

Business and Human Rights during the Trump Era

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I. INTRODUCTION

Under the Obama administration, the United States Government continued on a slow but steady path of leadership on certain business and human rights (BHR) issues and was transitioning from exclusively voluntary efforts to some key mandatory measures. That came to an abrupt halt when the Trump Administration came into office in 2017. Instead of incremental progress or just maintaining the *status quo*, the new government and a Republican-led Congress have made a concerted effort to dismantle the BHR agenda, largely under the guise of ‘deregulation’.

II. ROLLBACK OF BUSINESS AND HUMAN RIGHTS BY THE TRUMP ADMINISTRATION

The Obama administration had moved beyond support for voluntary BHR efforts such as the Voluntary Principles on Security and Human Rights² or the UN Guiding Principles on Business and Human Rights to regulatory measures such as Sections 1502 and 1504 of the Dodd–Frank financial reform act.³ Those laws required extractive companies to disclose their payments to foreign governments and to disclose whether companies sourced ‘conflict minerals’ from the Democratic Republic of Congo, respectively. Those laws, combined with a host of domestic regulations to improve health, safety and wages led to significant new steps to ensure companies were accountable. Finally, in September 2012, the administration used the power of government procurement to require US government contractors to comply with enhanced anti-trafficking rules as a condition of receiving government contracts.⁴ Nonetheless, the administration’s efforts were uneven. Some efforts under the Obama administration’s BHR framework, while significant, were also criticized for not going far enough, such as its negotiated Trans Pacific Partnership (TPP), implementing more mandatory measures on companies, or its efforts with industry to conduct global surveillance.

¹ Director, Human Rights and Business Division, Human Rights Watch.

² <http://www.voluntaryprinciples.org> (last accessed 5 June 2018).

³ Dodd–Frank Wall Street Reform and Consumer Protection Act, Public Law 11-203 (23 July 2010).

⁴ Executive Order No. 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts (25 September 2012).

The US government had been involved with BHR issues since the mid-1990s under the Clinton administration when it convened the Apparel Industry Partnership, the precursor to the Fair Labor Association, in response to scandals over sweatshops and US brands and the Voluntary Principles on Security and Human Rights. No administration since Clinton had been a forceful proponent for strong human rights laws or regulations on companies, but by the end of the Obama administration, the transition from just voluntary efforts to some mandatory measures had begun.

Once it took office, the Trump administration and the Republican-controlled Congress signalled that the new government would go in a profoundly different direction with serious impacts for BHR.

Just three weeks into the new administration, the first regulation it eliminated was the Dodd–Frank 1504 rule requiring extractive companies to disclose their payments to foreign governments on 14 February 2017.⁵ A few days later, Congress and the administration overturned the ‘Clean Stream’ rule that was meant to curtail the dumping of coal mining waste into adjacent water supplies.⁶ In March of that year, the ‘Fair Pay’ rule that required federal contractors to comply with health, safety, wage and civil rights laws in order to be eligible for further government contracts was rescinded.⁷ On 1 June, President Trump announced the federal government’s withdrawal of the US from the voluntary Paris Climate Accord, even as several states and cities said they would continue to implement it.⁸ Then in November 2017, the US ceased implementing the Extractive Industries Transparency Initiative (EITI) after it had agreed to comply in 2012.⁹ Then, in late December 2017, the Environmental Protection Agency announced it was considering rolling back federal standards that ban children under 18 from working with toxic pesticides.¹⁰

In less than a year, the administration had reversed key efforts that civil society had spent more than a decade to secure. Often, the regulatory rollback has been beneficial to industries, such as the extractive industries, whose excesses first spawned the business and human rights movement. In other cases, the administration eviscerated key consumer protections that impact rights. But more importantly, the Trump administration undermined the concept that the human rights responsibilities of business would evolve into legally binding obligations in the world’s largest economy and a prominent government voice on business and human rights. Meanwhile, traditionally prominent voices on human rights issues within the government, such as the State Department, seem far less potent now under the then-stewardship of former Exxon Chief Executive Officer (CEO), Rex Tillerson.

⁵ Roger Yu, ‘Trump Signs Legislation to Scrap Dodd–Frank Rule on Oil Extraction’, *USA Today*, 15 February 2017 (<https://eu.usatoday.com/story/money/2017/02/14/trump-scrap-dodd-frank-rule-resource-extraction-disclosure/97912600/>).

⁶ Nadja Popovich, Livia Albeck-Ripka and Kendra Pierre-Louis, ‘67 Environmental Rules on the Way Out Under Trump’, *New York Times*, 31 January 2018 (<https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html>).

⁷ Janet Burnes, ‘Trump Order Drops Pesky Regulations on Equal Pay, Sexual Harassment’, *Forbes*, 14 April 2017 (<https://www.forbes.com/sites/janetwburnes/2017/04/04/trump-order-drops-pesky-regulations-on-equal-pay-sexual-harassment/#5463db3d5c10>).

⁸ Popovich *et al*, see note 6.

⁹ Julia Simon, ‘US Withdraws from Extractive Industries Anti-Corruption Effort’, *Reuters Business News*, 2 November 2017 (<https://www.reuters.com/article/us-usa-eiti/u-s-withdraws-from-extractive-industries-anti-corruption-effort-idUSKBN1D2290>).

¹⁰ Popovich *et al*, see note 6.

III. PRIVATE SECTOR RESPONSE AMIDST TRUMP ERA ROLLBACKS

One of the most interesting developments is that on some issues, companies have become much more vocal advocates for human rights in the US. This is especially true in areas related to non-discrimination and the environment.

After President Trump issued his highly controversial ban on individuals from seven predominantly Muslim countries, colloquially known as his 'Muslim Ban' on 27 January, at least twenty major US companies publicly opposed it, some more explicitly than others. For example, Apple's CEO Tim Cook wrote in an email to staff that soon became public, 'Apple would not exist without immigration, let alone thrive and innovate the way we do ... [President Trump's Executive Order] is not a policy we support.'¹¹ Goldman Sachs' CEO similarly told the company's staff in a voicemail that 'This is not a policy we support ... Being diverse is not optional; it is what we must be. Now is a fitting time to reflect on those words and the principles that underlie them.'¹² Google urged people to join them in donating to the American Civil Liberties Union (ACLU) who fought the Trump executive order in federal courts. Some reports estimated that Google's contribution was worth up to US\$4 million to the ACLU.¹³

When President Trump made remarks widely interpreted as sympathetic to White Supremacists and Anti-Semites who demonstrated in Charlottesville, Virginia in mid-August 2017, Kenneth Frazier, the CEO of Pfizer resigned within days to show his deep disagreement with the President's stance.¹⁴ Numerous business leaders on the President's high-profile manufacturing council denounced his remarks and planned to resign *en masse*. To pre-empt that rebuke, Trump disbanded the council and another business advisory group.¹⁵ For a President who touted his business credentials, this mass rebuke by so many of the country's most prominent business leaders was striking.

The administration's withdrawal from the Paris Climate Accord similarly generated public rebukes from major corporations. A coalition of companies, including Intel, Microsoft, Morgan Stanley and Tiffany published full page advertisements in major newspapers urging the administration to stay in the Paris Agreement.¹⁶

Perhaps the most interesting example of corporate advocacy around business and human rights issues was the seemingly counterintuitive reaction of Apple, Tiffany and Intel to the administration's plan to repeal Section 1502 of the Dodd-Frank law.

¹¹ Madeline Farber, 'Apple CEO Tim Cook Really Does Not Like President Trump's Travel Ban', 9 February 2017 (<http://fortune.com/2017/02/09/apple-ceo-tim-cook-donald-trump-travel-ban/>).

¹² Dakin Campbell and Hugh Son, 'Goldman Sachs Breaks with Government Sachs on Immigrant Ban', *Bloomberg*, 30 January 2017 (<https://www.bloomberg.com/news/articles/2017-01-30/goldman-sachs-breaks-with-government-sachs-on-immigration-ban>).

¹³ Alex Heath, 'So Un-American it Pains Us All – How Tech Titans are Responding to Trump's Immigration Ban', *Business Insider*, 29 January 2017 (<http://uk.businessinsider.com/tech-ceos-respond-to-trumps-immigration-ban-with-concern-calls-for-unity-2017-1?r=US&IR=T>).

¹⁴ 'Merck Chief Ken Frazier Resigns from Trump Council', *BBC News*, 14 August 2017 (<https://www.bbc.com/news/business-40921600>).

¹⁵ Ed Crooks, 'Trump Disbands Business Councils After More CEOs Quit', *Financial Times*, 15 August 2017 (<https://www.ft.com/content/4a8d62c5-ea78-3043-952d-24bf1cf5ee86>).

¹⁶ Center for Climate Policy and Energy Solutions, 'Business Support for the Paris Agreement' (<https://www.c2es.org/content/business-support-for-the-paris-agreement/>).

That law was the seminal ‘conflict minerals’ law that requires companies to disclose if they source tin, tantalum, tungsten or gold. In early February 2017, the administration planned to overturn the implementing rules according to news reports. Human Rights Watch’s contacts suggested such a step was imminent. Civil society mobilized quickly to denounce such measures. The US Senate convened hearings where further critiques of the administration’s efforts were voiced. However, the most compelling voice in support of the law came from Apple, Intel and Tiffany who each urged that regulations be kept in place.¹⁷

The companies’ concerns broadly fell into two categories. Eliminating the rule would create a competitive disadvantage for some of the world’s most prominent companies as they had already invested time and money for almost six years to comply with the law and were starting to see benefits from those efforts. Without the law, other companies would be able to avoid those efforts. In addition, the companies argued that their employees and customers expected them to act responsibly. After that flurry of activity in early 2017, the administration backed off its efforts to revoke the rules, although Congress is still trying to repeal it.

Corporate advocacy against some of the Trump administration’s policies is not necessarily an indication that these companies have embraced the human rights movement in some broad sense. Instead it reflects a sobering reality about the administration: many of its policies are so regressive that they are out of step with the values of major corporations that have traditionally been resistant to regulation and oversight of any kind.

The actions of companies, while positive, have not been a harbinger for new progressive steps on BHR. Instead it has just been an effort to maintain the pre-Trump *status quo*. In short, the Trump administration’s actions on many fronts reflect mass retrogression from the principles and rules underpinning business and human rights that civil society, companies and others are trying to preserve, but not necessarily advance. The challenge in the US is to try to stop further erosion of those norms.

While the Trump administration backslides, much of the world is moving forward. In Canada, the Trudeau administration announced an upgraded business and human rights strategy that included a newly empowered Ombudsperson that would have the authority to investigate allegations of human rights abuses linked to Canadian companies abroad, and a multi-stakeholder advisory body to advise the government on ‘the effective implementation and further development of its laws, policies and practices addressing business and human rights’. These steps marked a significant improvement over Canada’s past practice.¹⁸

The European Union also made important strides on business and human rights. Even as the Trump administration threatened to get rid of the Dodd–Frank conflict minerals rules, the EU adopted its own regulations on 3 April 2017 to stop the trade in conflict

¹⁷ Todd Frankel, ‘Why Apple and Intel Don’t Want to See the Conflict Minerals Rule Rolled Back’, *Washington Post*, 23 February 2017 (https://www.washingtonpost.com/business/economy/why-apple-and-intel-dont-want-to-see-the-conflict-minerals-rule-rolled-back/2017/02/23/b027671e-f565-11e6-8d72-263470bf0401_story.html?noredirect=on&utm_term=.03314c82ca23).

¹⁸ Government of Canada, ‘Advancing Canada’s Approach on Responsible Business Conduct Abroad’ (https://www.canada.ca/en/global-affairs/news/2018/01/advancing_canadasapproachonresponsiblebusinessconductabroad.html).

minerals. While the rules will not go into force until 2021, it is still a key example of how business and human rights norms are spreading, regardless of the problems with the US government.¹⁹

At the country level, there have been major regulatory developments in Europe. On 21 February 2017, the French government established a ‘Duty of Vigilance’ law requiring companies with headquarters in France that employ at least 5,000 people or foreign companies that employ at least 10,000 people worldwide and have subsidiaries in France to establish mechanisms to prevent human rights and environmental problems in their supply chain. Although the civil penalties for non-compliance were removed, the law represents a major step towards mandatory human rights due diligence.²⁰

The same month that the French passed their law, the Dutch Parliament passed a new bill that requires companies to prevent child labour in their supply chains by demonstrating it has undertaken due diligence to prevent child labour. It also provides for large fines of up to €820,000 or 10 per cent of a company’s revenue in cases of non-compliance. That bill is still awaiting final passage by the Dutch Senate.²¹

Meanwhile Australia is considering a new law to combat modern forms of slavery.²² Australia is following the model of the UK Modern Slavery Act that became law in 2015. Among its provisions, it requires companies with revenues of at least £36 million to disclose their efforts to prevent modern slavery in their business and throughout their supply chain.

IV. MOVING FORWARD ON BHR IN THE UNITED STATES

These developments show that the US has ceded leadership to other governments and that despite efforts to stop human rights regulations, they are growing in ways that will still affect US companies. That begs the question of how to move forward.

The legal and regulatory developments, the role of companies as vocal advocates for rights, and past experience suggest a way forward for business and human rights under Trump. The first step is to protect the *status quo* while enlisting companies to support these efforts. As the debates on immigration, Charlottesville and Dodd–Frank 1502 show, the business community can have a powerful voice in key human rights debates – at least insofar as some may seek to maintain the *status quo*. It is not clear how far companies will go to pressure the government to change policies they oppose, beyond public rebukes and resignations from government bodies.

Second, it is essential to recognize that several other governments are starting to lead. Regardless of the damage the US government has done to progress in the business and human rights space, governments are starting to regulate companies on human rights

¹⁹ Council of the European Union, ‘Conflict Minerals: Council Adopts New Rules to Reduce Financing of Armed Groups, 3 April 2017 (<http://www.consilium.europa.eu/en/press/press-releases/2017/04/03/conflict-minerals>).

²⁰ S Cossart, J Chaplier and T Beau de Lomenie, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’ (2017) 2:2 *Business and Human Rights Journal* 317–323 (doi: 10.1017/bhj.2017.14).

²¹ Sarah Altschuller and Amy Lehr, ‘Proposed Dutch Legislation on Child Labor Due Diligence: What You Need to Know’, Foley Hoag CSR and the Law, 24 August 2017 (<http://www.csrandthelaw.com/2017/08/24/proposed-dutch-legislation-on-child-labor-due-diligence-what-you-need-to-know/>).

²² ‘Australia Aims to be Global Leader, With Strong Anti-Slavery Law Expected in 2018’, *Japan Times*, 18 April 2018 (<https://www.japantimes.co.jp/news/2018/04/18/asia-pacific/social-issues-asia-pacific/australia-aims-global-leader-strong-anti-slavery-law-expected-2018/#.Wx3ZTIOFN8c>).

grounds. Those rules are growing, not receding, and will impact US business, even if the US government shuns those efforts.

Finally, the reversal of so many gains on business and human rights is a dark moment for those that have worked to ensure the US government holds companies accountable, but it is not new. At its core, the business and human rights movement (to the extent it is a movement) has been driven by civil society. It was civil society that exposed the depredations of companies around the world and made the first arguments for new human rights rules. That led to companies and governments adopting standards like the UN Guiding Principles or the growing number of laws requiring due diligence. In that respect, civil society has succeeded when there were no rules, in making rules, and seeing them enforced. As the Trump administration has rolled back business and human rights progress, it may be that civil society will have to go back to its roots in the US and redouble its efforts to expose corporate excess while understanding global trends favour stronger rules on companies.