING PRINCIPLES

With input from non-governmental actors, including business and civil society, playing a key role in NAPs processes, it is important to keep a critical eye on trends and developments within the business and human rights context. In a world increasingly concerned with the human rights impacts of corporate actors, attempts at social entrepreneurship have proliferated widely and rapidly. One of the fastest expanding movements in this realm has been the invention of corporate forms that explicitly allow for or require consideration of social and/or environmental issues in corporate board decision-making.<sup>50</sup> This movement is seen most prominently in the United States with the recent burgeoning of benefit corporation legislation and, on a global level, with the spread of the B Corp movement from the United States to more than thirty countries.<sup>51</sup> As the B Corp movement becomes increasingly attractive to corporate actors who wish to integrate social and environmental concerns into their bottom line, it is

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*to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights*, 7 J. HUMAN RTS. PRACT. 40 (2015).

<sup>46</sup> *NAPs Toolkit*, *supra* note 5; *Working Group Guidance*, *supra* note 51. The U.N. Working Group and civil society have both created in depth guidance for countries developing NAPs. The ICAR/DIHR Toolkit is a leading document on the State development, implementation and review of NAPs in the business and human rights context. For up to date information regarding the toolkits developments and road-testing, see *National Action Plans*, INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, <http://www.icar.ngo/initiatives/national-action-plans/> (last visited Oct. 16, 2015).

<sup>47</sup> *NAPs Toolkit*, *supra* note 5, at 16–17.

<sup>48</sup> *Working Group Guidance*, *supra* note 41, at 7.

<sup>49</sup> *NAPs Toolkit*, *supra* note 5, at 37–38; *Working Group Guidance*, *supra* note 41, at 7.

<sup>50</sup> This includes, *inter alia*, the benefit corporation, social purpose corporation, and flexible purpose corporation.

<sup>51</sup> *State by State Legislative Status*, BENEFIT CORP INFORMATION CENTER, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited February 22, 2015); *What are B Corps?*, *supra* note 11.

important to understand how well the B Corp requirements uphold the current international standards for corporate human rights responsibilities. Additionally, regardless of the B Corp movement's effectiveness in promoting the Guiding Principles, a supplemental normative inquiry must be made into the effects of B Corps' continued propagation of the shareholder wealth maximization norm on the business and human rights movement. Both of these queries are timely and important, given the substantial role stakeholders should play, and increasingly are playing, in the creation of NAPs for the implementation of the Guiding Principles. It is critical at this juncture of B Corp proliferation, and increasing NAP development worldwide, to take assessment of the technical and normative impacts of this new corporate social responsibility movement in the business and human rights context.

### C.I THE B CORP MOVEMENT: AN OVERVIEW

The B Corp movement is a fast growing and relatively new corporate social responsibility trend.<sup>52</sup> Spearheaded by U.S.-based non-profit B Lab, the B Corp movement is a tri-platform effort to increase business respect and support for social and environmental rights across stakeholder groups by: (1) certifying corporate dedication to high levels of social and environmental performance, accountability and transparency; (2) passing benefit corporation legislation; and (3) providing a platform for benchmarking, measuring and reporting on impact.<sup>53</sup> The following discussion will focus on B Corp certification. While future reference will be made to the benefit corporation legislation, the third prong of the B Lab platform focusing on analytics and impact reporting is not within the scope of this analysis.

There are three steps to B Corp certification: (1) A corporation must meet the performance requirements established by B Lab; (2) if the corporation meets or exceeds the required minimum performance review score, it must meet certain legal requirements based on its corporate structure; (3) the corporation must sign the B Corp Declaration and Term Sheet, and pay the appropriate fees associated with attaining B Corp status.<sup>54</sup>

#### C.I.I PERFORMANCE REQUIREMENTS

The first step in B Corp certification is passing the B Impact Assessment. The assessment measures the overall impact of a company's social and environmental performance on its stakeholders based on a 200-point scale, focusing specifically on worker, community, environmental, long-term and core impacts.<sup>55</sup> Assessment points pertinent to the business and human rights field will be discussed

<sup>52</sup> *Our History*, *supra*, note 8.

<sup>53</sup> *The Non-Profit Behind B Corps*, *supra* note 9.

<sup>54</sup> See generally *How to Become a B Corp*, B CORPORATION, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp> (last visited Feb. 23, 2015).

<sup>55</sup> RYAN HONEYMAN, *THE B CORP. HANDBOOK: HOW TO USE BUSINESS AS A FORCE FOR GOOD* 46, 54–55, 74–75, 96–97, 118–19, 138–39 (2014).

in greater detail later in this section. The B Impact Assessment exists in multiple variations, taking into account company size, sector, and location of primary operation.<sup>56</sup> Upon completion of the assessment, companies receive a B Impact Report and a score of first impression.<sup>57</sup> Companies next undergo an assessment review with B Lab staff, where questions are clarified and answers further refined.<sup>58</sup> If, after the review, the company has achieved a B Impact Assessment score of eighty or higher, it is eligible to move forward in the certification process.<sup>59</sup> These corporations must submit supporting documentation to B Lab to substantiate a randomly selected subset of eight to twelve B Impact Assessment questions previously answered in the affirmative.<sup>60</sup> Additionally, successful corporations must also complete a disclosure questionnaire aimed at assessing the need for any further transparency or public disclosure.<sup>61</sup> Certified B Corps are also subject to on-site review to further corroborate the veracity of assessment responses; ten percent of B Corps are chosen at random each year for review by B Lab staff.<sup>62</sup>

#### C.I.2 LEGAL REQUIREMENTS

In addition to performance requirements, certified B Corps must also comply with specific legal requirements. These requirements vary based on a business's corporate form and location of incorporation and are meant to "bake sustainability into the DNA" of a certified B Corp, in order to ensure that the corporation's social or environmental mission "can better survive new management, new investors, or even new ownership."<sup>63</sup> The ultimate goal of the legal requirements is to have companies adopt benefit corporations status where feasible, and where not, to adopt analogous language into governing documents.<sup>64</sup> The benefit corporation, distinct from B Corp certification, is a new corporate form that holds the dual purpose of both creating profit for its shareholders and a "material positive impact on society and the environment."<sup>65</sup> Along these lines, benefit corporations must "consider the impact of their decisions not only on shareholders but also on workers, community and the environment."<sup>66</sup> Benefit corporations and B Corp certification are often confused: a corporation can be a benefit corporation without being B Corp certified, and in certain circumstances, to be discussed below, a corporation can be B Corp certified without

<sup>56</sup> *Performance Requirements*, B CORPORATION, <https://www.bcorporation.net/performance-requirements> (last visited Feb. 23, 2015).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Protect Your Mission*, B CORPORATION, <https://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/protect-your-mission> (last visited Feb. 23, 2015).

<sup>64</sup> *Id.*

<sup>65</sup> *Quick FAQ's*, BENEFIT CORP INFORMATION CENTER, <http://benefitcorp.net/quick-faqs> (last visited Feb. 25, 2015).

<sup>66</sup> *Id.*

having benefit corporation status.<sup>67</sup> However, the legal requirements for certification are formed around building a company that is either a benefit corporation or as akin to one as legally possible.

The legal requirements established by B Corp are specific to companies incorporated in the United States; requirements for companies incorporated elsewhere are established on an ad hoc basis with B Corp staff.<sup>68</sup> However, an overview of U.S. legal requirements is instructive. The requirements are as follows: corporations, including S and C corporations and for-profit cooperatives, incorporated in states with benefit corporation legislation must adopt benefit corporation status within either four years of the first effective date of the legislation or within two years of certification, whichever occurs later.<sup>69</sup> Corporations that are incorporated in states with constituency statutes must amend their articles of incorporation within a year of certification to reflect their commitment to taking social and environmental impacts to stakeholders into management decisions.<sup>70</sup> Likewise, limited liability companies (LLC), limited liability partnerships (LLP), and limited partnerships (LP), regardless of the state of incorporation, must amend their governing documents within ninety days of certification to adopt similar commitments.<sup>71</sup> The operative language in this regard is:

In discharging his or her duties, and in determining what is in the best interests of the [corporation/limited liability company] (the “Company”) and its members, a [director/managing member] shall not be required to regard any interest, or the interests of any particular group affected by such action, as a dominant or controlling interest or factor.

He or she shall give due consideration to the following factors, including, but not limited to, the long-term prospects and interests of the Company and its [shareholders/members], and the social, economic, legal, or other effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities and society in which the Company or its subsidiaries operate, (collectively, with the [shareholders/members], the “Stakeholders”), together with the short-term, as

<sup>67</sup> For more information, see *Benefit Corp v. Certified B Corp*, BENEFIT CORP INFORMATION CENTER, <http://benefitcorp.net/what-makes-benefit-corp-different/benefit-corp-vs-certified-b-corp> (last visited, Feb. 25, 2015).

<sup>68</sup> Ad hoc determinations exist for all countries outside the United States, except for Canada. *Corporate Legal Roadmap*, B CORPORATION, <https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap/corporation-legal-roadmap> (last visited Feb. 25, 2015). Canadian corporations are asked to amend their articles of incorporation to adopt language giving the corporation the same operative effect as benefit corporation status. However, amending articles of incorporation are seen as a “fundamental change” under Canadian law, and therefore must be accompanied by a “special resolution” by the shareholders. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *LLC Legal Roadmap*, B CORPORATION, <https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap/llc-legal-roadmap> (last visited Feb. 25, 2015).

well as long-term, interests of its [shareholders/members] and the effect of the Company's operations (and its subsidiaries' operations) on the environment and the economy of the state, the region, and the nation.<sup>72</sup>

However, in cases where the state has both benefit corporation legislation and a constituency statute, a corporation must either adopt benefit corporation status within two years or amend its articles as explained above within one year of certification.<sup>73</sup> In states where neither benefit corporation legislation nor constituency statutes exist, corporations must build the B Corp language into the B Corp Term Sheet to the best of their legal ability.<sup>74</sup> This includes: (1) committing to "consider stakeholders to the extent possible within the current corporate laws" of the state; (2) supporting benefit corporation legislation adopted within the state; and (3) adopting benefit corporation status within four years of the first effective date of legislation or within two years of certification, whichever occurs later.<sup>75</sup>

According to B Lab, the benefits of adopting these legal requirements are threefold; they "(1) give legal protection to directors and officers to consider the interests of all stakeholders, not just shareholders, when making decisions; (2) create additional rights for shareholders to hold directors and officers accountable to consider these interests; [and] (3) limit these expanded rights to shareholders exclusively."<sup>76</sup> The normative implications of these presumed benefits, specifically the concept of conferring legal protection to directors and officers regarding corporate decision-making, will be further analyzed below.

### C.1.3 ADMINISTRATIVE REQUIREMENTS

Once a corporation has passed the performance review and undertakes implementation of necessary legal requirements, it is ready to be certified as a B Corp. Corporations must sign the B Corp Declaration of Interdependence and Term Sheet and pay annual fees to B Lab to finalize B Corp status.<sup>77</sup> The Declaration of Interdependence, signed by a director or officer of the corporation as a "symbol of...commitment to...shared collective purpose," recognizes, *inter alia*, that "all business ought to be conducted as if people and place mattered" and "that, through their products, practices, and profits, businesses should aspire to do no harm and benefit all."<sup>78</sup> The Term Sheet, which varies slightly depend-

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*; *Corporate Legal Roadmap*, *supra* note 68.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Protect Your Mission*, *supra* note 63.

<sup>77</sup> *Make it Official*, B CORPORATION, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official> (last visited Feb. 23, 2015).

<sup>78</sup> See, e.g., *Term Sheet for Certified B Corporation (for corporations in states that do not have constituency statutes where benefit corporation is available)*, B CORPORATION, 2, 5 [https://www.bcorporation.net/sites/default/files/documents/term\\_sheets/B%20Corp%20Term%20Sheet%20-%20Non%20Constituency%20Benefit%20States-1.pdf](https://www.bcorporation.net/sites/default/files/documents/term_sheets/B%20Corp%20Term%20Sheet%20-%20Non%20Constituency%20Benefit%20States-1.pdf) (last visited Feb. 23, 2015).

ing on the subsection of legal requirements that must be attained, sets out the general terms of initial certification and certification maintenance.<sup>79</sup> In addition, certified B Corps must pay annual fees based on a tiered structure according to annual sales.<sup>80</sup> Certification is granted for two years terms, after which, companies must re-certify using the same process required in initial certification.<sup>81</sup>

## C.2 B CORP CERTIFICATION AND THE GUIDING PRINCIPLES

Do B Corps conform to and fulfill the requirements of the Guiding Principles? In order to answer this question, a review of the overlay between the B Corp certification requirements and the Guiding Principles is essential. As introduced earlier, in order to uphold the corporate responsibility to respect, businesses should establish, at a minimum, the following three mechanisms: (1) a policy commitment to respect human rights; (2) a “human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights”; and (3) processes enabling remediation of adverse human rights impacts caused or contributed to by the business.<sup>82</sup>

### C.2.1 POLICY COMMITMENT

According to the Guiding Principles, businesses should express their commitment to upholding their responsibility to respect human rights by adopting a policy statement that:

- (a) Is approved at the most senior level of the business enterprise;
- (b) Is informed by relevant internal and/or external expertise; (c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; [and] (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.<sup>83</sup>

In doing so, businesses should “strive for coherence between their responsibility to respect human rights and other policies and procedures that govern their wider business activities and relationships.”<sup>84</sup>

B Lab requires that all corporations adopt benefit corporation status or language into governing documents akin to the dual aims expressed and protected by such status.<sup>85</sup> All B Corps must commit to considering “social, economic, legal, or other effects of any action on . . . employees, the suppliers, and customers

<sup>79</sup> See, e.g., *id.*

<sup>80</sup> *Make it Official*, *supra* note 77.

<sup>81</sup> *Performance Requirements*, *supra* note 56.

<sup>82</sup> *Guiding Principles*, *supra* note 2, at princ. 15.

<sup>83</sup> *Id.* at princ. 16.

<sup>84</sup> *Id.* at princ. 16 cmt.

<sup>85</sup> See *supra* text accompanying notes 63–74.



of the Company or its subsidiaries, and the communities and society in which the Company or its subsidiaries operate” in their decision-making process.<sup>86</sup> This requirement partially fulfills the Guiding Principles’ prescription for respect. The commitment made through benefit corporation status or an amendment to governing documents is approved at the most senior level and is publicly available and widely communicated. However, the policy commitment required by B Corp certification does not go as far in protecting human rights as the Guiding Principles advise. Corporations are only asked to consider the social and economic effects of their actions on stakeholders; they need not respect any rights of these stakeholders. Admittedly, the breadth of the Guiding Principles does not align completely with the more narrow scope of corporate articles of incorporation; however, the B Impact Assessment inquires further into a corporate policy to respect. The assessment allocates quality points to corporations for the following policy actions:

- [I]ntegrat[ing] a commitment to social and/or environmental responsibility into...written corporate mission statement.
- [T]rain[ing] employees on . . .social and/or environmental mission.
- [E]valuat[ing] employees and management on their performance with regard to [the] company’s social and environmental targets.
- [T]ying] social and environmental performance to bonuses or other rewards.
- S]olicit[ing] from . . .external stakeholders (e.g. customers, community members, suppliers or nonprofit organizations) feedback about [the] company’s social and environmental performance.
- [M]aintain[ing] a board of directors (or other governing body) that meets regularly, has at least one independent outside member, reviews the company’s social and environmental performance, and oversees executive compensation.
- [P]roduc[ing] an external annual report detailing . . .mission-related performance.<sup>87</sup>

These policy preferences map directly onto the Guiding Principles guidance on policy commitments. Not only is the social and environmental policy written into the corporate mission, it is informed by external stakeholder views, is

<sup>86</sup> See *supra* text accompanying note 71.

<sup>87</sup> HONEYMAN, *supra* note 55, at 118–19. The B Impact Assessment queries used in this analysis are drawn from the Quick Assessment sections of the B Corp Handbook due to restrictions on material for personal use. *Terms of Use*, B CORPORATION, <http://www.bcorporation.net/terms-of-use> (last visited Feb. 26, 2015). The actual B Impact Assessment is available online in both quick assessment and full form. *B Impact Assessment*, B IMPACT ASSESSMENT, <http://bimpactassessment.net/> (last visited Feb. 26, 2015). Impact Assessment questionnaires also vary depending on sector and industry. *Create Your Free Account*, B IMPACT ASSESSMENT, <http://b-lab.force.com/bcorp/AssessmentRegistration?p=clear> (last visited Feb. 26, 2015).

publicly available, and is impressed upon personnel and reflected in practice as seen by the evaluation and reward structure based upon employee compliance. While a corporation is not required to fulfill any of these policies in order to receive certification, except for implementation of the legal requirements, it is encouraged to adopt them through the B Corp system, making it a useful tool in the promotion of the policy aspect of the corporate responsibility to respect.

### C.2.2 DUE DILIGENCE PROCESS

Another key component in a corporation's respect for human rights, according to the Guiding Principles, is the implementation of a due diligence mechanism aimed at identifying, preventing, and mitigating adverse human rights impacts caused by a business entity, its subsidiaries, or others with whom it has a business relationship.<sup>88</sup> This process should include "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."<sup>89</sup> In order to evaluate human rights risks, businesses should "identify and assess any actual or potential adverse human rights impacts with which they may be involved" by drawing on internal or external human rights experts and meaningful consultations with potentially affected stakeholders.<sup>90</sup> In verifying "whether adverse human rights impacts are being addressed, businesses should track the effectiveness of their response" by basing appraisal on "appropriate qualitative and quantitative indicators" and drawing on feedback from internal and external sources, including involved stakeholders.<sup>91</sup> Businesses should periodically communicate externally on the steps undertaken to respond to and mitigate adverse human rights impacts.<sup>92</sup>

Certain aspects of this due diligence requirement are fulfilled by the assessment components in the B Impact Assessment's questionnaire, including:

- Conduct[ing] an annual environmental audit of . . . energy, water and waste efficiency.
- Mak[ing] the results of the environmental audit transparent to the public.
- Encourag[ing] suppliers to start their own environmental reviews or audits, which may cover energy, water, waste, carbon emissions, renewables, or materials.
- Publicly disclos[ing] the social and environmental performance of your suppliers.
- Hav[ing] an employee committee to monitor and advise on occupational health and safety.

<sup>88</sup> *Guiding Principles*, *supra* note 2, princ. 17.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at princ. 18.

<sup>91</sup> *Id.* at princ. 20.

<sup>92</sup> *Id.* at princ. 21

- Conduct[ing] regular, anonymous worker satisfaction and engagement surveys.
- Review[ing] a compensation study for your industry to determine whether you are paying above-market, market, or below-market.<sup>93</sup>

The Guiding Principles call on corporations to respect, at a minimum, the human rights enshrined in the International Bill of Human Rights and ILO Declaration on Fundamental Principles and Rights at Work.<sup>94</sup> Some of the quality point considerations listed above, if implemented by a B Corp, help uphold this respect through due diligence processes. Audit requirements, employee monitoring committees, worker surveys, and compensation reviews all aid the company in assessing actual and potential human rights impacts. Similarly, the use of employee committees and anonymous surveys, in addition to publicly disclosing and making transparent the results of company and supplier environmental audits, help guide due diligence processes by ensuring both internal and external consultation and feedback.

However, the scope of the B Corp requirements for certification are severely limited in covering holistically the due diligence requirements of the Guiding Principles, in that they only cover specific issues in environmental and labor law. While multiple human rights encompassed in the Guiding Principles protective ambit can be implicated in environmental and labor rights violations, many additional key human rights are not protected in the due diligence context of the B Corp certification process, i.e. the right to life, right to property, right to standard of living adequate for health and well-being.

### C.2.3 REMEDIATION PROCESSES

According to the Guiding Principles, where businesses identify that they have caused or contributed to human rights violations, they should either provide for or cooperate in their remediation through legitimate processes.<sup>95</sup> Here, B Corp certification makes no inquiry into the remediation mechanisms in place to address a company's adverse human rights impacts—a troubling shortcoming of the B Corp as a model of Guiding Principle implementation.

### C.2.4 CONCLUSION

The B Corp Declaration of Interdependence, which all B Corps sign at certification, declares: “We hold these truths to be self-evident: That we must be the change we seek in the world; That all business ought to be conducted as if people and place mattered; That, through their products, practices, and profits, businesses should aspire to do no harm and benefit all.”<sup>96</sup> While the B Corp movement does not hold itself out to be in line with an implementation of the Guiding

<sup>93</sup> HONEYMAN, *supra* note 55, at 96–97, 75, 54–55.

<sup>94</sup> See *supra* text accompanying notes 41–44.

<sup>95</sup> *Guiding Principle*, *supra* note 2, at princ. 22.

<sup>96</sup> *Term Sheet*, *supra* note 78.

Principles' corporate responsibility to respect pillar, many view it as an answer to the business and human rights problem, in part due to the lofty rhetoric within and surrounding the movement. Many have praised the movement for its progressive, altruistic nature—B Corps are a new form of business that “transcend the contradictions between the ineffective parts of the social sector and myopic capitalism”; they are the “highest standard for socially responsible businesses.”<sup>97</sup> However, B Corp certification does not do enough to uphold the corporate responsibility to respect human rights as enshrined in the Guiding Principles. While the majority of the policy commitment components of the responsibility to respect are covered by the B Corp certification process, efforts at implementing due diligence processes are limited, and attempts at installing remediation processes are non-existent. On top of these lackluster certification requirements, businesses seeking certification need only score positively on forty percent of the assessment, and no mechanism exists to promote or mandate incremental progress on achieving greater quality points in the biennial certification processes.<sup>98</sup> Based on a comparative analysis of the B Corp requirements and the Guiding Principles corporate responsibility to respect, certification promotes inclusion of social and environmental consideration, but does not adequately uphold the full extent of the corporate responsibility under international law to respect human rights.

### C.3 THE NORMATIVE DEBATE BEHIND B CORPS

Even if the B Corp movement robustly promoted and fulfilled the Guiding Principles on corporate responsibility to respect human rights, there are still major concerns regarding the movement's normative contributions to the business and human rights debate. The major normative dispute occurring in the background of the B Corp movement concerns the possible functional necessity of B Corp legal requirements for corporate social responsibility practices; specifically, whether the implementation of legal requirements allowing corporate decision-makers to consider social and environmental consequences is necessary to protect against liability risks.

The legal requirements behind B Corp certification require that business entities either adopt benefit corporation status or the functional equivalent in their governing documents. According to B Lab, the primary reason B Corps are required to undergo this legal reform is to “give legal protection to directors and officers to consider the interest of all stakeholders, not just shareholders, when making decisions.”<sup>99</sup> It is this belief—that legal protection is necessary to shield corporate boards from liability incurred by considering interests other than those of the shareholders—that puts the future of sustainable and human rights compliant business “in a heap of trouble.”<sup>100</sup> If, as B Lab maintains, the legal status

<sup>97</sup> HONEYMAN, *Has the B Corp Movement Made a Difference?*, (Feb. 26, 2015), [http://www.ssiireview.org/blog/entry/has\\_the\\_b\\_corp\\_movement\\_made\\_a\\_difference](http://www.ssiireview.org/blog/entry/has_the_b_corp_movement_made_a_difference).

<sup>98</sup> *Performance Requirements*, *supra* note 56.

<sup>99</sup> *Protect Your Mission*, *supra* note 63.

<sup>100</sup> Marc Gunther, Op-Ed., *B Corps: Sustainability Will Be Shaped by the Market, Not Corporate Law*, THE GUARDIAN, Aug. 12, 2013, <http://www.theguardian.com/sustainable-business/b->

of B Corps gives them more legal freedom to take into account social and environmental responsibilities, it follows that conventional corporations, “have no choice but to focus narrowly on maximizing short-term profits, at the expense of workers, communities and the planet.”<sup>101</sup>

### C.3.1 THE “GREAT DEBATE” REGARDING SHAREHOLDER WEALTH MAXIMIZATION

What are the legal obligations of a corporate board in decision-making? A number of leading scholars argue that shareholder wealth maximization is not only a fundamental norm of U.S. corporate law, but also the world over.<sup>102</sup> The principle of shareholder wealth maximization, or the shareholder-oriented model, holds that ultimate control of the corporation lies with the shareholders, and “the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; [and that] other corporate constituencies, such as creditors, employees, suppliers, and customers, should have their interests protected by contractual and regulatory means rather than through participation in corporate governance.”<sup>103</sup> This viewpoint rose to prominence not only due to its attractiveness to the business world, but also in large part to the classic 1919 case *Dodge v. Ford Motor Co.*, in which the court famously stated:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.<sup>104</sup>

More recently, in 1986, the Delaware Supreme Court breathed additional life into the shareholder wealth maximization theory with its holding in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, which held, in short, that an unconflicted board in the process of taking a corporation private was liable to shareholders for failing to maximize shareholder value.<sup>105</sup> Indeed, Chief Justice of the Delaware Supreme Court, Leo Strine, continues to maintain “American corporate law makes corporate managers accountable to only one constituency—stockholders”<sup>106</sup> As the most influential corporate law jurisdiction in the United

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corps-markets-corporate-law.

<sup>101</sup> *Id.*

<sup>102</sup> See, e.g., Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 439 (2001).

<sup>103</sup> *Id.* at 440–41.

<sup>104</sup> *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

<sup>105</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

<sup>106</sup> Leo E. Strine, Jr., *Making it Easier for Directors to “Do The Right Thing?”* 4 HARV. BUS. L. REV. 235, 241–42 (2014).

States, the position of the Delaware Supreme Court regarding the shareholder wealth maximization's primacy speaks volumes. However, despite the shareholder-oriented model having arguably achieved international "ideological hegemony,"<sup>107</sup> the Great Debate over the purpose and duties of the public corporation wages on.<sup>108</sup>

Other corporate law scholars have argued that shareholder wealth maximization is "not a managerial obligation, it is a managerial choice."<sup>109</sup> As Lynn Stout astutely argues in her book *The Shareholder Value Myth*, other than the antiquated dicta in *Dodge v. Ford*, there is no other "solid legal authority to support the proposition that the law requires directors of public corporations to maximize shareholder value."<sup>110</sup> In fact, she upholds, no court has ever imposed legal sanctions on members of corporate boards for failing to pursue one corporate purpose over another; due mainly in part to the business judgment rule.<sup>111</sup> While executives and directors owe a fiduciary duty of loyalty to the corporation, which bars them from making self-interested decisions, under the business judgment rule, conflicted board members remain legally capable of pursuing any valid corporate purpose.<sup>112</sup> Corporate decision-makers can "safely donate corporate funds to charity; reject profitable business strategies that might harm the community; refuse risky projects that benefit shareholders at creditors' expense . . . [S]hareholders in public companies cannot successfully sue directors simply because those directors place other stakeholders' or society's interests above the shareholders' own."<sup>113</sup> While the group of academics seeking to debunk the shareholder value myth is limited to a small number of crusaders, headed by Stout, their arguments appear to be solidly based in legal authority and historical accuracy.<sup>114</sup> However, as bluntly stated by Jay Coen Gilbert, co-founder of B Lab, "business leaders understandably care more about what is said by the courts and practicing corporate attorneys than by academics."<sup>115</sup>

### C.3.2 SHAREHOLDER WEALTH MAXIMIZATION: IMPLICATIONS AND SOLUTIONS

This continuing normative debate has serious implications in the business and human rights context. If the prevailing view holds that corporate actors can be held legally liable for taking other considerations, such as human rights impacts, into account in the decision-making process, directors will refuse to consider so-

<sup>107</sup> Henry Hansmann & Reinier Kraakman, *supra* note 102, at 468.

<sup>108</sup> For more on the Great Debate regarding corporate purpose, see LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* 16–23 (2013).

<sup>109</sup> *Id.* at 32.

<sup>110</sup> *Id.* at 27.

<sup>111</sup> *Id.* at 29.

<sup>112</sup> *Id.* at 43.

<sup>113</sup> *Id.*

<sup>114</sup> Jay Coen Gilbert, Op-Ed., *Maximising Shareholder Profits Still Rules the Day for US Business*, *THE GUARDIAN* (Aug. 13, 2013; 16:58 PM), <http://www.theguardian.com/sustainable-business/maximising-shareholder-profits-rules-us-businesses>.

<sup>115</sup> *Id.*

cial or environmental impacts, among others, without adopting some form of the B Corp legal protections. Thus, future implementation of the corporate responsibility to respect human rights will be greatly hindered by possibly unnecessary legal red tape. In other words, the prevalence of the shareholder wealth maximization principle can be used to justify a traditional corporate board's refusal to consider the human rights impacts of its actions for fear of liability. The Guiding Principles' corporate responsibility to respect is thus severely undermined by the continuing dominance of the shareholder wealth maximization principle, and objectives like the B Corp movement that continue to propagate it.

While the Great Debate continues in the United States regarding the validity of the shareholder wealth maximization rule, other countries have clearly addressed the issue, therefore, alleviating the pressures faced by corporate executives to avoid liability in considering the human rights implications of board decision-making.<sup>116</sup> For example, Section 172 of the United Kingdom's Companies Act of 2006 makes clear that directors of all corporations, when making decisions regarding what actions would be "most likely to promote the success of the company for the benefit of its members as a whole," must consider, *inter alia*, "the interest of the company's employees"; "the impact of the company's operations on the community and the environment"; and "the desirability of the company maintaining a reputation for high standards of business conduct."<sup>117</sup> This section also maintains that where the purposes of a company consist of or include purposes other than solely the benefit of its members, the same social and environmental considerations must be taken into account in deciding how to achieve the additional purposes of the company.<sup>118</sup> Similarly, the Dutch Corporate Governance Code adopts the view that "a company is a long-term alliance between the various parties involved in the company" including stakeholders such as employees, the public sector and civil society.<sup>119</sup> As such, the management and supervisory boards should "take account of the interests of the various stakeholders, including corporate social responsibility issues that are relevant to the enterprise."<sup>120</sup>

While the normative concerns of B Corps are obviated in these two countries, this will not always be the case. In jurisdictions where the State has not clarified the purpose or responsibilities of public corporations, like the United States, the B Corp movement's continued support for the shareholder wealth maximization norm threatens to undermine the business and human rights movement.

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<sup>116</sup> While clarifying the fiduciary duties of corporate boards in national legislation is an effective way to cure the normative threats the B Corp model poses, this quick fix will likely be unavailable in federal countries where individual states maintain independent corporate laws.

<sup>117</sup> Companies Act, (c. 46, §172/2006) (Eng.); *see also*, HM GOVERNMENT, GOVERNMENT, GOOD BUSINESS: IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2013).

<sup>118</sup> *Id.*

<sup>119</sup> CORPORATE GOVERNANCE CODE MONITORING COMMITTEE, DUTCH CORPORATE GOVERNANCE CODE: PRINCIPLES OF GOOD CORPORATE GOVERNANCE AND BEST PRACTICES PROVISIONS 6 (2008); *see also*, MINISTRY OF FOREIGN AFFAIRS OF THE NETHERLANDS, NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS (2013).

<sup>120</sup> CORPORATE GOVERNANCE CODE MONITORING COMMITTEE, *supra* note 119.

## D CONCLUSION

As the B Corp movement continues to proliferate, both in geographic scope and in relation to the size and economic power of corporations seeking certification, how businesses, governments, civil society, and other stakeholders view the movement will have considerable impact on the future operationalization of the Guiding Principles, in particular, whether and how the B Corp movement will be included in future NAPs. In the current NAP process, States are asked to take stock of existing laws, regulations, and policies that affect the corporate responsibility to respect as part of their own duty to protect human rights. In this regard, countries are to consult with business, civil society, and international and regional actors in establishing the best practices and gaps in corporate social responsibility. As stakeholder consultations proceed throughout the world, how the B Corp movement is perceived, and whether it is ultimately supported in the business and human rights context, can have clear detrimental impacts in the field.

First, B Corp certification does not fully advance the corporate responsibility to respect human rights as espoused in the Guiding Principles. While the B Corp certification process largely covers the policy commitments recommended by the Guiding Principles, the program is lacking in mandatory due diligence mechanisms and completely fails to incorporate any sort of remediation requirements into certification. Additionally, while the B Corp program does a good job of covering human rights concerns within the labor and environmental law contexts, its strength as an overall promoter of the Guiding Principles is hindered by this narrowed focus. This analysis is not to say that the B Corp movement does not help technically advance certain aspects of corporate respect for human rights, which it does. It is only to warn that the B Corp movement must not be seen as a panacea for the business and human rights problem. While the movement may be viewed as “the highest standard for socially responsible businesses” today, this designation should not gain permanence.<sup>121</sup> This does not mean that a NAP should not endorse the B Corp movement, but that it must do so with the caveat that B Corps are not the ultimate example of “human rights respecting” corporations.

Similarly, any endorsement for the B Corp movement in a NAP should be accompanied with an additional disclaimer regarding its normative effect on the business conceptualization of shareholder wealth maximization. While B Corps have not been mentioned by name in any completed NAP, a few plans clearly address, and therefore further avoid, the normative concerns presented by the movement. The NAPs of both the United Kingdom and the Netherlands highlight domestic legislation that clarifies the role of the corporation as including the requirement to take into account various stakeholder considerations when decision-making, obviating the risk presented by the B Corp’s propagation of the shareholder wealth maximization norm.<sup>122</sup> However, in countries where the

<sup>121</sup> HONEYMAN, *supra* note 97.

<sup>122</sup> See, HM GOVERNMENT, *supra* note 117; MINISTRY OF FOREIGN AFFAIRS OF THE NETHER-



Great Debate regarding the purpose of public corporate bodies wages on, the continued support the B Corp movement lends to the norm threatens to undermine the business and human rights movement. As such, any country planning to incorporate the B Corp movement into a NAP should also be prepared to clarify the existing standards and liability risks regarding corporate decision-making and ideally lay out the ability of corporate boards to consider aspects beyond shareholder wealth maximization.

In sum, in States where liability concerns for considering stakeholder effects are removed by clarifying legislation, the B Corp movement presents itself as a useful tool in promoting certain aspects of the corporate responsibility to respect, though not to the full extent recommended by the Guiding Principles. However, in States where corporate purpose has not been clarified, or where the shareholder-oriented model has prevailed, the normative risks the B Corp movement presents arguably do not outweigh the positive effects the movement has on implementation of the Guiding Principles' corporate responsibility to respect. The value of promoting this limited respect for certain subsets of human rights is dwarfed by the negative consequences of continuing to maintain the shareholder wealth maximization norm.

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LANDS, *supra* note 119.

