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United States Labor Practices in South Africa: Will A Mandatory Fair Employment Code Succeed Where The Sullivan Principles Have Failed?

Brian J.F. Clark*

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Abstract

This Note examines whether such a mandatory employment code is a necessary and effective means of accomplishing the bill's goals. Following a brief discussion of the extent of United States business involvement in South Africa and the effect of the Sullivan Principles, an existing voluntary program, on these companies' labor practices, the potential conflicts between the Labor Standards bill and South African law and policy are explored. A specific analysis of the legal and practical problems in enforcing the bill's provision in South Africa follows. The relative merits of the Sullivan Principles and the Labor Standards bill are discussed, and an alternate scheme is proposed.

UNITED STATES LABOR PRACTICES IN SOUTH AFRICA: WILL A MANDATORY FAIR EMPLOYMENT CODE SUC- CEED WHERE THE SULLIVAN PRINCIPLES HAVE FAILED?

INTRODUCTION

H.R. 3231¹ was introduced on June 6, 1983 as a proposed amendment to the Export Administration Act of 1979.² Title III of H.R. 3231 would directly affect United States relations with the Republic of South Africa.³ Subtitle 1 of Title III (Labor Standards bill or bill) would compel United States persons doing business in South Africa⁴ to adhere to fair labor standards.⁵

1. H.R. 3231, 98th Cong., 1st Sess. (1983) (originally introduced as H.R. 1693). In February 1983, the Foreign Affairs Committee reported the bill as Title III of the Export Administration Act of 1983, H.R. 3231. *See* 129 CONG. REC. E3027 (daily ed. June 20, 1983) (statement of Rep. Solarz).

2. 50 U.S.C. app. §§ 2401-2420 (Supp. IV 1980).

3. Title III is composed of two subtitles. Subtitle 1 governs the labor practices of United States persons in South Africa. H.R. 3231, 98th Cong., 1st Sess. subtit. 1, (1983) [hereinafter cited as Labor Standards Bill]. Subtitle 2 prohibits United States banks from making loans to the South African government, or any corporation, partnership, or other organization controlled by the South African government. H.R. 3231, 98th Cong., 1st Sess. subtit. 2, § 321 (1983). Importation of the South African krugrand into the United States is also prohibited under subtitle 2. *Id.* § 322.

4. Labor Standards Bill, *supra* note 3, § 311. The bill applies to "[a]ny United States person who—(A) has a branch or office in South Africa, or (B) controls a corporation, partnership, or other enterprise in South Africa, in which more than 20 people are employed." *Id.* The bill presumes a United States person to control a corporation, partnership, or other enterprise in South Africa when:

(A) the United States person beneficially owns or controls (whether directly or indirectly) more than 50% of the outstanding voting securities of the corporation, partnership, or enterprise;

(B) the United States person beneficially owns or controls (whether directly or indirectly) 25% or more of the voting securities of the corporation, partnership, or enterprise, if no other person owns or controls (whether directly or indirectly) an equal or larger percentage;

(C) the corporation, partnership, or enterprise is operated by the United States person pursuant to the provisions of an exclusive management contract;

(D) a majority of the members of the board of directors of the corporation, partnership, or enterprise are also members of the comparable governing body of the United States person;

(E) the United States person has authority to appoint a majority of the members of the board of directors of the corporation, partnership, or enterprise; or

(F) the United States person has authority to appoint the chief operating officer of the corporation, partnership, or enterprise.

Id. § 332(4). The bill also applies to any United States person who aids any attempts to evade the provisions of subtitle 1. *Id.* § 333(a).

5. Labor Standards Bill, *supra* note 3.

The underlying purposes of the Labor Standards bill are to register United States protest against apartheid, and to prevent United States persons from participating in racial discrimination.⁶ The bill sets specific guidelines for collective bargaining,⁷ desegregation,⁸ and equal employment.⁹ Two advisory councils,¹⁰ one in

6. "The answer I propose will make clear in deed as well as word our abhorrence of apartheid." 129 CONG. REC. E3027 (daily ed. June 20, 1983) (statement of Rep. Solarz). Representative Solarz also stated: "An effective fair employment code can, however, make a meaningful difference in the lives of the men and women who work for American firms and can send an unmistakable signal that our country does not countenance South Africa's system of racial discrimination." 129 CONG. REC. E2566 (daily ed. May 26, 1983) (statement of Rep. Solarz).

Apartheid is a term much used but rarely defined. The Afrikaans word "apartheid" is literally translated "separateness, apartness." J. DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 5 (1978). While racial separation has existed throughout the history of South Africa, it did not become an overt, aggressive policy of the government until 1948. G. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 240-41 (1981). Prior to that time, South Africa's racial policy was like that of the United States. In the United States, no federal scheme existed for separation of the races, yet local laws differentiating among the races were allowed. *Plessy v. Ferguson*, 163 U.S. 537 (1896). United States and South African racial policies diverged in the 1950's when the United States Supreme Court held the "separate but equal" policy to be unconstitutional. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The National Party was voted into power in South Africa on its "apartheid" platform in 1948, just a few years before *Brown*. G. FREDRICKSON, *supra*, at 240-41. Since 1948, apartheid has evolved under the National Party into a comprehensive national system to separate the races in every aspect of life. See J. DUGARD, *supra*, at 53-58; G. FREDRICKSON, *supra*, at 239-82.

The Labor Standards Bill, *supra* note 3, seeks to affect South Africa's apartheid system by imposing fair employment practices on United States firms operating in South Africa. *Id.* A widely debated alternate method for changing apartheid is the disinvolvement of United States firms and capital from South Africa. For a discussion of the disinvolvement approach, see THE CENTRE FOR BUSINESS STUDIES, UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG, A CASE AGAINST DISINVOLVEMENT IN THE SOUTH AFRICAN ECONOMY (1980); L. LITVAK, R. DEGRASSE & K. MCTIGUE, *SOUTH AFRICA: FOREIGN INVESTMENT AND APARTHEID* (1978); Chettle, *The Law and Policy of Divestment of South African Stock*, 15 L. & POL'Y INT'L BUS. 445 (1983); Davis, Cason & Hovey, *Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Divestment*, 15 L. & POL'Y INT'L BUS. 529 (1983); Smith & Hoffman, . . . *No, Instead Divest*, N.Y. Times, June 24, 1983, at A22, col. 4; Weigand, *Invest in South Africa . . .*, N.Y. Times, June 24, 1983, at A22, col. 1.

7. Labor Standards Bill, *supra* note 3, § 312(a)(7). See *infra* notes 96-109 and accompanying text.

8. Labor Standards Bill, *supra* note 3, § 312(a)(1). See *infra* notes 120-23 and accompanying text.

9. Labor Standards Bill, *supra* note 3, § 312(a)(2)-(6). See *infra* notes 110-19 and accompanying text.

10. Labor Standards Bill, *supra* note 3, § 313. See *infra* notes 124-33 and accompanying text.

the United States,¹¹ the other in South Africa,¹² would implement and administer the legislation. Civil and criminal penalties are provided for enforcement.¹³

This Note examines whether such a mandatory employment code is a necessary and effective means of accomplishing the bill's goals. Following a brief discussion of the extent of United States business involvement in South Africa¹⁴ and the effect of the Sullivan Principles,¹⁵ an existing voluntary program, on these companies' labor practices, the potential conflicts between the Labor Standards bill and South African law and policy are explored.¹⁶ A specific analysis of the legal and practical problems in enforcing the bill's provisions in South Africa follows.¹⁷ The relative merits of the Sullivan Principles and the Labor Standards bill are discussed,¹⁸ and an alternate scheme is proposed.¹⁹

I. UNITED STATES BUSINESS INVOLVEMENT IN SOUTH AFRICA

Approximately 400 companies operating in South Africa would be affected by the Labor Standards bill.²⁰ These firms employ more than 140,000 workers, of whom over 75% are non-

11. Labor Standards Bill, *supra* note 3, § 313(b). *See infra* notes 129-33 and accompanying text.

12. Labor Standards Bill, *supra* note 3, § 313(a). *See infra* notes 124-28 and accompanying text.

13. Labor Standards Bill, *supra* note 3, § 314(d). *See infra* notes 134-48 and accompanying text.

14. *See infra* notes 20-31 and accompanying text.

15. *See* Rev. Sullivan, Statement of Principles 1-4 (July 6, 1978) (available from the offices of the American Committee on Africa, New York City) [hereinafter cited as Sullivan Principles]. For a discussion of the Sullivan Principles, *see infra* notes 32-95 and accompanying text.

16. *See infra* notes 149-81 and accompanying text.

17. *See infra* notes 182-250 and accompanying text.

18. *See infra* text accompanying notes 90-95, 251.

19. *See infra* text accompanying notes 251-54.

20. The relevant provisions concerning the bill's coverage are contained in *supra* note 4. The estimate of how many companies would be affected by the Labor Standards bill is based on information contained in INVESTOR RESPONSIBILITY RESEARCH CENTER INC., IRRC DIRECTORY OF U.S. CORPORATIONS IN SOUTH AFRICA (1982) [hereinafter cited as IRRC REPORT]. More than 6000 United States firms do business in South Africa through sales agents or licensing agreements. *Id.* at 1; Davis, Cason & Hovey, *supra* note 6, at 546. *See generally* D. MEYERS, U.S. BUSINESS IN SOUTH AFRICA (1980).

white.²¹ At present, it is estimated that over U.S.\$2.3 billion is directly invested by these companies in South Africa, one-fifth of all direct foreign investment.²² United States business involvement is chiefly in the oil, automobile, computer, and mineral industries.²³ Three United States-based-multinational firms—Caltex Petroleum, Mobil, and Exxon—control about 44% of South Africa's petroleum market.²⁴ These firms employ 5755 workers, 47% of whom are nonwhite.²⁵ General Motors, Ford, and Chrysler control at least one-third of the auto manufacturing market in South Africa.²⁶ Combined with the two major United States tire companies, Good-year and Firestone, these companies employ about 20,000 workers, of whom approximately 75% are nonwhite.²⁷ The three largest United States employers in South Africa—Newmont Mining, U.S. Steel, and AMAX—are involved in mining.²⁸ These companies employ over 30,000 workers, of whom over 80% are nonwhite, the large majority being black.²⁹ United States companies dominate the computer market, with five American firms among the top seven in sales.³⁰ Yet, blacks do not comprise more than 20% of the work force in any United States computer firm, and very few blacks perform technical work.³¹

21. IRRIC REPORT, *supra* note 20. One source states that as many as 123,000 black Africans work for United States companies in South Africa. Simon, *At a Crossroad in South Africa*, N.Y. Times, Nov. 6, 1983, at F1, col. 4.

22. Simon, *supra* note 21, at F1, col. 2; N.Y. Times, June 15, 1983, at A22, col. 1. United States direct investment has tripled during the last ten years. Chettle, *supra* note 6, at 446. In addition to direct investment, United States lenders have extended over U.S.\$3.6 billion in loans to South African borrowers, and United States investors hold U.S.\$8 billion worth of shares in South African gold mines, bringing total United States financial involvement to over U.S.\$14 billion. Davis, Cason & Hovey, *supra* note 6, at 546.

23. L. LITVAK, R. DEGRASSE & K. MCTIGUE, *supra* note 6, at 46-56; *see* D. MEYERS, *supra* note 20 at 153-271.

24. L. LITVAK, R. DEGRASSE & K. MCTIGUE, *supra* note 6, at 44; D. MEYERS, *supra* note 20, at 162-165; Davis, Cason & Hovey, *supra* note 6, at 548.

25. IRRIC REPORT, *supra* note 20, at 11, 17-18, 28.

26. L. LITVAK, R. DEGRASSE & K. MCTIGUE, *supra* note 6, at 47; D. MEYERS, *supra* note 20.

27. IRRIC REPORT, *supra* note 20, at 12-13, 18-19, 20, 21. Chrysler did not submit a racial breakdown response to the IRRIC questionnaire. The percentage of nonwhite workers is based on the completed questionnaires of the other four companies. *Id.* at 12-13.

28. IRRIC REPORT, *supra* note 20, at 5-6, 30-31, 41-42; Simon, *supra* note 21, at F9, col. 1.

29. IRRIC REPORT, *supra* note 20, at 5-6, 30-31, 41-42; Simon, *supra* note 21, at F9, col. 1.

30. D. MEYERS, *supra* note 20, at 197-98. In the late 1970's, United States firms provided 70% of South Africa's computers. Chettle, *supra* note 6, at 462.

31. D. MEYERS, *supra* note 20, at 199-200.

II. THE SULLIVAN PRINCIPLES

In 1977, Reverend Leon Sullivan, a Philadelphia minister and member of the General Motors board of directors,³² proposed a voluntary code of fair labor practices for United States firms operating in the Republic of South Africa,³³ which came to be known as the Sullivan Principles.³⁴ There are six principles:

- 1) Non-segregation of the races in all eating, comfort and work facilities.
- 2) Equal and fair employment practices for all employes.
- 3) Equal pay for all employes doing equal or comparable work for the same period of time.
- 4) Initiation of and development of training programs that will prepare, in substantial numbers, Blacks and other non-whites for supervisory, administrative, clerical and technical jobs.
- 5) Increasing the number of Blacks and other non-whites in management and supervisory positions.
- 6) Improving the quality of employes' lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities.³⁵

Each principle contains guidelines for implementing and progressively expanding the fair labor practices.³⁶

Twelve major companies adopted the Sullivan Principles within months.³⁷ As of 1983, there are 120 signatories.³⁸ Arthur D.

32. Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 L. & POL'Y INT'L BUS. 427, 428-29 (1983).

33. *Id.* at 429-31.

34. Sullivan Principles, *supra* note 15, at 1-4. The Sullivan Principles seek to mobilize the influence of U.S. multinational companies to contribute to peaceful change in South Africa. Sullivan, *supra* note 32, at 427.

35. Sullivan Principles, *supra* note 15, at 1-4. Following the inauguration of the Sullivan Principles in 1977 similar voluntary codes have been developed. Sullivan, *supra* note 32, at 430. Among them are the European Community Code, the Canada Code, the Urban Foundation (SACCOLA) Code, the Cape Code, and the Barlow Rand Code. *Id.* The full texts of the European Community and Urban Foundation Codes are reprinted in D. MEYERS, *supra* note 20, at 330-32 app. B.

36. Sullivan Principles, *supra* note 15, at 1-4. Each year the requirements under the principles are expanded, progressively calling for greater efforts. Sullivan, *supra* note 32, at 441. For example, the guidelines for the equal employment principle include calling for the signatories to implement equal terms of employment, provide nondiscriminatory eligibility for benefit plans, and support the elimination of discriminatory labor laws. Sullivan Principles, *supra* note 15, at 2.

37. American Comm. on Africa, *The Sullivan Principles: No Cure for Apartheid* 1

Little, Inc. (Little), a Boston-based research firm, has been evaluating the signatories' progress in annual reports since 1978.³⁹ The reports are based on signatory companies' response to questionnaires prepared by Little.⁴⁰ The Little reports evaluate the companies' relative progress and rate the firms in three categories: 1) Making Good Progress; 2) Making Progress; and 3) Needs to Become More Active.⁴¹ The third category is further divided into two sub-categories: A) companies who have met the basic requirements of the first three principles, but performed poorly in implementing the latter three; and B) companies that have not met the basic requirements of the first three principles.⁴² Of the companies that responded to the latest report, twenty-nine companies were making good progress, thirty-eight were making progress, and forty-one needed to become more active.⁴³ Of the companies needing to become more active, thirty-two met the basic requirements, and nine did not.⁴⁴

A. Progress Under the Sullivan Principles

The greatest advancement has been in implementing the basic requirements of the first three Sullivan principles.⁴⁵ Only one signatory, Firestone, has failed to desegregate, and that company plans total desegregation during 1984.⁴⁶ Several guidelines under the "equal and fair employment principle" have been achieved.⁴⁷ All reporting signatories indicate they have common medical, pension, and insurance plans.⁴⁸ All signatories have established grievance

(available from the offices of the American Committee on Africa, New York City). Among those firms were Ford, Mobil, General Motors, IBM, and Union Carbide. *Id.*

38. ARTHUR D. LITTLE, INC., SEVENTH REPORT ON THE SIGNATORY COMPANIES TO THE SULLIVAN PRINCIPLES 10-11 (1983). The 99 reporting signatories employ 66,175 workers, of whom 44% are black, 37% white, 16% colored, and 3% Asian. *Id.* at 22. In South Africa, the word "colored" is used as a specific term to denote people of mixed racial descent. J. DUGARD, *supra* note 6, at 4, n.2.

39. *Id.* at 1, 10-11.

40. *Id.* at 1.

41. *Id.* at 1, 5-11.

42. *Id.* at 1, 7-11.

43. *Id.* at 1, 10-17.

44. *Id.* at 1, 11, 12-13, 16-17.

45. *Id.* at 22-26, 36.

46. *Id.* at 3, 22, 36; Lewin, *Rev. Sullivan Steps Up His Anti-Apartheid Fight*, N.Y. Times, Nov. 6, 1983, at F12, col. 6.

47. See Sullivan Principles, *supra* note 15, at 1.

48. ARTHUR D. LITTLE, INC., *supra* note 38, at 3, 23-24.

and disciplinary procedures applicable to all races,⁴⁹ and all support the workers' right to form unions.⁵⁰

All signatories report that they pay all races at the same rate for equal work.⁵¹ In effort to comply with the equal pay principle, signatories have granted higher wage increases for nonwhites during the last five years.⁵² The equal pay principle also involves the establishment of a minimum living level, currently U.S.\$228 per month, upon which a minimum wage standard is based.⁵³ In the latest report, 164 signatory locations had established a minimum wage at least 30% above the minimum level, while only five locations were below the minimum.⁵⁴

There has also been improvement under the other principles. In 1983, 27,277 nonwhite employees participated in training programs for skilled and supervisory positions, an 11% increase over the prior year.⁵⁵ Signatories spent over U.S.\$6 million on training programs, an 80% increase from 1982.⁵⁶ Over U.S.\$7 million was contributed in 1983 by signatory companies to help educate nonwhites who were not employees, over U.S.\$2 million more than was contributed in 1982.⁵⁷ The number of schools "adopted" by signatory companies rose to 200 in 1983 from 150 in 1982,⁵⁸ and United States companies spent more than 5% of their corporate earnings on housing development, training, and education programs.⁵⁹

Signatories have been leaders in advancing labor relations in South Africa. Ford Motor Company was the first to permit full-time black shop stewards in its factories.⁶⁰ Kellogg Company was

49. *Id.* at 24, 37.

50. *Id.*

51. *Id.* at 25, 37.

52. *Id.* at 3, 25, 37.

53. *Id.* at 25. The minimum living level is based on studies done by the University of South Africa. *Id.*

54. *Id.* at 26, 38.

55. *Id.* at 3, 27.

56. *Id.* at 29, 38. The conversion rate used to derive the South African rand to dollars is U.S.\$0.90 for each rand. See N.Y. Times, Apr. 20, 1984, at D10, col. 6.

57. *Id.* at 30, 40-41.

58. *Id.* at 30. Under the adoption program, a signatory company provides better facilities, equipment, and instruction to nonwhite elementary or secondary schools. Sullivan, *supra* note 32, at 433.

59. Simon, *supra* note 21, at F9, col. 1.

60. *Id.* at F8, col. 4.

the second company in South Africa to sign a formal agreement recognizing a black trade union.⁶¹ Borg-Warner Corporation was among the first companies in the engineering industry to negotiate wages with black workers rather than through a government recognized industrial council dominated by whites.⁶²

The signatories have also combined to register against apartheid, as exemplified in their support of a challenge to discriminatory housing restrictions⁶³ and their opposition to a proposed resettlement bill.⁶⁴ The case involved a black engineer, Mehloti Tom Rikhoto, who was denied the right to live in Johannesburg because South African law only permits blacks to live in cities where they have worked continuously for ten years.⁶⁵ Mr. Rikhoto was prevented from fulfilling this requirement by another South African law requiring blacks to return to their tribal homeland every year to renew their work permits.⁶⁶ Mr. Rikhoto won his case with help given principally by the Legal Resources Center, a law firm financially supported by the Sullivan signatories.⁶⁷ The signatories also acted against the South African government's proposed Orderly Movement and Settlement Bill No. 113-82, which would have further restricted blacks' movement into urban areas.⁶⁸ The signatory companies, through the American Chamber of Commerce in South Africa, jointly submitted a written protest.⁶⁹ The bill was later shelved by the South African government.⁷⁰ The flexibility of the Sullivan Principles has allowed such selective confrontation with South African law, and has resulted in changes in the law and its enforcement.⁷¹

61. *Id.*

62. *Id.*

63. *See infra* notes 65-67 and accompanying text.

64. *See intra* notes 68-70 and accompanying text.

65. N.Y. Times, June 14, 1983, at A22, col. 1; ARTHUR D. LITTLE, INC., *supra* note 38, at 3.

66. ARTHUR D. LITTLE, INC., *supra* note 38, at 3; *See* N.Y. Times, *supra* note 65.

67. ARTHUR D. LITTLE, INC., *supra* note 38, at 3; N.Y. Times, *supra* note 65.

68. ARTHUR D. LITTLE, INC., *supra* note 38, at 3.

69. *Id.*

70. *Id.*

71. *See* Sullivan, *supra* note 32, at 434.

B. *Decline in the Effectiveness of the Sullivan Principles*

Only 120 companies are signatories,⁷² while 280 firms have opted to stay outside the Sullivan program.⁷³ Only two of the seven United States companies that employ over 5000 workers are Sullivan signatories.⁷⁴ The remaining five include Newmont Mining, U.S. Steel, and AMAX, the largest United States employers; together they employ almost half the total of signatory employees.⁷⁵ Participation in the program has recently decreased. During the last reporting period twenty-nine signatories withdrew from the program, the first such withdrawal in the program's history.⁷⁶ From a high of 145 signatories in 1982, and 83,133 employees covered in 1981,⁷⁷ participation has declined to 120 companies and 66,175 employees.⁷⁸

While the first three principles have generally been met,⁷⁹ the goals of the program have not been achieved. The number of nonwhites engaged in training programs has grown,⁸⁰ yet programs preparing employees for supervisory and management jobs are increasingly dominated by whites. During 1982 and 1983, over 60% of those in training for supervisory positions were white, up from 52% in 1981.⁸¹ In the last two years, whites have comprised 85% and 86% of employees being prepared for managerial positions.⁸² Signatories have also been slow in putting nonwhites into supervi-

72. ARTHUR D. LITTLE, INC., *supra* note 38, at 11.

73. IRRRC REPORT, *supra* note 20.

74. *Id.* at 5, 12, 18-19, 30, 32, 41; Simon, *supra* note 21, at F9, col. 1.

75. IRRRC REPORT, *supra* note 20, at 5, 30, 41; Simon, *supra* note 21, at F9, col. 1.

76. Lewin, *supra* note 46, at F12, col. 6. A large number of the signatory companies' withdrawal was due to their failure to pay the U.S.\$1000 to U.S.\$7000 fee to take part in the program. *Id.* Under a policy issued prior to the last report, Arthur D. Little, Inc. did not evaluate any companies that did not pay the fee. *Id.* Some companies claim that their failure to pay the fee does not mean they have abandoned instituting fair labor practices. *Id.* However, none of the companies that dropped out had been in Little's top two categories the year before. *Id.*

77. ARTHUR D. LITTLE, INC., *supra* note 38, at 10-11, 21-22, 35. Lewin, *supra* note 46, at F12, col. 6.

78. ARTHUR D. LITTLE, INC., *supra* note 38, at 10-11.

79. *See supra* notes 45-54 and accompanying text.

80. *See supra* note 55 and accompanying text.

81. ARTHUR D. LITTLE, INC., *supra* note 38, at 27-28.

82. *Id.*

sory and management jobs.⁸³ While nonwhites comprise 63% of the signatories' workforce, they hold only 35% of the supervisory jobs, and only 4% of management positions.⁸⁴ Significantly, the 300 blacks in such jobs supervise only 621 whites,⁸⁵ and only .007% of nonwhite employees supervise white employees.⁸⁶ In addition, signatory contributions for community development have dropped dramatically, from near U.S.\$11 million in 1982 to U.S.\$5 million in 1983.⁸⁷

In light of the recent withdrawals,⁸⁸ and as the great majority of United States companies have never been part of the program,⁸⁹ it appears that full implementation of the principles will be the responsibility of a core group of dedicated firms.

Progress under the Sullivan Principles has been uneven. The height of achievement was securing the active participation of United States multinational firms in developing fair employment practices in South Africa.⁹⁰ Yet, the recent withdrawals from the program and the increasing inability of the signatories to progress beyond the first three principles signal a decline in the effectiveness of the Sullivan Principles.⁹¹ Such decline has prompted Reverend Sullivan to assert that "*so much more needs to be and must be done.*"⁹² Specifically, the nonsignatory companies must become involved, and all firms must increase their efforts to improve the conditions of nonwhites in South Africa.⁹³ The Labor Standards bill,⁹⁴ which Reverend Sullivan supports,⁹⁵ represents an attempt to stop the decline in participation under the Sullivan Principles by instituting a mandatory labor relations code.

83. See *infra* notes 84-86 and accompanying text.

84. ARTHUR D. LITTLE, INC., *supra* note 38, at 22.

85. See *id.* at 34.

86. *Id.*; Simon, *supra* note 21, at F1, col. 4.

87. See ARTHUR D. LITTLE, INC., *supra* note 38, at 3, 34. For the currency rate used to convert rand to U.S. dollar, see *supra* note 56.

88. See *supra* notes 76-78 and accompanying text.

89. See *supra* notes 72-75 and accompanying text.

90. See *supra* notes 45-54 and accompanying text.

91. See *supra* notes 72-87 and accompanying text.

92. Sullivan, *supra* note 32, at 436.

93. See *id.* at 434-35.

94. Labor Standards Bill, *supra* note 3.

95. Sullivan, *supra* note 32, at 440.

III. THE LABOR STANDARDS BILL AND SOUTH AFRICAN LAW

A. Provisions of the Labor Standards Bill

1. Collective Bargaining Provisions

Many of the collective bargaining provisions of the Labor Standards bill⁹⁶ are closely modelled after sections 7 and 8(a) of the United States National Labor Relations Act⁹⁷ (NLRA). Like section 7 of the NLRA, the bill recognizes employees' right "to self-organization and to form, join, or assist labor organizations."⁹⁸ Prohibited employer practices in the bill include the NLRA's "unfair labor practices."⁹⁹ Employees engaged in concerted activities would be protected from employer interference¹⁰⁰ or retaliation.¹⁰¹ United States firms would be prohibited from interfering with labor organizations¹⁰² and discriminating against employees due to union membership.¹⁰³ Employers would also be compelled to bargain with duly chosen employee unions.¹⁰⁴

96. Labor Standards Bill, *supra* note 3, § 312(a)(7).

97. 29 U.S.C. §§ 157, 158(a) (1976).

98. Labor Standards Bill, *supra* note 3, § 312(a)(7)(A). The bill provides that the United States companies must recognize: "the right of all employees, regardless of racial or other distinctions, to self-organization and to form, join or assist labor organizations, freely and without penalty or reprisal, and recognizing the right to refrain from any such activity." *Id.* Cf. 29 U.S.C. § 157 (1976). Section 157 provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

Id.

99. 29 U.S.C. § 158(a).

100. Labor Standards Bill, *supra* note 3, § 312(a)(7)(B)(i). This section prohibits United States firms from "interfering with, restraining, or coercing employees in the exercise of their rights of self-organization under this paragraph." *Id.*

101. *Id.* § 312(a)(7)(B)(iv). It prohibits United States firms from "discharging or otherwise disciplining or discriminating against any employee who has exercised any rights of self-organization under this paragraph." *Id.*

102. *Id.* § 312(a)(7)(B)(ii). It prohibits United States firms from "dominating or interfering with the formation or administration of any labor organization, or sponsoring, controlling, or contributing financial or other assistance to it." *Id.*

103. *Id.* § 312(a)(7)(B)(iii). It prohibits United States firms from "encouraging or discouraging membership in any labor organization by discrimination in regard to hiring, tenure, promotion, or other condition of employment." *Id.*

104. *Id.* § 312(a)(7)(B)(v). This section makes it a violation of the legislation for Ameri-

Other collective bargaining provisions of the bill reflect federal court and National Labor Relations Board (NLRB) decisions. The Labor Standards bill's provisions regulating the distribution of union literature and union solicitation of employees is essentially a codification of the NLRB's presumptive tests set forth in *Stoddard-Quirk Manufacturing Co.*¹⁰⁵ United States firms would be required to utilize arbitration to resolve disputes,¹⁰⁶ in accordance with United States Supreme Court decisions that have established arbitration as a favored labor policy.¹⁰⁷ The bill also provides that nonemployee union organizers will be granted reasonable access to company property during reasonable times.¹⁰⁸ Such a grant is broader than that found in United States law,¹⁰⁹ which requires an employer to provide access to outside organizers only in limited circumstances.

2. Fair Employment Provisions

Besides requiring United States companies to practice equal employment, the bill would require the companies to implement

can firms to "refus[e] to bargain collectively with any organization freely chosen by employees." *Id.*

105. 138 N.L.R.B. 615 (1962). The test established in *Stoddard-Quirk* is that rules prohibiting the distribution of union literature during nonworking hours would be presumptively invalid, as would be rules prohibiting union solicitation during nonworking hours. *Id.* The bill permits "employees to exercise rights of self-organization, including solicitation of fellow employees during nonworking hours, allowing distribution and posting of union literature by employees during nonworking hours in nonworking areas." Labor Standards Bill, *supra* note 3, § 312(a)(7)(C).

106. Labor Standards Bill, *supra* note 3, § 312(a)(7)(F). This bill requires United States firms to "utiliz[e] impartial persons mutually agreed upon by employer and employee representatives to resolve disputes concerning election of representatives, negotiation of agreements or grievances arising thereunder, or any other matters." *Id.*

107. See *United States Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

108. Labor Standards Bill, *supra* note 3, § 312(a)(7)(C). This section requires United States firms to allow "reasonable access to labor organization representatives to communicate with employees on employer premises at reasonable times." *Id.*

109. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (requires the employer to provide access to an outside organizer only when there are no alternate reasonable means by which the union can reach the employees). For an example of no alternate reasonable means, see *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26 (2d Cir. 1967).

job training programs and aid in community development.¹¹⁰ New salary structures would be implemented, and job classifications and benefit systems would be reviewed to insure equal pay for equal work.¹¹¹ A minimum wage would be established based on a cost of living index that would take into account workers' household needs.¹¹²

Like the Sullivan program, the Labor Standards bill emphasizes placing nonwhite workers in skilled and supervisory positions,¹¹³ and it establishes a progressive placement program.¹¹⁴

110. Labor Standards Bill, *supra* note 3, § 312(a)(2). This section requires United States firms to:

(A) assur[e] that any health, accident, or death benefit plans that are established are non-discriminatory and open to all employees, whether they are paid on a salary or are compensated on an hourly basis; and

(B) implement . . . equal and nondiscriminatory terms and conditions of employment for all employees, and abolish . . . job reservations, job fragmentation, apprenticeship restrictions for blacks and other nonwhites, and differential employment criteria, which discriminate on the basis of race or ethnic origin.

Id.

111. *Id.* § 312(a)(3). United States firms would be required to establish equal pay for all employees doing equal or comparable work, including:

(A) establishing and implementing, as soon as possible, a wage and salary structure which is applied equally to all employees, regardless of race, who are engaged in equal or comparable work;

(B) reviewing the distinction between hourly and salaried job classifications, and establishing and implementing an equitable and unified system of job classifications which takes into account such review; and

(C) eliminating inequities in seniority and in-grade benefits so that all employees, regardless of race . . . are eligible for the same seniority and in-grade benefits.

Id.

112. *Id.* § 312(a)(4). The bill requires United States firms to "[e]stablish a minimum wage and salary structure based on a cost-of-living index which takes into account the needs of employees and their families." *Id.*

113. *Id.* § 312(a)(5). The bill requires United States companies to increase nonwhites in managerial, supervisory, administrative, clerical, and technical jobs, and requires companies to implement programs to effectuate such increases. *Id.*

114. *Id.* § 312(a)(5). The bill requires United States firms to:

Increas[e], by appropriate means, the number of blacks and other nonwhites in managerial, supervisory, administrative, clerical, and technical jobs for the purpose of significantly increasing the representation of blacks and other nonwhites in such jobs, including -

(A) developing training programs that will prepare substantial numbers of blacks and other nonwhites for such jobs as soon as possible.

Id.

United States companies would be required to set up training¹¹⁵ and educational¹¹⁶ programs for workers, and would be obligated to develop criteria to identify and advance nonwhite workers with potential for management positions.¹¹⁷

United States companies would also be required to take reasonable steps to improve the quality of workers' lives outside the workplace by providing assistance for housing, health care, transportation, schooling, and recreation.¹¹⁸ In addition, the bill mandates that United States companies develop programs to improve the quality of local education.¹¹⁹

3. Desegregation Provisions

The Labor Standards bill requires that United States persons desegregate their facilities,¹²⁰ including all eating, rest, and work places.¹²¹ Regulations based on race would be terminated,¹²² and all race designation signs removed from the workplace.¹²³

115. *Id.* § 312(a)(5)(A)(i), (ii). The bill requires United States firms to expand "existing programs and [form] new programs to train, upgrade, and improve the skills of all categories of employees, and . . . creat[e] on-the-job training programs and facilities to assist employees to advance to higher paying jobs requiring greater skills." *Id.*

116. *Id.* § 312(a)(5)(D). The bill requires United States firms to establish and expand "programs to enable employees to further their education and skills at recognized education facilities." *Id.*

117. *Id.* § 312(a)(5)(B), (C). The bill requires United States firms to establish "procedures to assess, identify, and actively recruit employees with potential for further advancement . . . [and to identify] blacks and other nonwhites with high management potential and enroll them in accelerated management programs". *Id.*

118. *Id.* § 312(a)(6)(A), (B). The bill requires United States firms to take reasonable steps to improve the quality of employees' lives outside the work environment, including:

(A) providing assistance to black and other nonwhite employees for housing, health care, transportation, and recreation either through the provision of facilities or services or providing financial assistance to employees for such purposes, including the expansion or creation of in-house medical facilities or other medical programs to improve medical care for black and other nonwhite employees and their dependents; and

(B) participating in the development of programs that address the education needs of employees, their dependents, and the local community.

Id.

119. *Id.* § 312(a)(6)(B).

120. *Id.* § 312(a)(1).

121. *Id.* § 312(a)(1)(B).

122. *Id.* § 312(a)(1)(C).

123. *Id.* § 312(a)(1)(A).

4. Advisory Councils

An eleven-member South African council would include the United States Ambassador to South Africa,¹²⁴ with the remaining positions to be filled by South African religious, civic, academic, and trade union leaders, and members of the United States Chamber of Commerce in South Africa.¹²⁵ The South African council would oversee implementation of the fair labor program.¹²⁶ In addition, it would review the required annual reports from the United States businesses¹²⁷ in order to evaluate compliance with the program.¹²⁸

A separate eleven-member American council would include officers and employees from government agencies,¹²⁹ as well as representatives of labor, business, civil rights, and religious organizations.¹³⁰ The council would make policy recommendations to the Secretary of State;¹³¹ these recommendations would be published in the Federal Register.¹³² It would also review the progress of United States persons in complying with the bill.¹³³

5. Enforcement Provisions

The Secretary of State is vested with broad powers to implement the fair labor program.¹³⁴ He may institute a monitoring system, including on-site observation, to check compliance.¹³⁵ The Secretary can resort to conferences, mediation, and conciliation to

124. *Id.* § 313(a).

125. *Id.* The bill requires that members chosen for the South African Council "have demonstrated a concern for equal rights." *Id.*

126. *Id.*

127. *Id.* § 314(a). In addition to the annual report, United States persons would be required to provide any information the Secretary of State deems necessary to determine whether the United States person is complying with the bill. *Id.*

128. *Id.* § 313(b).

129. *Id.* The government agencies named by the bill are the Department of State, the Department of Commerce, the Department of Labor, and the Equal Employment Opportunity Commission. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* § 314.

135. *Id.* § 314(b)(1).

ensure implementation of the bill.¹³⁶ The Secretary is granted full investigatory powers, including the ability to hold hearings, examine witnesses, and issue subpoenas to require testimony of witnesses and production of documents.¹³⁷ The Secretary may bring suit in United States district court to recover fines imposed under the bill,¹³⁸ and can recommend to the Attorney General that criminal proceedings be brought against persons who submit false information in the compliance reports.¹³⁹

6. Sanctions

If the Secretary of State determines that any United States person is not complying with the bill,¹⁴⁰ or has failed to provide accurate information necessary to determine compliance,¹⁴¹ such person would be prohibited from exporting goods or technology¹⁴² to South Africa¹⁴³ and from using the services of the United States Export-Import Bank.¹⁴⁴ If the United States person fails to abide by these prohibitions, fines and imprisonment up to five years may be imposed.¹⁴⁵ In addition to those penalties, firms violating the bill could be fined up to U.S.\$1 million,¹⁴⁶ while individual owners could face a maximum fine of U.S.\$50,000.¹⁴⁷ Individuals know-

136. *Id.* § 314(b)(2).

137. *Id.* § 314(b)(4).

138. *Id.* § 314(d)(2)(B).

139. *Id.* § 314(b)(3).

140. *Id.* § 314(d)(1).

141. *Id.*

142. *Id.* § 314(d)(1)(D). The bill states that " 'goods' and 'technology' have the same meanings as are given those terms in paragraphs (3) and (4) of section 16 of the Export Administration Act of 1979 (50 U.S.C. app. 2415)." *Id.* § 314(d)(3). The Export Administration Act of 1979 provides that "goods are any article, material, supply or manufactured product, including inspection and test equipment and excluding technical data . . . [and] [t]echnology is the information and knowhow that can be used to design, produce, manufacture, utilize, or reconstruct goods, including computer software and technical data, but not the goods themselves." 50 U.S.C. app. 2415 (Supp. IV 1980).

143. Labor Standards Bill, *supra* note 3, § 314(d)(1)(A).

144. *Id.* § 314(d)(1)(B).

145. *Id.* § 314(d)(2)(D)(3). The fines would be for each violation of the prohibitions, and could be up to five times the value of the export involved or U.S.\$50,000, whichever is greater. *Id.*

146. *Id.* § 314(d)(2)(A)(i).

147. *Id.* § 314(d)(2)(A)(ii).

ingly involved in carrying out a violation could be fined up to U.S.\$10,000.¹⁴⁸

B. *South African Law Affecting Labor Relations*

1. South African Labor Law

South African statutes affecting employment practices range from specific regulations dividing the workplace along racial lines¹⁴⁹ to broad state internal security laws that have been used to disrupt organizational efforts by black trade unions.¹⁵⁰ The flow of nonwhite workers to urban industrial centers is controlled by various "pass" laws.¹⁵¹ The South African government uses the passes to limit the number¹⁵² and amount of time nonwhites are allowed to spend in white areas.¹⁵³

A number of laws reserve skilled jobs for white workers.¹⁵⁴ A system of "work certificates" effectively excludes blacks from most

148. *Id.* § 314(d)(2)(B).

149. For example, the Factories, Machinery and Building Work Amendment provides for "the separation in or at any factory of persons of different sexes, races, or classes, and the making of separate provisions in or at any factory for persons of different sexes, races, or classes in regard to any matter." 1960 Stat. S. Afr. No. 31, § 21(b).

150. Internal Security Amendment Act, 1976 Stat. S. Afr. No. 79, § 10. This statute contains the banning order provision which has regularly been used against black trade union officials. See Gould, *Black Unions In South Africa: Labor Law Reform and Apartheid*, 17 *STAN. J. INT'L L.* 99, 114 (1981). The Bantu (Prohibition of Interdicts) Act, allows "the Executive to prohibit any meeting which is attended by an African, in any urban area outside an African residential area, where it considers the meeting would be undesirable or cause a nuisance." 1956 Stat. S. Afr. No. 64, § 9(7)(f).

151. The Bantu (Abolition of Passes and Co-ordination of Documents) Act provides that every black over 16 years of age must be fingerprinted and get a pass book with an identity card containing employment information. 1952 Stat. S. Afr. No. 67, § 3(1). The Bantu Labor Act requires the same passes for all migrant workers. 1964 Stat. S. Afr. No. 67, § 25.

152. For example, the Bantu Labor Act, 1964 Stat. S. Afr. No. 67, provides for the establishment of migration centers to filter the influx of migrant workers. See *id.* §§ 21, 22.

153. Bantu Urban Areas Consolidation Act, 1945 Stat. S. Afr. No. 54, makes it an offense for an African to remain "longer than 72 hours in an urban area unless he is able to show" that he has resided in such area continuously since birth, that he has continuously worked in such area since birth, that he has lawfully continuous residence in such area for at least fifteen years, or that the African is the wife, unmarried daughter, or minor son of a male under the other three exceptions. *Id.* § 27.

154. For example, the Environment Planning Act, 1967 Stat. S. Afr. No. 88, places restrictions on the number of Africans who may be employed in the manufacturing industry located in large industrial areas. *Id.* § 3.

skilled jobs in white areas.¹⁵⁵ While black unions are not illegal in South Africa, blacks are not allowed to participate in collective bargaining,¹⁵⁶ and the existence of black trade unions is contrary to government policy.¹⁵⁷ The South African government allows the establishment of committees through which blacks may discuss grievances on a plant by plant basis,¹⁵⁸ but these committees exist at the employer's discretion.¹⁵⁹ While black union leaders have obtained leadership positions on these committees,¹⁶⁰ their effectiveness has been limited by the government's use of various security laws¹⁶¹ and "banning orders."¹⁶² Blacks are not expressly excluded from trade apprenticeship programs,¹⁶³ but the dominant influence of white trade unions has largely prevented black apprenticeships.¹⁶⁴ Another major obstacle to black advancement is the unwritten rule that no white employee shall be subordinate to a black.¹⁶⁵

155. For example, the Bantu Building Workers Act, 1951 Stat. S. Afr. No. 27, requires work certificates to perform skilled work in the building industry. *Id.* Africans are prohibited from performing skilled work, and it is a criminal offense for an employer to employ an African in a skilled position. *Id.* §§ 14, 15.

156. Blacks are not specifically prohibited from joining a union, but under South African law blacks are not defined as employees, and therefore cannot meet the legal definition of a trade union. Industrial Conciliation Act, 1956 Stat. S. Afr. No. 28, § 1(1)(xi). Only registered unions may collectively bargain, black unions are not allowed to register. *Id.* § 4.

157. The Bantu Labor Relations Amendment Act only allows blacks to communicate, not to collectively bargain, with their employer. 1973 Stat. S. Afr. No. 70.

158. *See* Bantu Labor Relations Amendment Act, 1973 Stat. S. Afr. No. 70.

159. *See id.* § 7(A)(4)(b).

160. Gould, *supra* note 150, at 111.

161. *See* Internal Security Amendment Act, 1976 Stat. S. Afr. No. 79, § 1; Riotous Assemblies Act, 1974 Stat. S. Afr. No. 30, § 2(1), (3), (4); Terrorism Act, 1967 Stat. S. Afr. No. 83, §§ 2, 6.

162. Internal Security Amendment Act, 1976 Stat. S. Afr. No. 79, § 10. A well documented example of how a banning order is used to punish union activists involved Mrs. Winnie Mandela, wife of a well known union leader. *See* N.Y. Times, June 4, 1977, at A1, col. 2; N.Y. Times, May 23, 1977, at C26, col. 1; N.Y. Times, May 19, 1977, at A6, col. 1; London Times, June 27, 1977, at 10, col. 1.

163. *See* Apprenticeship Act, 144 Stat. S. Afr. No. 37.

164. J. DUGARD, *supra* note 6, at 86.

165. *Id.* According to Dugard, "there is an unwritten law that no white employee shall be subordinate to a black and few employers are willing to risk the wrath of their white labor force (and the Government) by departing from this rule." *Id.*

2. The Protection of Business Act

The Protection of Businesses Act¹⁶⁶ (PBA) prevents the use by foreign authorities of testimony or evidence concerning any business activity connected to the Republic of South Africa.¹⁶⁷ Under the PBA, South Africans are forbidden to comply with foreign orders requesting information or evidence relating to South African business.¹⁶⁸ The statute also prohibits the production of South African-based evidence in foreign legal proceedings.¹⁶⁹ Violation of the PBA exposes a South African to fines and imprisonment.¹⁷⁰ In addition, the PBA gives the South African government the power to order its courts not to enforce foreign judgements.¹⁷¹ The basis of the Labor Standards bill's enforcement is the Secretary of State's ability to compel evidence of compliance with the fair labor program by United States firms.¹⁷² The absence of South African employees' testimony and other South African-based evidence would greatly restrict the availability of information needed by the Secretary to enforce the bill.

C. Conflicts Between the Labor Standards Bill and South African Law

Several basic provisions of the Labor Standards bill contravene South African law. The desegregation provisions¹⁷³ of the bill are in direct opposition to the Factories, Machinery, and Building Work Act,¹⁷⁴ which empowers the South African government to divide the workplace according to race, sex, and class.¹⁷⁵ Similarly, the bill's scheme for affirmative action programs¹⁷⁶ would be contrary

166. Protection of Businesses Act, 1978 Stat. S. Afr. No. 99. See J. Atwood & K. Brewster, *ANTITRUST AND AMERICAN BUSINESS ABROAD*, § 4.18, at 104, n.83 (1981).

167. Protection of Businesses Act, 1978 Stat. S. Afr. No. 99, § 1(3).

168. *Id.* § 1(1). See Atomic Energy Act, 1967 Stat. S. Afr. No. 90. This statute prohibits revealing any information concerning South African mineral reserves. *Id.* § 30. Violators of the Atomic Energy Act incur liability of fines and imprisonment. *Id.* § 34(f), (iii).

169. See Protection of Businesses Act, 1978 Stat. S. Afr. No. 99, § 1(1)(a).

170. *Id.* § 2. The penalties levied could be a maximum fine of 2,000 rands (approximately U.S.\$1800) or 2 years imprisonment, or both. *Id.*

171. *Id.* § 1(1)(a).

172. See Labor Standards Bill, *supra* note 3, § 314.

173. Labor Standards Bill, *supra* note 3, § 312(a)(1).

174. 1969 Stat. S. Afr. No. 31, § 21(b).

175. *Id.*

176. See *supra* notes 110-17 and accompanying text.

to the number of South African statutes reserving jobs for white workers.¹⁷⁷ Other provisions of the bill would arguably not offend the letter of South African law, but would certainly undercut its intent. For example, the collective bargaining provisions¹⁷⁸ of the bill may not be in direct conflict with the Bantu Labor Relations Regulation Act¹⁷⁹ or the Industrial Conciliation Act,¹⁸⁰ but these provisions would certainly be against government policy.¹⁸¹

IV. POTENTIAL INEFFECTIVENESS OF THE LABOR STANDARDS BILL

While international law is part of United States law, and must be ascertained and applied by United States courts,¹⁸² international law "bends to the will of the Congress,"¹⁸³ and must give way when it conflicts with federal legislation.¹⁸⁴ Congress has the power to regulate the actions of United States citizens outside its territorial jurisdiction, whether or not such action occurs within the territory of a foreign nation.¹⁸⁵ Therefore, since the Labor Standards bill specifically controls the activities of United States persons in South

177. The Bantu Building Workers Act, 1951 Stat. S. Afr. No. 27, prohibits blacks from performing skilled work in the building trade in white urban areas. *Id.* § 14. The Environment Planning Act places restrictions on the number of blacks who may be employed in the manufacturing industry in large industrial areas. 1967 Stat. S. Afr. No. 83, § 3(1), (4). The Industrial Conciliation Act, 1956 Stat. S. Afr. No. 28, empowers the Minister of Labor to reserve specified classes of work for specified races as a safeguard against interracial competition. *Id.* § 77. The Mines and Works Act permits the granting of competency certificates for a number of skilled mining occupations to whites and coloreds only. 1956 Stat. S. Afr. No. 27, § 12(2)(a).

178. See *supra* notes 96-109 and accompanying text.

179. See *supra* note 157.

180. See *supra* note 156.

181. See J. DUGARD, *supra* note 6, at 88-89.

182. See *The Paquette Habana*, 175 U.S. 677, 700 (1900); *United States v. James-Robinson*, 515 F. Supp. 1340, 1342 (S.D. Fla. 1981).

183. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1179 (E.D. Pa. 1980) (quoting *The Over the Top*, 5 F.2d at 842); *The Over the Top*, 5 F.2d 838, 842 (D. Conn. 1925).

184. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 comment j (1965). According to the Restatement: "If there is domestic legislation contrary to international law that is also pertinent, courts in the United States will usually apply the legislation." *Id.*

185. See *Vermilya-Brown Co. v. Cornell*, 335 U.S. 337 (1948); *Blackmer v. United States*, 284 U.S. 421 (1932).

Africa,¹⁸⁶ international law could not operate to abridge the bill's application.

The Labor Standards bill's effectiveness, however, could be limited. Increasingly, United States courts employ a comity analysis in determining to what extent United States law should be extraterritorially applied.¹⁸⁷ This "balancing of interests" between United States and foreign concerns could work against attempts to enforce the bill.¹⁸⁸ In conjunction with the comity approach, United States firms could use the foreign governmental compulsion defense.¹⁸⁹ An even greater threat to the bill's success is posed by the South African government. Strong opposition to the mandatory program would either force the United States to discontinue it, or put United States firms in the impossible position of necessarily violating either United States or South African law.¹⁹⁰

A. Comity Analysis

The United States Court of Appeals for the Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America*,¹⁹¹ adopted a comity analysis to approach the question of when United States law should be extraterritorially applied.¹⁹² A similar comity analysis has also been espoused in the American Law Institute's *Restatement (Revised) of Foreign Relations Law of the United States*¹⁹³ (*Draft Restatement*). Both analyses balance the relevant interests of the United States and the foreign nation to determine whether United States law should be applied.¹⁹⁴

186. Labor Standards Bill, *supra* note 3, § 311.

187. *See* *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); *Dominicus Americana Bohio v. Gulf & West. Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979).

188. *See infra* notes 208-13 and accompanying text.

189. *See infra* notes 214-31 and accompanying text.

190. *See infra* notes 232-50 and accompanying text.

191. 549 F.2d 597 (9th Cir. 1976).

192. *Id.* at 601-14.

193. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (Tent. Draft No. 2, 1983) [hereinafter cited as DRAFT RESTATEMENT].

194. *See Timberlane*, 549 F.2d at 601-14; DRAFT RESTATEMENT, *supra* note 193, § 403.

1. The *Timberlane* Balancing Approach

In *Timberlane*,¹⁹⁵ the ninth circuit was presented with the issue of extraterritorial application of United States antitrust law.¹⁹⁶ The court found the traditional "intended effects"¹⁹⁷ test inadequate to decide the issue because it failed to consider other nations' interests.¹⁹⁸ Instead, the court opted for "an evaluation and balancing of the relevant considerations in each case . . . a 'jurisdictional rule of reason.'"¹⁹⁹

Timberlane sets forth a three-part test for determining the circumstances under which a United States court should assert jurisdiction:

Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?²⁰⁰

The third question calls for balancing the relevant comity considerations in each case.²⁰¹ *Timberlane* suggested that the following seven factors be weighed:

[T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such affect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.²⁰²

195. 549 F.2d at 597.

196. 549 F.2d at 600-01.

197. The "intended effects" test was introduced in *United States v. Aluminum Co. of Am. (ALCOA)*, 148 F.2d 416 (2d Cir. 1945). This test permits courts to apply United States antitrust laws extraterritorially upon finding an intent to affect United States commerce. 148 F.2d at 444.

198. *Timberlane*, 549 F.2d at 611-12.

199. *Id.* at 613.

200. *Id.* at 615.

201. *Id.* at 613-15.

202. *Id.* at 614.

After assessing the conflict, the court must determine whether United States' contacts and interests are sufficient, in the face of other nations' interests, to justify an assertion of extraterritorial jurisdiction.²⁰³

2. The *Draft Restatement* Approach

The *Draft Restatement* adopts a "reasonableness" test to determine when United States law should be extraterritorially applied.²⁰⁴ Similar to the *Timberlane* approach, the *Draft Restatement* balances relevant comity considerations.²⁰⁵ Factors to be considered under the *Draft Restatement's* analysis include:

- (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
- (b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
- (e) the importance of regulation to the international political, legal, or economic system;
- (f) the extent to which such regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity;
- (h) the likelihood of conflict with regulation by other states.²⁰⁶

203. *Id.* at 614-15. For other cases that have adopted the *Timberlane* approach, see, e.g., *Montreal Trading Ltd. v. AMAX Inc.*, 661 F.2d 864, 869 (10th Cir. 1981); *Wells Fargo & Co. v. Wells Fargo Express, Co.*, 556 F.2d 406, 427-30 (9th Cir. 1977); *National Bank of Can. v. Interbank Card Assoc.*, 507 F. Supp. 1113, 1120 (S.D.N.Y. 1980).

204. DRAFT RESTATEMENT, *supra* note 193, § 403.

205. *Id.* § 403(2)

206. *Id.* The list of considerations is not exhaustive, and the weight given to the factors will depend on the circumstances. *Id.* § 403(3).

Furthermore, under the *Draft Restatement*, an exercise of jurisdiction that "requires a person to take action that would violate a regulation of another state" is deemed unreasonable.²⁰⁷

3. Analysis

Under *Timberlane* or the *Draft Restatement*, United States enforcement of the bill could be limited. Both tests emphasize location of the activity,²⁰⁸ foreign states' interests in regulating activity within their territory,²⁰⁹ and conflict with foreign states' laws.²¹⁰ Although the Labor Standards bill specifically applies to the activities of United States persons in South Africa,²¹¹ and United States courts must therefore assert jurisdiction,²¹² a "balancing of interests" could still work to curtail application of the bill. For example, the bill requires United States persons to recognize unions and implement fair labor practices.²¹³ What if a United States firm were to recognize an industrial council, assuming a majority of the employees wanted the council, instead of a black trade union? If a court were to balance South Africa's interests in maintaining its labor system against the United States' interest in promoting collective bargaining, the court could reasonably find no violation of the bill.

B. The Foreign Government Compulsion Defense

1. The United States Doctrine

Under South African law, United States firms could be required to violate provisions of the Labor Standards bill.²¹⁴ Under such compulsion, the firms could plead the foreign government compulsion defense.²¹⁵ Developed in antitrust decisions, the defense exempts from liability certain private conduct violating United

207. *Id.* § 403(3).

208. See *Timberlane*, 549 F.2d at 614; DRAFT RESTATEMENT, *supra* note 193, § 403(2)(g).

209. See 549 F.2d at 614; DRAFT RESTATEMENT, *supra* note 193, § 403(2)(g).

210. See 549 F.2d at 614; DRAFT RESTATEMENT, *supra* note 193, § 403(2)(h).

211. Labor Standards Bill, *supra* note 3, § 311.

212. See *supra* note 185 and accompanying text.

213. Labor Standards Bill, *supra* note 3, § 312(7).

214. See *supra* notes 173-81 and accompanying text.

215. See *infra* notes 216-31 and accompanying text.

States law compelled by a foreign government.²¹⁶ The defense is premised on several policy considerations.²¹⁷ First, a party should not be subject to liability for conduct compelled by a foreign sovereign.²¹⁸ A second consideration is that absent the defense, United States firms abroad would be forced to leave the country when required to violate United States law.²¹⁹ Another foreign policy consideration is that United States courts should not condemn governmental activity of another nation.²²⁰

The Justice Department maintains that the foreign government compulsion defense may be pleaded only for conduct occurring within the territory of the compelling government.²²¹ However, in *Interamerican Refining Corp. v. Texas Maracaibo*,²²² the only case in which the defense has been successfully asserted,²²³ the compelled conduct was a directive of the Venezuelan government relating to conduct in the United States—a refusal to sell Venezuelan oil to a particular company *after* the oil had been processed at a bonded refinery in New Jersey.²²⁴

2. *Draft Restatement*

Section 419 of the *Draft Restatement* adopts the foreign government compulsion defense.²²⁵ According to the *Draft Restatement*, the defense applies when United States law would require violation of the laws of a foreign government.²²⁶ It is broader than

216. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 606 (9th Cir. 1976); *Interamerican Refining Corp. v. Texas Maracaibo, Inc.*, 307 F. Supp. 1291, 1296 (D. Del. 1970).

217. B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST LAW: A COMPARATIVE GUIDE* 151-52 (1982).

218. *Id.* at 151 (citing *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976)).

219. *Id.* at 151-52 (citing *Interamerican Refining Corp. v. Texas Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970)).

220. *Id.* at 152 (citing *United States v. Watchmakers of Switz. Info. Center, Inc.*, 1963 Trade Cas. (CCH) ¶70,600 (S.D.N.Y.)).

221. *Id.* at 155.

222. 307 F. Supp. 1291 (D. Del. 1970).

223. B. HAWK, *supra* note 217, at 149.

224. 307 F. Supp. at 1294-96.

225. DRAFT RESTATEMENT, *supra* note 193, § 419.

226. *Id.* § 419(1)(a).

the common law doctrine²²⁷ in that it allows use of the defense when United States law would require a United States entity to refrain from doing acts required by the foreign government.²²⁸

When conflicts of law arise, the *Draft Restatement* position is that the law of the state where the activity occurs should prevail.²²⁹ As an example, the comment to section 419 provides that if United States nationals are charged under United States law with unlawful employment discrimination that took place in a foreign state, a showing that conforming to United States hiring practices would result in criminal liability under the foreign state's law would be a valid defense.²³⁰

3. Analysis

United States firms compelled to follow South African law should be able to raise the foreign government compulsion defense in actions under the Labor Standards bill. Though the defense has been successfully proven only in the *Texas Maracaibo*²³¹ antitrust case, the potential situation of the United States firms under the Labor Standards bill appears to justify recognition of the defense. The activity is taking place on South African soil. The discriminatory labor practices are compelled by the law of the host country, and a firm's compliance with the Labor Standards bill would subject it to liability under South African law.

C. Effect of Foreign Political Opposition

Two examples of foreign political opposition to United States attempts to extraterritorially apply its law, the Fruehauf inci-

227. See *supra* notes 216-24 and accompanying text.

228. DRAFT RESTATEMENT, *supra* note 193, § 419(1)(b).

229. *Id.* § 419 comment a, at 4.

230. *Id.* § 419 comment b, at 5. The *Draft Restatement* position has been favorably reviewed by the Court of Appeals for the Fifth Circuit in *United States v. First Nat'l Bank*, 699 F.2d 341, 345-46 (5th Cir. 1983) (remanding lower court order requiring Greek nationals to provide information that would violate Greek law).

231. See *supra* note 223 and accompanying text.

dent,²³² and the Soviet pipeline controversy,²³³ demonstrate how effectively foreign opposition can prevent such application.

1. The Fruehauf Incident

In 1964, the United States and France became embroiled in a dispute over which country's law should govern the conduct of Fruehauf/France.²³⁴ Fruehauf/France was incorporated under the laws of France, but was controlled by a United States corporation, Fruehauf/Detroit, which owned 70% of the shares and controlled five of its eight board of director seats.²³⁵ Fruehauf/France contracted to sell equipment to Berliet, another French corporation, for use in tractor-trailer units.²³⁶ These tractor-trailer units were to be sold to the Republic of China.²³⁷

The United States Department of Treasury (Treasury), pursuant to authority granted under the Trading with the Enemy Act,²³⁸ ordered Fruehauf/Detroit to suspend execution of the contract or be subject to criminal violations.²³⁹ The French government responded by stating that Fruehauf/France was subject only to French law, and if it followed United States law, Fruehauf/France would be liable to prosecution for violation of French corporate law.²⁴⁰

The three French directors of Fruehauf/France successfully brought suit in a local commercial court to have a temporary administrator appointed to run the affairs of the company until the contract with Berliet was completed.²⁴¹ The Paris Court of Appeals

232. See *infra* notes 234-43 and accompanying text. For a more detailed discussion of the Fruehauf incident, see Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970); Lowenfeld, *Public Law in the International Arena*, 163 RECUEIL DES COURS 311, 335-43 (1979).

233. See *infra* notes 244-50 and accompanying text; see also Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983).

234. See Craig, *supra* note 232, at 580; Lowenfeld, *supra* note 232, at 338.

235. See Craig, *supra* note 232, at 580; Lowenfeld, *supra* note 232, at 338.

236. See Craig, *supra* note 232, at 580; Lowenfeld, *supra* note 232, at 338.

237. See Craig, *supra* note 232, at 580; Lowenfeld, *supra* note 232, at 338.

238. 50 U.S.C. app. §§ 1-39, 41-44 (1976).

239. See Craig, *supra* note 232, at 580; Lowenfeld, *supra* note 232, at 339.

240. Lowenfeld, *supra* note 232, at 339.

241. See Craig, *supra* note 232, at 589; Lowenfeld, *supra* note 232, at 340.

affirmed.²⁴² The response of the Treasury was that no sanction would be taken against the directors of Fruehauf/France since the contract had been carried out while the subsidiary was not in control of the parent.²⁴³

2. The Soviet Pipeline Controversy

In 1982, President Reagan, pursuant to the Export Administration Act of 1979,²⁴⁴ expanded export controls on oil and gas equipment destined for the Soviet Union.²⁴⁵ The expanded controls sought to regulate goods and technology produced by foreign subsidiaries of United States corporations.²⁴⁶ This action marked the first extraterritorial application of the Export Administration Act to foreign subsidiaries.²⁴⁷

Several European countries ordered corporations located in their territory not to comply with President Reagan's directive.²⁴⁸ The European defiance of the United States restrictions resulted in severe sanctions against the companies that did export.²⁴⁹ After several months of stalemate, President Reagan lifted the embargo and curtailed the sanctions.²⁵⁰

242. *Fruehauf v. Massardy*, Judgement of May 22, 1965, Cour d'appel, Paris, 1965 Dalloz-Sirey, *Jurisprudence* II 12,274 bis. Translated in 5 I.L.M.: CURRENT DOCUMENTS 476 (1976).

243. Lowenfeld, *supra* note 232, at 340.

244. 50 U.S.C. §§ 2401-2420 (Supp. III 1979). Section 6 of the Export Administration Act of 1979 authorizes the President to "prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States." *Id.* § 2405(a)(1).

245. *See Note, supra* note 233, at 1308-09.

246. *See id.*

247. *N.Y. Times*, June 19, 1982, at 1, col. 2.

248. *See, e.g., N.Y. Times*, Aug. 27, 1982, at D1, col. 4 (the French government ordered Dresser France, a subsidiary of the American corporation Dresser Industries, to comply with its U.S.\$700 million contract for pipeline equipment with the Soviet Union); *N.Y. Times*, Aug. 3, 1982 at A1, col. 2 (the United Kingdom invoked section 1(1) of the Protection of Trading Interests Act, 1980, ch. 11, *reprinted in* 1 Current L. Stat. ann. 11, ordering four companies to comply with their contracts with the Soviet Union).

249. *See, e.g., N.Y. Times*, Aug. 27, 1982, at A1, col. 4. On August 27, 1982 the Reagan administration placed Creusot-Loire and Dresser France on the "temporary denial list" which prevented those companies from doing any business with the United States. *Id.*

250. *See N.Y. Times*, Nov. 14, 1982, at A1, col. 6.

V. ALTERNATE SCHEME

It has been demonstrated that the Labor Standards bill's effectiveness could be severely curtailed. United States persons could effectively attack the legal application of the bill by arguing that under a *Timberlane/Draft Restatement* analysis they should not be required to follow the bill's provisions, and that the foreign government compulsion defense should apply. The Fruehauf incident and Soviet pipeline controversy show that the United States could do little to enforce the bill if the Republic of South Africa were to oppose the bill's application.

The Sullivan Principles have declined in effectiveness due to an inability to secure the participation of all of the United States firms operating in South Africa.²⁵¹ Yet, the Labor Standards bill, which would compel these firms to participate in a fair labor program or withdraw from South Africa, would fail due to the United States' inability to effectively prescribe the conduct of persons in South Africa. It is submitted that the adoption of a multifaceted scheme to strengthen the Sullivan Principles through active United States government involvement would be a beneficial alternative.

The United States government might improve the Sullivan Principles in several ways. First, it could offer incentive programs, such as favorable tax treatment, to reward firms complying with the Sullivan program.²⁵² Second, the government could require the submission of annual employment reports from the companies as a condition to the grant of any such incentive. These reports could then be published for public inspection. Third, the United States could actively encourage organizations other than multinationals to adopt the Sullivan Principles as a guide for dealing with South Africa.²⁵³ Fourth, the United States could use diplomatic persuasion to increase the commitment of European and Japanese companies operating in South Africa to practice fair employment. Fifth, the United States could ease present sanctions against South Africa

251. See *supra* notes 72-78 and accompanying text.

252. The United States Supreme Court recently upheld as constitutional Internal Revenue Service regulations denying tax exempt status to private schools practicing racial discrimination. See *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983).

253. See Sullivan, *supra* note 32, at 430.

according to that country's progress in eliminating apartheid.²⁵⁴ Finally, the United States government could make a more concentrated diplomatic effort to eliminate apartheid through dialogue with the Republic of South Africa.

CONCLUSION

The Labor Standards bill seeks to register United States protest against apartheid by committing United States firms to practicing fair employment in South Africa. By its mandatory nature, the bill attempts to overcome the decline in effectiveness of the Sullivan Principles. The Sullivan Principles did not succeed because there was no strong governing body to compel companies to participate or to monitor their performance. Yet the solution of legal compulsion offered by the Labor Standards bill would also be ineffective due to the conflicts arising from extraterritorial application of United States law. The United States protest could most effectively be expressed by strengthening the Sullivan Principles through United States government involvement, thereby maintaining a voluntary program fortified by strong persuasion.

Brian J. F. Clark

254. The Export Administration Act already conditions bank loan sanctions on South Africa's progress in eliminating apartheid. *See* 12 U.S.C. § 635(b)(8) (Supp V 1981).

