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International dimension of US fair employment laws: Protection or interference?

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Over 3 million American citizens reside outside the territorial boundaries of the United States; many of them are employed by US-based multinational corporations, which operate in over 120 countries worldwide. In certain situations, the domestic labour laws of the United States follow its citizens to the foreign workplace, with the laudable intent of affording overseas Americans the protection enjoyed by their counterparts at home. Such laws are known as extraterritorial standards – legislation that transcends the territorial limits of the United States.

Although authorized under international law, extraterritorial employment standards may be considered an unacceptable interference in the internal affairs of the host country. Foreign governments can enact (and in some cases have already enacted) legislation that effectively counters any efforts by the United States to regulate overseas employment and foster positive change in the overseas workplace. By applying extraterritorial standards, therefore, the United States exposes itself to international criticism and retaliation. This article describes and examines US domestic labour laws that apply overseas, and in particular individual employment law. It then discusses the implications of extraterritorial coverage and concludes that efforts at improving conditions in the foreign workplace might meet with greater success if they were undertaken within a wider framework of international law.[1]

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[1] The United States attempts to influence the overseas workplace in a number of other ways which are beyond the scope of this article. For instance, it requires the observance of internationally recognized worker rights as a condition for participating in trade preference programmes. See G. van Liemt: "Minimum labour standards and international trade: Would a social clause work?", in *International Labour Review*, 1989/4. Also, the US Overseas Private Investment Corporation is prohibited from providing insurance and financial assistance to operations in countries that fail to recognize fundamental worker rights. See J. Zimmerman:

(footnote continued overleaf)

I. Employment standards applicable overseas

A. Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 (ADEA) was established to protect citizens from arbitrary age discrimination and to promote the employment of older persons on the basis of ability rather than age. The ADEA prohibits age discrimination in the employment of individuals between the ages of 40 and 70.[2] When, in 1984, Congress amended the ADEA to apply to foreign employment, it added the following definition of employee: "The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."

The ADEA amendment covers two classes of employers: US citizens or entities incorporated in the United States and foreign nationals or corporations controlled by US citizens or entities. Consistent with the statute, the Equal Employment Opportunity Commission (EEOC) defines "employers" to include:

- a United States firm;
- a foreign branch of a United States firm; and
- a foreign corporation controlled by a United States firm.

With respect to foreign corporations controlled by US interests, the ADEA provides:

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.[3]

This provision thus prevents US corporations from circumventing the requirements of the ADEA by incorporating their subsidiaries overseas.

The statute provides that the following factors be considered in determining whether a United States firm controls a foreign corporation:

- interrelation of operations;
- common management;
- centralized control of labour relations; and

"The Overseas Private Investment Corporation and worker rights: The loss of role models for employment standards in the foreign workplace", in *Hastings International & Comparative Law Review* (San Francisco), Spring 1991, pp. 603 ff. As regards import restrictions on prison-produced goods, see J. Zimmerman: "US laws and convict-produced imports", in *China Business Review* (Washington, DC), Mar.-Apr. 1992, pp. 41 ff.

[2] 29 United States Code [hereinafter "USC"] s. 631(a).

[3] 29 USC s. 623(h).

– common ownership or financial control, of the employer and the corporation.[4]

In applying this test, the courts analyse whether the US and foreign entities in question maintain separate or common personnel policies, advertising, business records, tax returns, financial statements and budgets. If the practices of the firms are so closely related as to constitute an integrated enterprise, the foreign corporation is deemed to be under the control of US interests and ADEA protection applies.

Recognizing the potential for conflict between the ADEA and the laws of a host country, the amendments provide that an employer is not in violation of ADEA standards if compliance "would cause such employer, or a corporation controlled by such employer, to violate the laws of the country, in which such workplace is located".[5] In the event of a potential conflict, the EEOC's policy is to consult with the Department of State to avoid foreign relations problems.

Although they are not expressly referred to in the amendments, it is clear that non-citizens employed outside the United States by foreign or United States employers are not protected by the ADEA. The language of the statute defining an "employee" as "a citizen of the United States" implies that Congress intended to exclude from coverage non-US citizens working overseas.

B. Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA) prohibits employers from discriminating against a "qualified individual with a disability" with regard to hiring, advancement, discharge, compensation, training or other terms, conditions or privileges of employment.[6] The ADA defines such a person as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires". Employers are required to make "reasonable accommodations", which may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; modifying work schedules; acquiring or modifying equipment, devices or machinery; providing interpreters or readers; and adjusting or modifying training materials or policies.

The Civil Rights Act of 1991 (CRA), signed into law on 21 November 1991, amended the ADA to apply extraterritorially. Many of the ADA's features are the same as those of the ADEA. It states that: "With respect to employment in a foreign country, [the term 'employee'] includes an

[4] 29 USC s. 623(h)(3).
[5] 29 USC s. 623(f)(1).
[6] 42 USC ss. 12111 ff.

individual who is a citizen of the United States";[7] and, as amended, it applies to foreign interests under the control of a US corporation, with any discriminatory practice being deemed the responsibility of that corporation. The rule does not apply if the employer is a foreign entity not controlled by an American employer. The determination of whether an employer controls a corporation is based on the same "control test" as in the ADEA.

As amended, the ADA recognizes foreign compulsion as a defence against a claim of discrimination. Under this defence, an entity subject to the ADA is not liable for acts of discrimination if compliance would cause the entity to violate the law of the foreign country where the workplace is located.

C. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits discrimination against any individual with respect to his or her compensation, terms, conditions or privileges of employment, because of such individual's race, colour, religion, sex or national origin.[8] Prior to recent amendments, the courts struggled with the question of Title VII's extraterritorial reach. Those courts that have held that Title VII extends globally have based themselves on the "alien exemption" provision, which states that Title VII "shall not apply to an employer with respect to the employment of aliens *outside any State*".[9] Since the statute expressly excludes *aliens* employed abroad by United States employers, the inference is that Title VII was intended to cover United States *citizens* employed overseas.

On 26 March 1991, however, the United States Supreme Court, in EEOC/Boureslan *v.* Arabian American Oil Co. (ARAMCO),[10] held that the language of Title VII "falls short of demonstrating the affirmative congressional intent required to extend the protection of the Title VII beyond our territorial borders".[11] The Supreme Court also discounted the

[7] 137 *Congressional Record* S15505 (Washington, DC), 30 Oct. 1991.

[8] 42 USC s. 2000e-2(a)(b)(c).

[9] 42 USC s. 2000e-1 (emphasis added).

[10] 113 *United States Supreme Court Reports*, Lawyers' Edition (Rochester, New York) 274 (1991).

[11] The courts apply a canon of statutory interpretation known as the presumption against extraterritoriality in determining whether a statute is to be given overseas application. The presumption against extraterritoriality is designed to leave to Congress "important policy decision[s] where the possibilities of international discord are so evident and retaliative action so certain". Benz *v.* Compañía Naviera Hidalgo SA, 353 United States Reports [hereinafter "US"] 138, 147 (1957). The presumption against extraterritoriality is rebuttable if the requisite congressional intent to apply a law overseas is evident in the legislative history and the statutory language. The Supreme Court mandates that "an act of Congress ought never to be construed to violate the laws of nations, if any other possible construction remains". Murray *v.* Schooner Charming Betsy, 6 US 64, 118 (1804). The Court thus requires that federal legislation be given an interpretation which is domestic in nature, unless there is an explicit and unequivocal showing of a contrary intent. On the basis of this rule, the courts have denied extraterritorial application

significance of the alien exemption clause. The Court reasoned that if the interpretation of the exemption were correct, then Title VII would apply to foreign employers as well as United States employers and thereby impose "this country's employment-discrimination regime upon foreign corporations operating in foreign commerce". The Supreme Court emphasized the need for "clearer evidence of Congressional intent . . . than is contained in the alien-exemption clause".

The Civil Rights Act of 1991 (CRA), however, amended Title VII to apply overseas, thereby reversing the Supreme Court's ARAMCO decision. It was again spelt out that the definition of employee included "an individual who is a citizen of the United States".[12] The amendment, couched in terms similar to those of the ADEA, covers both citizens or entities incorporated in the United States and foreign persons or corporations controlled by domestic interests. A determination of whether an employer controls a foreign corporation is based on the control test set forth in the ADEA; and, as in the other cases, the amendment to Title VII recognizes avoidance of violating foreign laws as a defence. The amendment is not retroactive and applies to conduct occurring on or after the date of enactment.

D. Fair Labor Standards Act

The Fair Labor Standards Act of 1938 (FLSA) requires employers to provide minimum standards for overtime pay, child labour, equal pay, maximum hours and minimum wages.[13] Prior to 1957, several courts gave the FLSA full extraterritorial effect. In 1948, for example, the United States Supreme Court held that Congress intended the FLSA to extend to employer-employee relations in foreign territory under lease for military bases.[14] The Overseas Fair Labor Standards Amendment was therefore introduced in 1954, and finally passed by Congress in 1957, to counter the Supreme Court's interpretation of the territorial scope of the FLSA. The amendment excludes from FLSA coverage "any employee whose services during the work-week are performed in a workplace within a foreign country".[15]

The 1957 amendment is, however, not a complete bar to the extraterritorial application of the FLSA. The Wage and Hour Division of the Department of Labor interprets the amendment as follows:

> Work performed by employees in "a workplace within a foreign country or within territory under the jurisdiction of the United States" other than those

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of the Labor Management Relations Act, the National Labor Relations Act and the Railway Labor Act.

[12] *Congressional Record*, op. cit.

[13] 29 USC ss. 201-219.

[14] Vermilya-Brown *v.* Connell, 335 US 377, 389-390 (1948).

[15] 29 USC s. 213(f) (as amended).

> enumerated in this paragraph is exempt by this amendment from coverage under the Act. *When part of the work performed by an employee for an employer in any work-week is covered work performed in any State, it makes no difference where the remainder of such work is performed; the employee is entitled to the benefits of the Act for the entire work-week unless he comes within some specific exemption.*[16]

Coverage thus applies if an employee performs a portion of his or her work-week overseas as well as in the United States.

Citing this interpretation, the court in Wirtz *v.* Healy held that tour escorts who performed services for part of their work-week in the continental United States were covered by the FLSA.[17] The court noted that the tour escorts usually commenced and terminated the tours in the United States, and on completion of a tour were required to prepare a report and forward it to the company's Chicago office. The court also observed that the defendants operated tours in various European countries, in Canada and throughout the United States; thus no single country was considered the employee's work station. The court enjoined the defendant tour operators from violating the minimum wage, maximum hour and record-keeping provisions of the FLSA, concluding that "when a tour escort of defendants spends part of a work-week with a tour in the United States, it makes no difference where the remainder of such work in that week is performed; the tour escort is entitled to the benefits of the Act for the entire week". The court further held that "the exemption ... is applicable to a tour escort of defendants during any work-week in which the tour escort performs all of his [or her] work exclusively in a foreign country".

The court in Hodgson *v.* Unión de Permisionarios Círculo Rojo [18] held that the Mexican employees of a Mexican bus company, incorporated under Mexican law, were precluded from recovering minimum wages and overtime compensation under the FLSA, on the basis that only a minor part of their duties took place within the United States. In this case, the Secretary of Labor sought relief on behalf of non-citizen bus drivers who were members of a Mexican bus drivers' union and who delivered passengers between the border towns of Matamoros, Mexico, and Brownsville, Texas. Recognizing the sensitive foreign relations issues involved, the court dismissed the case. In that regard the court concluded:

> Employees of this Mexican bus company earn less per week than most United States labourers earn per day, and the bus fares are priced accordingly. This valuable bus service would obviously have to be discontinued in the event the company was forced to pay a minimum wage, because if fares were raised to compensate for the wage-hike, the buses would be devoid of passengers.

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[16] 29 *Code of Federal Regulations* [hereinafter "CFR"] (Washington, DC), s. 776.7, fn. 20 (emphasis added).

[17] 227 *Federal Supplement* [hereinafter "F.Supp."] 123, 129 (Northern District Court, Illinois 1964).

[18] 331 F.Supp. 1119, 1121-1122 (Southern District Court, Texas 1971).

> The economic, political and administrative repercussions which would be generated by a decree for Plaintiff would alone be grounds for a judgment for Defendant here. This is a case that is best left to Congress for a solution. It is without the province of this Court to delve into matters international on such a tenuous basis.

The court decisions do not explain the minimum days or hours of employment within the territorial boundaries of the United States required to trigger FLSA coverage. A determination of coverage requires the employment relationship to be analysed in each individual case.

E. Equal Pay Act

The Equal Pay Act of 1963 (EPA) prohibits an employer from paying any employee a wage rate less than that paid an employee of the opposite sex for work that requires equal skill, effort and responsibility.[19] The EPA is part of the FLSA, with the same coverage, and thus may apply to situations where an employee performs a portion of his or her work outside the United States but at the same time maintains a "work station" or "employment base" in the United States. Coverage under the EPA does not extend to employment exclusively performed in a foreign country.

The EEOC, the agency charged with enforcing the EPA, recognizes the partial work-week exemption and has authority to process a wage discrimination charge if a complainant's work station or employment base is found to be in the United States. Under the EPA, as in the minimum wage, overtime compensation and child labour provisions of the FLSA, the employee must perform an appreciable amount of his or her services in the United States to qualify for protection against wage discrimination based on sex. The frequency and duration of the employee's visits to the United States must be sufficient to constitute US-based employment; what exactly is required in terms of days or hours is not defined by the statute, by agency rules or by the courts.

F. Export Administration Act

The Export Administration Act of 1979 (EAA) prohibits a United States firm, or its foreign subsidiaries or affiliates, from discriminating against United States citizens on the basis of race, religion, sex or national origin pursuant to a boycott initiated by a foreign government.[20] The EAA is a Congressional response to the Arab boycott of Israel. To date, only one court has acknowledged a private right of action under the EAA to permit an individual plaintiff relief for extraterritorial employment discrimination. In Abrams *v.* Baylor College of Medicine,[21] Jewish physicians were excluded

[19] 29 USC s. 206(d)(1).

[20] 50 USC App. ss. 2401-2420.

[21] 581 F.Supp. 1570 (Southern District Court, Texas 1984).

from participating in a medical programme in Saudi Arabia on the grounds of their religious beliefs. The *Abrams* court held that an implied right of action is available for discrimination overseas, although the statute did not contain language that created an express private right of action.

G. Employment discrimination against personnel at defence facilities abroad

Section 106 of Public Law 92-129 prohibits employment discrimination against US citizens or the dependants of members of the armed forces at military facilities located overseas. Discrimination is only authorized if permitted by a treaty between the United States and the host country government.[22] Section 106 applies to *any* "facility or installation operated by the Department of Defense" including any officers' or non-commissioned officers' clubs, post exchange or commissary store. Section 106 was enacted to protect military personnel from financial hardship while stationed overseas.

The judicial decisions interpreting section 106 concern the scope of the "treaty" exception clause of the statute. The United States Supreme Court in Weinberger *v.* Rossi interpreted the word "treaty" in section 106 to include international agreements negotiated by the President as well as traditional treaties that require the advice and consent of the United States Senate under article II of the US Constitution.[23] The Court interpreted the treaty exception of section 106 broadly and held that an executive agreement providing for preferential employment of Filipino citizens at US military bases in the Philippines was a treaty under section 106, although never submitted to the Senate for its perusal.

In Collins *v.* Weinberger, the United States Court of Appeals for the District of Columbia Circuit expanded the interpretation of the treaty exception.[24] The question before the court was whether United States Army, Europe (USAREUR) Regulation 690-84, which provides preferential treatment against dismissal for certain local nationals at military installations in the former Federal Republic of Germany, is a treaty under section 106. The *Collins* court held that, although not a treaty under section 106, USAREUR regulations implemented and clarified the pre-existing treaty obligations under the NATO Status of Forces Agreement (NATO/SOFA), an article II treaty under the Constitution, and were therefore insulated from the discrimination prohibition of section 106.

[22] 5 USC s. 7201, Explanatory Notes.

[23] 456 US 25, 36 (1982).

[24] 707 *Federal Reports, Second Edition* 1518, 1522 (1983).

II. Authority to prescribe extraterritorial labour standards

The United States maintains that, under international law, it has jurisdiction to prescribe laws with extraterritorial application on various grounds, including territoriality, nationality, objective territoriality (the effects doctrine) and universality.[25]

A. Territoriality

Like any other State, the United States has the right under international law to prescribe laws with respect to conduct that, wholly or in substantial part, takes place within its territory or with respect to the status of persons, or interests in things, present within its territory. On the principle of territoriality, it has plenary power under the FLSA and the EPA to control the employment relationship of ambulatory employees who spend a part of their work-week in the United States.

B. Nationality

International law recognizes the right of a State to exercise jurisdiction on the basis of nationality or citizenship. The United States thus has the right to regulate the conduct of its nationals, including individuals as well as juridical persons, such as corporations, located overseas. The ADEA, Title VII, ADA, FLSA and the EPA, for instance, are authorized by the nationality theory of jurisdiction.

C. Objective territoriality: The effects doctrine

The purpose of the objective territoriality principle is to regulate actions taken in one State having an impact far beyond that State's territorial boundaries. Thus it may be argued that discriminatory employment practices abroad adversely affect protected persons in the United States. Many transnational firms, for example, require overseas assignments for professional advancement. If the employment practices abroad condone discrimination, a protected individual based in the United States may choose not to accept an overseas assignment for fear of disparate treatment and thus may be unable to achieve career objectives and advancement.

[25] See American Law Institute: *Restatement of the Law. The Foreign Relations Law of the United States*, Vol. 1, ss. 1-488 (St. Paul, Minnesota, 1986), pp. 235 ff., and Zimmerman: *Extraterritorial employment standards* ..., op. cit., pp. 160-184.

D. Universality

A State has jurisdiction to apply its laws to punish certain offences recognized by the community of nations as a universal concern, such as piracy, slave trade, hijacking of aircraft, genocide, war crimes and terrorism. An argument may also be made that the United States has jurisdiction to prescribe extraterritorial employment standards on the basis that fundamental labour standards, including a prohibition on discrimination in employment, are a universal concern, as defined by ILO Conventions and the declarations of the United Nations.

E. Limitations on extraterritorial jurisdiction

Under international law, a State may not regulate persons or activities overseas without limitation. Even when one or more bases for jurisdiction are present, a State may not exercise jurisdiction to prescribe laws when the exercise of such jurisdiction is unreasonable, in that the exercise violates the sovereignty of other countries or disregards international obligations.

Many countries view extraterritorial standards in general as unacceptable interference in their domestic affairs, as paternalistic and imperialistic. Difficulty arises when a host country considers that decisions made outside its territorial limits concern activities exclusively in the host's jurisdiction. The right of a nation to regulate conduct within its territory is a primary element of sovereignty.

Most governments regulate the employment relationship in their country, including that of aliens employed within their borders. The rules of work are often deeply ingrained in a State's socio-economic and cultural history. The extraterritorial application of United States labour standards may thus be unreasonable because such prescription usurps the power of the host country to regulate the local employment relationship.

Similarly, the unilateral imposition of United States standards may be unreasonable because such standards are not universally accepted. Although discrimination in all forms, and in particular disparate treatment based on race, religion or sex, is abhorred by the international community, certain forms of discrimination in employment, such as discrimination against older workers, are in some cases recognized and even encouraged with a view to attaining economic and development objectives.

Extraterritorial labour standards must also be considered in the context of the United States' obligations as a Member of the ILO. Although US extraterritorial labour legislation may be seen as demonstrating commitment to various ILO principles, the means of enforcing such legislation in the foreign workplace falls outside ILO procedures. The ILO makes no claim to have a monopoly on international labour issues, yet its multilateral enforcement process is less intrusive than the unilateral efforts of the United States. The ILO does not impose punitive measures such as economic sanctions, but seeks compliance through influence and education. It has no

means of enforcing international labour standards, other than its system of supervision and representation, and above all its complaints procedure. This provides for inter-State complaints of violations, but on condition that both States have ratified the ILO Convention concerned. The United States has ratified only 11 of the 172 Conventions and is thus seldom able to avail itself of this procedure.

The exportation of labour standards is also inconsistent with the spirit of United States bilateral treaties of friendship, commerce and navigation (FCN treaties). FCN treaties ensure that United States citizens and entities are treated equally with nationals of the host country, or at least with citizens and enterprises of other nations located within the host country. Since FCN treaties are arrangements establishing mutual rights and privileges, any attempts by the United States unilaterally to apply domestic standards violates the spirit of mutuality.

III. Implications of extraterritorial applications

A. The US control test, foreign corporations and the concept of nationality

There is a strong case to be made for the argument that US fair employment statutes, as amended, with their expanded definition of an "employer" and their provision that a foreign corporation is liable under US law if it is controlled by a US citizen or entity, are an intrusion on other countries.

Many States contend that the nationality of a corporation is properly determined by its place of incorporation, regardless of the degree of control exercised by a foreign parent company. The United Kingdom, for instance, holds that a State is not entitled to regulate the activities of an entity incorporated in another State on the basis that such an entity is controlled by nationals of the regulating State.

Other European countries maintain that the nationality of a corporation is determined by the location of its head office *(siège social)* or by the place in which the principal business operations are located. A jurisdictional dispute may thus arise in a situation where a parent corporation located in the US exerts financial control over a foreign subsidiary that has its *siège social* located overseas. Such a situation occurred in 1965, when a French court found that a subsidiary of a US-based parent corporation was subject to the laws of France because the *siège social* was in France, notwithstanding the fact that a majority of the subsidiary's stock was owned by the parent corporation.[26] Such differences of approach may lay the US control test open to criticism.

[26] Fruehauf Corp. *v.* Massardy, in *International Legal Materials* 476 (1966) (Ct. App. Paris 1965).

B. Host country custom and the foreign compulsion defence

The ADEA, Title VII and the ADA provide that an employer is not in violation of US standards if compliance would cause such an employer, or a corporation controlled by such an employer, to violate the laws of the country in which such a workplace is located.[27] The foreign compulsion defence may, however, be unavailable to an employer engaged in discriminatory conduct recognized by *unwritten* standards such as ethnic and community customs, local traditions and social norms.

In Japan, for example, older workers are expected to accept retirement beginning at 45 years of age. This system, known as *katatataki*, literally meaning the "tap on the shoulder", is an established practice where management applies subtle pressure for voluntary early retirement.[28] Indirectly, the system of *katatataki* reduces unemployment among younger citizens, allowing them to advance through the ranks by stepping into positions previously held by older workers. The application of *katatataki* by an employer subject to the ADEA may result in a discrimination charge that is potentially undefendable, despite the fact that such practices are recognized by custom and local tradition.

Another example concerns the treatment of women in certain Arab States. Under rules derived from religious beliefs and custom, often unwritten, women have few substantive political and social rights, and sometimes are not considered equal members of society. Their employment is limited to the news media and the education and health care professions. In such cases, the foreign compulsion defence may be unavailable to an employer facing a sex discrimination charge in a situation where, although in compliance with unwritten community standards, the employer engages in disparate treatment of female employees in violation of US extraterritorial standards.

C. Administrative procedures and overseas enforcement

To seek redress under the ADEA, Title VII and the ADA, a claimant must file a discrimination charge with the EEOC. The administrative scheme vests the EEOC with exclusive responsibility for the case, and no individual may bypass this requirement. An action brought by the EEOC pre-empts the individual's right to commence suit. The EEOC has broad power to:

[27] See, for example, Kern *v.* Dynalectron Corp., 577 F.Supp. 1196 (Northern District Court, Texas 1983), affirmed 746 F.2d 810 (5th Circuit 1984) (religious discrimination by US firm permissible because Saudi Arabian law prohibits non-Muslims from flying over Mecca and any violation is punishable by death); Fernandez *v.* Wynn Oil Company, 653 F.2d 1273 (9th Circuit Court of Appeals, 1981) (alleged preference of South American businessmen to do business with males does not justify discrimination against female executive).

[28] See W. Gould: "Labor law in Japan and the United States: A comparative perspective", in *Industrial Relations Law Journal* (Berkeley), 1984/1, pp. 1, 13-14.

(1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts; (3) interview employees; (4) impose appropriate record-keeping and reporting requirements; and (5) subpoena witnesses and require the production of documents and other evidence. The overseas application of US labour laws is administratively impracticable because the EEOC has neither foreign offices nor international investigative power. The processing of a discrimination charge therefore entails obtaining evidence from the parent corporation or the controlling persons located in the United States or through the cooperation of other US agencies with posts abroad, as well as cooperation with host country officials.

However, the EEOC's investigative efforts may conflict with the discovery laws of other States. Some countries employ "blocking" statutes that prohibit their nationals from cooperating with United States administrative investigations and legal proceedings. For example, French law forbids the communication of economic, commercial, industrial, financial or technical documents to aliens if such communication harms the sovereignty, security or essential economic interests of France.[29] France passed this law in response to a US federal district court's order requiring a French corporation to produce documentary evidence. The statute also subjects foreign government agencies and individuals to criminal liability and penalties merely for requesting economic, commercial, industrial or financial information "leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceeding".

Similarly, the South African Government has enacted a blocking statute known as the Protection of Businesses Act (PBA),[30] which, in effect, prohibits South African entities and individuals from complying with amendments to the United States Export-Import Bank Act (Eximbank Act) requiring the recognition of fair employment standards as a prerequisite to receiving financial support for the purchase of United States goods. The Eximbank Act, as amended, requires the United States Secretary of State to certify that the South African purchaser has "endorsed and has proceeded toward the implementation" of fair labour standards. The purchaser is required to provide information concerning the measures taken to implement the principles set forth in the statute. However, the State Department's efforts to enforce labour standards have been stymied by the passage of the PBA, which provides that "no person shall in compliance

[29] Law No. 80-538 of 16 July 1980 concerning the Communication of Documents or Information of an Economic, Commercial, Industrial, Financial or Technical Nature to Aliens, whether Natural or Artificial Persons, reprinted in B. Toms: "The French response to the extraterritorial application of United States law", in *International Lawyer* (Chicago), Fall 1981, pp. 585, 611.

[30] Protection of Businesses Act, No. 99 of 1978, amended by Protection of Businesses Act, No. 114 of 1979, reprinted in A. Vance: "The Export-Import Bank of the United States and South Africa: The effects of the Evans amendment", in *Vanderbilt Journal of Transnational Law* (Nashville), Fall 1984, pp. 801, 811, 832-833.

with any order, direction or letters of request issued or emanating from outside the Republic, furnish any information as to any business whether carried on in or outside the Republic". In response, and to avoid a diplomatic crisis, the State Department refused to process the questionnaire responses received from a number of South African nationals.

IV. Conclusion

The United States, then, applies some of its employment standards to the overseas workplace. However, although the United States maintains that it is authorized to do so under international law, the uninvited regulation of the foreign employment relationship may be considered an unacceptable interference in other countries' domestic affairs. Moreover, it is conceivable that foreign governments will increasingly enact legislation effectively countering US efforts to regulate overseas employment and thereby impeding endeavours to foster positive change in the overseas workplace. To avoid being branded as protectionist and paternalistic, the United States should therefore enact and enforce extraterritorial fair employment legislation with caution. The more intrusive the application, the more the United States exposes itself to international criticism and retaliation. At the same time, the United States should become more active within the ILO, both to demonstrate its commitment to ILO principles and because the multilateral enforcement process is less intrusive than unilateral efforts. One means of doing this would be to ratify more Conventions covering employment matters, so as to be able to raise these questions through the ILO.