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Mahoney v. RFE/RL: An Unexpected Direction for the Foreign Laws Defense

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ABSTRACT

A law is only as good, or as powerful, as its exceptions allow it to be. Unless carefully drawn, an exception intended to avoid unjust or impractical applications of a rule can consume the rule itself. In the case of the Age Discrimination in Employment Act and Title VII, which were amended to apply to U.S. citizens working abroad, the "foreign laws defense," as interpreted in Mahoney v. RFE/RL, threatens to defeat the application of the general rule prohibiting discrimination. This Note briefly traces the history of the extraterritorial application of U.S. law and the interests that were served by the judge-created presumption against extraterritoriality and the foreign compulsion defense. This Note then analyzes the Mahoney decision against that backdrop and questions whether the legal standard it establishes accommodates those competing concerns. Finding that it does not, this Note suggests that the institutional framework of the Equal Employment Opportunity Commission and the State Department could be used to evaluate claims for their merit and potential for controversy, and thus relieve the courts of the traditionally uncomfortable role of making foreign policy.

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I. INTRODUCTION

Ordinarily, international custom is the primary source of international law.[1] In the realm of extraterritorial employment law, however, there is no body of customary international law because only the United States extends its employment laws to govern its nationals working abroad.[2] Without custom as a guideline, U.S. courts have been forced to develop this body of law on their own. In *Mahoney v. RFE/RL, Inc.*,[3] the D.C. Circuit Court of Appeals was faced with the task of defining the extraterritorial scope of Title VII[4] and the Age Discrimination in Employment Act (ADEA)[5] by interpreting the foreign laws

1. Helen M. Hibbing, *Extraterritorial Application of Title VII of the Civil Rights Act*, 84 AM. SOC'Y. INT'L L. PROC. 415, 418 (1990).
2. *Id.*
3. 47 F.3d 447 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 181 (1995).
4. 42 U.S.C. § 2000 (1964).
5. 29 U.S.C. §§ 621-34 (1967).

exception to those statutes.[6] The foreign laws defense provides that U.S. companies hiring U.S. citizens abroad are not required to comply with the ADEA and Title VII where compliance with them "would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located."[7] *Mahoney* is the first decision to set standards for the foreign laws exception, and its interpretation unnecessarily limits protection against employment discrimination for U.S. citizens working abroad. With an increasing number of U.S. citizens working outside the country,[8] the increase in international trade and work, and the strong national interest in eliminating discrimination in the workplace, any unnecessary limitation on the protection against employment discrimination undermines a significant national interest in promoting fair employment practices.

For those inclined to balance interests, the international labor arena presents a dizzying array of conflicting motivations: the interest in eliminating employment discrimination against U.S. citizens, the legitimate desire of foreign states to regulate their domestic workplaces, the potential for international disputes stemming from jurisdictional or cultural overreaching by the United States, the rational impulse of U.S. companies to avoid being caught in conflicting social and legal regimes, and the reluctance of U.S. courts to become involved in international policy making. This Note argues that the *Mahoney* court has not balanced the interests in this field so much as it has avoided making decisions affecting foreign policy, a role that courts have strived to avoid. As a consequence, the rule promulgated in *Mahoney* limits the protection of U.S. law even when there is no significant threat to international comity or foreign relations, which are the most important factors in the balancing of competing interests.

Section II briefly traces the history of the extraterritorial application of U.S. law and the circumstances that led Congress to apply the ADEA and Title VII to U.S. citizens abroad. Section III surveys the policies served by the presumption against extraterritoriality, the foreign compulsion defense, and the construction of other defenses to the ADEA and Title VII. This analysis reveals the strongest interests in the equation, those

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6. 29 U.S.C. § 623(f)(1) (1967). Although the terms "foreign laws defense" and "foreign laws exception" are used interchangeably, the terms imply different purposes. The notion that the provision is a "defense" suggests that its purpose is to protect U.S. corporations abroad, while the term "exception" places the emphasis on avoiding international conflict.

7. *Id.*

8. Lairold M. Street, *Extraterritoriality: Conflict of Laws*, NAT'L B. ASS'N MAG., July/Aug. 1995, at 16.

that should be served by an interpretation of the foreign laws defense. Section IV considers the district court and court of appeals decisions in *Mahoney*, and Section V attempts to classify the facts of *Mahoney* to determine which interests were really at stake in that case. Section VI surveys several legal standards that could be used to determine when to limit the extraterritorial application of law, and concludes that the foreign compulsion defense, rather than the standard created in *Mahoney*, better addresses the interests involved. Finally, the Note concludes by suggesting one way in which these statutes might be amended to allow each branch of the government to make decisions that are better tailored to their respective roles.

II. A BRIEF HISTORY OF EXTRATERRITORIALITY

For two centuries, the U.S. Congress, U.S. courts, and commentators have struggled to determine under which circumstances to extend the reach of U.S. law beyond our national borders. Initially, the question was easily resolved by the Supreme Court's strict adherence to a jurisdiction limited by territoriality—the traditional notion that the law of a country cannot extend beyond its territorial boundaries.[9] Under such a scheme, Congress, whatever its intent, simply lacked the power to affect the employment relations of U.S. citizens working abroad. In *Blackmer v. United States*, the Supreme Court abandoned its strict adherence to territoriality and recognized that the nationality of an actor can serve as a valid basis for jurisdiction over disputes involving that actor.[10] In certain circumstances, the law of the actor's country may appropriately follow the actor abroad and serve as the legal standard to adjudicate disputes involving that party which occur overseas.[11]

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9. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (holding that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."), *overruled by* Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962).

10. 284 U.S. 421 (1932).

> While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. . . . By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States.

Id. at 436.

11. *Id.*

Today, international law recognizes that nations may permissibly exercise extraterritorial jurisdiction over disputes in which the state has an interest, so long as each state recognizes the duty not to interfere with the sovereignty and jurisdiction of other states.[12]

Once the court determined that Congress had the power to make laws applying beyond the United States national boundaries, the question became one of statutory interpretation as to whether Congress had chosen to exercise its power to legislate extraterritorially in a particular statute. In keeping with its traditional stance, as expressed in *American Banana*, the Court crafted the so-called "presumption against extraterritoriality" to apply U.S. law abroad and to respect the sovereignty of other countries. Under this doctrine, the court required a clear statement of congressional intent to apply a statute extraterritorially before wandering into "a delicate field of international relations."[13]

U.S. courts used the presumption against extraterritoriality in refusing to apply the ADEA and Title VII to U.S. citizens working abroad. In *Cleary v. United States Lines, Inc.*,[14] a U.S. plaintiff filed an action with the Equal Employment Opportunity Commission (EEOC) after being fired by a U.S. corporation operating in England.[15] The court dismissed the suit for lack of jurisdiction, holding that the ADEA did not evidence the requisite intent to overcome the presumption against extraterritoriality.[16] Specifically, the court found that the absence of an "alien exemption" provision, as well as the absence of institutional apparatus for its enforcement outside the United States, suggested that Congress did not intend to apply the ADEA abroad.[17] Congress responded to this decision by amending the ADEA to apply extraterritorially.[18] At the time, it was commonly

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12. Gary Z. Nothstein & Jeffrey P. Ayres, *The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act*, 10 CORNELL INT'L L. J. 1, 13 (1976).

13. Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957).

14. 555 F. Supp. 1251 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984).

15. *Id.* at 1254.

16. *Id.* at 1259.

17. *Id.* at 1257-60.

18. The statutory definition of "employee" was amended to include "any individual who is a citizen of the United States employed by an employer in a foreign country," and stated that "the provisions of this section shall not apply where the employer is a foreign person not controlled by an U.S. employer." This ensured that the act would only apply to U.S. corporations. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(a), 98 Stat. 1767, 1792 (1984). At the time it was passed, the amendment applying the ADEA extraterritorially was considered to be one of "two minor changes" to the statute. S. REP. NO. 98-467, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, 2975.

thought that, unlike the ADEA, Title VII was intended to apply extraterritorially.[19] Nonetheless, in *Boureslan v. Arabian American Oil Co.*,[20] the Supreme Court held that Congress had not expressed the requisite intent to overcome the presumption against extraterritoriality.[21] In its opinion, the Court invited Congress to amend Title VII to clearly state its intent to enforce it abroad.[22]

In 1991, Congress accepted the Court's invitation.[23] However, Congress limited the jurisdictional scope of Title VII, like the ADEA, to U.S. workers working for U.S. companies, and not to foreign nationals hired by U.S. corporations, or U.S. citizens hired by foreign companies.[24] To further restrict extraterritorial application, Congress inserted the "foreign laws exception" into both provisions.[25] While courts and commentators have differed on the proper role of the "foreign laws" defense in extraterritorial discrimination actions, it is clear that the protection of the ADEA and Title VII can only extend as far as the defense will allow them.

III. POLICY CONSIDERATIONS IMPLICATED BY THE FOREIGN LAWS DEFENSE

A. *The Presumption Against Extraterritoriality*

"The history of the extraterritorial application of U.S. labor standards, as applied to overseas U.S. citizens, is the history of a canon of interpretation known as the presumption against

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19. Otherwise, Title VII too would have been amended.

20. Boureslan v. Arabian Am. Oil Co., 499 U.S. 244 (1991). The court based its decision on a lengthy and technical discussion of the implications of Title VII's "alien exemption" clause. *Id.* at 253-57.

21. *Id.* at 259.

22. *Id.*

23. Congress amended Title VII with the Civil Rights Act of 1991, applying Title VII extraterritorially. *See* Civil Rights Act of 1991, Pub. L. No. 102-66, § 109(b), 105 Stat. 1071, 1077 (1991) (codified as amended at 42 U.S.C. § 2000e-1(b)-(c)).

24. Congress assumed that few disputes would arise by applying these laws only to U.S. citizens working for U.S. companies. The presumption against extraterritoriality allowed courts "to avoid, if possible, the separation-of-powers and international-comity questions associated with construing a statute to displace the domestic law of another nation." *Boureslan*, 499 U.S. at 265. In contrast "[n]othing nearly so dramatic is at stake when Congress *merely seeks to regulate the conduct of United States nationals abroad.*" *Id.* (emphasis added).

25. If the "mere regulation" of U.S. citizens and corporations abroad were as non-controversial as the *Boureslan* Court suggested, the foreign laws exception would have been unnecessary.

extraterritoriality."[26] The primary objective of the presumption against extraterritoriality was to respect principles of international comity and to remove the judiciary from delicate international disputes that could be the source of discord.[27] In *Murray v. Schooner Charming Betsy*,[28] the Supreme Court announced a rule of judicial construction that U.S. legislation "ought never to be construed to violate the law of nations if any other possible construction remains."[29] The Court's reluctance to interfere in the internal legal affairs of foreign nations is reflected in its statement that the U.S. government would intervene on behalf of a U.S. citizen abroad if that citizen were oppressed without having violated any foreign domestic law.[30] If the U.S. citizen were oppressed by the operation of another nation's laws while in that country, any court relying on *Schooner Charming Betsy* would not intervene on behalf of the U.S. citizen.[31]

The presumption against extraterritoriality was designed not just to avoid foreign policy disputes, but to ensure that courts did not overstep their bounds and intrude upon the realm of the legislative and executive branches in making and implementing foreign policy.[32] Courts typically invoked the presumption against extraterritoriality to avoid interfering in the "delicate field of international relations,"[33] and to avoid judicial constructions that could raise "foreign policy implications"[34] with the

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26. JAMES M. ZIMMERMAN, EXTRATERRITORIAL EMPLOYMENT STANDARDS OF THE UNITED STATES: THE REGULATION OF THE OVERSEAS WORKPLACE 111 (1992).

27. Derek G. Barella, *Checking the "Trigger-Happy" Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence*, 69 IND. L.J. 889, 893 (1994). *See also* ZIMMERMAN, *supra* note 26, at 113.

28. 6 U.S. (2 Cranch) 64 (1804).

29. *Id.* at 118.

30. *Id.* at 120.

31. *Id.*

32. "[I]t is the court's province and duty to say what the law is, although this responsibility does not traditionally extend to directing the United States as to how to proceed on the international stage." Footwear Distrib. and Retailers v. United States, 852 F. Supp. 1078, 1095 (Ct. Int'l Trade 1994). The court also noted that while "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments," not every foreign controversy is necessarily beyond judicial decisionmaking. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)).

33. Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957).

34. Boureslan v. Arabian Am. Oil Co., 499 U.S. 244, 264 (1991) (Marshall, J., dissenting). Although foreign policy concerns are not completely beyond the scope of judicial decisionmaking, "courts should be reluctant to review these matters because 'resolution of such issues frequently turn[s] on standards that . . . involve the exercise of discretion demonstrably committed to the executive or the legislature.'" *Footwear Distrib. and Retailers*, 852 F. Supp. at 1096 (quoting Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L. L 1, 12-13 (1992)).

"possibilities of international discord . . . and retaliative action."[35] Likewise, commentators generally agree that the presumption was designed to promote international comity[36] and to avoid judicial involvement in potential international conflicts.[37]

This is not to say that U.S. courts were unaware of the hardship on U.S. parties caught between competing sovereigns. Some courts have cited the interests of U.S. businesses as being important to the presumption against the extraterritorial application of law. In deciding not to apply the ADEA abroad, Judge Posner observed that "the fear of outright collisions between domestic and foreign law—collisions both hard on the people caught in the cross-fire and a potential source of friction between the United States and foreign countries—lies behind the presumption."[38] Despite Judge Posner's attention to the fate of unwary defendants, his opinion in *Pfeiffer* was anomalous. Many decisions not to apply a law extraterritorially were driven by "the hesitancy exhibited by the courts when considering the transnational application of federal employment statutes."[39] The protection of U.S. corporations, deriving from such judicial abstinence, was a side effect rather than a primary motivation behind the presumption.

Since the Supreme Court has "presume[d] that Congress legislates against the backdrop of the presumption against extraterritoriality," the statutory foreign laws defense should be informed by the policy concerns behind the presumption against extraterritoriality.[40] Because the presumption against extraterritoriality was designed not to protect U.S. corporations, but primarily to avoid diplomatic clashes and the courts' involvement in such conflicts, it is sensible to interpret the foreign laws defense to accomplish the same objectives. Similarly, considerations that were incidental to the presumption against extraterritoriality should not be given much weight in construing the foreign laws defense. The existence of potential hardships placed on U.S. employers abroad, though not

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35. *Benz*, 353 U.S. at 147.

36. Comity traditionally has two meanings. The first is what might be called "prescriptive comity," which refers to "the respect sovereign nations afford each other by limiting the reach of their laws." Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891, 2920 (1993). The presumption against extraterritoriality is essentially an expression of such respect. In the absence of specific intent regarding extraterritorial application, courts will assume that Congress did not intend to intrude upon the jurisdiction of other nations. There is another related concept referred to as the "comity of courts," under which judges "decline to exercise jurisdiction over matters more appropriately adjudged elsewhere." *Id.*

37. *See* Barella, *supra* note 27, at 891-99.

38. Pfeiffer v. William Wrigley Co., 755 F.2d 554, 557 (7th Cir. 1985).

39. Barella, *supra* note 27, at 901.

40. *ARAMCO*, 499 U.S. at 264.

completely immaterial, was not a deciding factor in constructing the presumption against extraterritoriality and should not be given too much weight in interpreting the "foreign laws" provisions of the ADEA and Title VII.[41]

B. *Congressional Intent in Applying the ADEA and Title VII Extraterritorially*

In extending the ADEA and Title VII extraterritorially, it is axiomatic that the congressional purpose was to protect as many U.S. citizens as possible from discrimination in the workplace, whether or not that workplace was in the territorial boundaries of the United States.[42] Given the millions of U.S. citizens living abroad, and the large volume of international trade and transnational employment, Congress doubtless has a significant interest in protecting those U.S. citizens from invidious discrimination.[43] One must also consider the circumstances under which Congress decided to extend the application of the ADEA and Title VII. The amendments were designed to overrule the decisions in *ARAMCO* and *Wrigley*, which unreasonably limited the protection afforded to employees of U.S. companies abroad according to some members of Congress.[44] In light of such circumstances, Congress would not have closed the "major

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41. This interpretation differs from that of the court of appeals in *Mahoney*, which stated that its construction "agrees with [the foreign laws defense's] evident purpose—to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes." Mahoney v. RFE/RL, Inc., 47 F.3d 447, 450 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 181 (1995).

42. The goal of the amendment was to "insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the Age Discrimination in Employment Act." S. Rep. No. 98-467, at 27 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, 3000.

43. Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 389 n.289 (1990). Interestingly, estimates of the numbers of U.S. citizens working abroad vary considerably, and no one can say with any certainty how many U.S. citizens work for private U.S. employers abroad. The difficulty in making these estimates stems partly from the fact that U.S. citizens abroad appear not to file their federal income tax returns with the same regularity as domestic taxpayers. *Id.*

44. *Age Discrimination and Overseas Americans, 1983: Hearings before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 1 (1983) (statement of Senator Charles Grassley) [hereinafter *Hearings*], *reprinted in* Renée S. Orleans, Note, *Extraterritorial Employment Protection Amendments of 1991: Congress Protects U.S. Citizens Who Work for U.S. Companies Abroad*, 16 MD. J. INT'L L. & TRADE 147, 162 (1992). Specifically, Senator Grassley complained that the courts had "opened up a major loophole which . . . could seriously threaten the protection under the Age Discrimination in Employment Act" and that these decisions could leave U.S. workers "out in the cold." *Id.*

loophole"[45] of extraterritorial non-application without intending that the statutes be broadly applied abroad.

C. *Interpretation of Other Defenses to Anti-Discrimination Statutes*

In interpreting the foreign laws exception, it is important to remember that the defenses were not enacted alone, but were an exception to a larger congressional mandate intended to end discrimination against U.S. employees abroad. This policy concerned a desire to eliminate the "headwinds" of employment discrimination.[46] When construing defenses to the ADEA or Title VII, exceptions to the statute should be read narrowly to achieve the statute's remedial goals as fully as possible.[47] Similarly, courts must avoid "interpretations of Title VII that deprive victims of discrimination of a remedy, without clear Congressional mandate."[48] In the domestic context, once a prima facie case of discrimination[49] has been proven against an employer, the defenses available to that employer are narrowly construed. The employer must show either that it did not discriminate on the basis of race in an individual case, or that the discriminatory effect of its hiring policies is driven by a bona fide occupational qualification (BFOQ).[50] Any BFOQ raised as a defense must relate directly to the employee's ability to perform the job in question, and not to considerations such as "customer preference."[51] In the domestic context, Congress was clearly not

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45. *Id.*

46. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability." *Id.*

47. Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 3 (D.D.C. 1992).

48. County of Washington v. Gunther, 452 U.S. 161, 178 (1981).

49. *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *McDonnell-Douglas* establishes a system of burden shifting in disparate treatment discrimination cases. The plaintiff establishes a prima facie case of discrimination by showing that (1) the plaintiff is a member of a protected class, (2) the plaintiff applied for a job and was qualified, (3) the plaintiff's application was rejected, and (4) the employer either continued the job search or hired someone not in the protected class. If the plaintiff makes out a prima facie case, then the burden shifts to the defendant to show a legitimate, non-discriminatory reason for its employment decision. *Id.*

50. *Id.* Depending on the nature of the alleged discrimination, there are a host of other possible defenses to a discrimination claim such as "reasonable factor other than age," or where an employer has made "reasonable accommodations" to a religious practice, or "authenticity" in the case of an ethnic restaurant.

51. Fernandez, 653 F.2d at 1276. *See also* Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (holding that "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether sex discrimination was valid. Indeed, it was . . . these very

concerned with the potential hardships to be borne by employers in complying with the ADEA and Title VII, so long as those difficulties did not arise from an employee's inability to perform the job in question. Likewise, courts have generally rejected employer attempts to use the cost of compliance as a defense to Title VII in domestic actions.[52] It has also been held that foreign private preference or widespread social discrimination does not allow a U.S. corporation to deviate from Title VII or the ADEA.[53] A customer's or client's "stereotypic impressions," whether domestic or foreign, do not justify a U.S. employer to discriminate when employing U.S. citizens abroad.[54] It seems unlikely that foreign prejudices or the costs of compliance are significantly greater in foreign countries, or that they represent hardships of a different quantum for employers.[55] Hence, in construing the foreign laws exception to the ADEA and Title VII, courts should seek to apply the statute as broadly as possible, limited only by the unique restraints of international jurisdiction, comity, and defenses that would work to defeat a domestic claim of discrimination.

D. *The Foreign Compulsion Defense as Applied to Non-Employment Cases*

Prior to the *Mahoney* decision, it had been suggested, and perhaps assumed, that the foreign laws exception of the ADEA and Title VII was intended to be a codification of the judge-

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prejudices that the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.").

52. At least in cases where the cost is not so high as to threaten the survival of the employer's business, "[t]he extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender." Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991). Under the Reagan administration, the EEOC considered, and rejected, the possibility of recognizing a cost defense to Title VII litigation. Laura Oren, *Protection, Patriarchy, and Capitalism: The Politics and Theory of Gender-Specific Regulation in the Workplace*, 6 UCLA WOMEN'S L. J. 321, 363 n.236 (1996). It is worth noting that a "cost effectiveness" requirement may simply be a way to reduce substantive protections without appearing to do so.

53. *See* Fernandez, 653 F.2d at 1277. The court rejected an argument that, due to societal discrimination, gender could constitute a "bona fide occupational qualification," which would operate as a defense to discriminatory hiring practices. Although the court was not construing the foreign compulsion defense, *Fernandez* supports the proposition that mere private pressures or business concerns cannot command respect from U.S. courts. *Id.* at 1276-77.

54. *Id.*

55. For instance, consider the harassment and costs domestic employers undoubtedly faced in racially integrating their workforce pursuant to Title VII mandates

created "foreign compulsion" defense.[56] The foreign compulsion defense originally arose as a defense to the extraterritorial application of U.S. antitrust law.[57] It provides that "a state may not require a person to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national. . . ."[58] As stated in the landmark case, *Interamerican Refining Co. v. Texaco Maracaibo Co.*, "[w]ere compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business."[59] Considering the focus on the fate of the U.S. company abroad, it would appear that the defense is designed to eliminate the hardships companies may suffer when subject to a clash of laws. However, an analysis of case law and commentary reveals that the real effect of the foreign compulsion defense is to extend the reach of U.S. law as far as possible, while avoiding international disputes caused by a serious conflict of laws. Its principal aim is not to protect U.S. companies from inconvenience or cost.

As was the case with the presumption against extraterritoriality, one must distinguish between the desired effects of the foreign compulsion defense and its incidental effects. There is a fundamental tension underlying the Restatement's professed reasons for the foreign compulsion defense and its standards for the application of the defense. On the one hand, the Restatement states that the purpose of the defense is to "protect persons caught between conflicting commands."[60] The Restatement, however, allows the defense "only when the other state's requirements are embodied in binding laws or regulations subject to penal or other severe sanction. . . ."[61] In many cases, a defendant may be placed in a seemingly intractable bind caused by the existence of foreign expectations, cultural norms, or private agreements that clash with U.S. law, but which do not rise to the level of formal legislation or regulations.[62] Informal compulsion, despite its

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56. "Congress has incorporated the foreign compulsion defense into the provisions of the Civil Rights Act of 1991." Mark R. Azman, *The Development of Title VII Protection for American Citizens Employed Abroad by American Employers: Yesterday, Today and Tomorrow*, 18 WM. MITCHELL L. REV. 531, 546 (1992)

57. Interamerican Refining Corp. v. Texaco Maracaibo, Inc.., 307 F. Supp. 1291, 1297-98 (D. Del. 1970).

58. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 (1987) [hereinafter RESTATEMENT].

59. Interamerican Refining, 307 F. Supp. at 1298.

60. RESTATEMENT, *supra* note 58, § 441 cmt. a.

61. *Id.* §441 cmt. c.

62. Wm. Scott Smith, *Extraterritorial Application of Title VII and the Americans with Disabilities Act: Have Statute, Will Travel*, 36 S. TEX. L. REV. 191, 206-08 (1995).

potentially harsh consequences for U.S. defendants, has never been sufficient to remove liability under U.S. law.[63] As a result, some commentators have suggested that the Restatement's requirement of a formal law or regulation defeats the essential purpose of the foreign compulsion defense—fairness to the defendant.[64] Nevertheless, this argument assumes that the purpose of the defense is to protect U.S. companies abroad. The Restatement's and courts' reluctance to find private or informal compulsion to be grounds for the foreign compulsion defense does not suggest that the foreign compulsion defense fails in its essential purpose to guarantee fairness to employers. Instead, such reluctance suggests that the essential purpose of the foreign compulsion defense is to avoid serious conflict of laws and diplomatic disputes. The fact that U.S. corporations are saved from the demands of seriously conflicting orders in some cases is a beneficial consequence of the foreign compulsion defense, but not the motivating factor behind the defense.

To ensure that the company is placed in a legally untenable position (mandated by a foreign government) before allowing the foreign compulsion defense, courts have repeatedly taken the position that a foreign government's "knowledge, approval, or even encouragement of the activity is not compulsion" sufficient to relieve liability under the U.S. law.[65] U.S. courts have been willing to expose U.S. businesses to economic reprisals, the loss of business, and even the risk of civil damages for compliance with U.S. law.[66] These cases tend to show that U.S. courts have not flinched at the prospect of putting U.S. companies in a difficult situation by forcing them to comply with U.S. law, so long as the pressures applied to the U.S. company are private or social, and not mandated by a foreign government.

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63. *Id.*

64. *See* Michael A. Warner Jr., Comment, *Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law*, 11 NW. J. INT'L L. & BUS. 371, 379-84 (1990). Warner argues that the other frequently asserted justifications for the foreign compulsion defense—the act of state doctrine (courts of the United States will accept the judgments of foreign courts) and international comity—do not adequately explain the foreign compulsion defense. *Id.* Thus fairness to the defendant is the principal motivation for the defense. *Id.* at 379, 382. To advance the goal of fairness, U.S. courts should acknowledge informal foreign compulsion.

65. Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1296-99 (D. Del. 1970); United States v. First Nat'l City Bank, 396 F.2d 897, 904-05 (2d Cir. 1968) (noting also that the executive branch, which prosecuted the action, could stop the suit of its own accord if it feared it would result in diplomatic difficulties).

66. *Interamerican Refining*, 307 F. Supp. at 1296-99; *First Nat'l City Bank*, 396 F.2d at 904-05.

There are circumstances under which even the existence of a binding foreign statute is not sufficient to serve as a basis for the defense.[67] In some cases, foreign governments, taking advantage of the foreign laws defense, have enacted "blocking statutes" to prevent U.S. companies from supplying information in U.S. lawsuits.[68] When faced with such a statute, U.S. courts have undertaken a "comity analysis" to determine which state has the most powerful interest in exercising jurisdiction, and whether the exercise of jurisdiction in such circumstances is reasonable.[69] In the event the U.S. interest is greater, the U.S. party must make a good faith effort to secure permission to comply with the discovery order.[70] If the U.S. party cannot secure permission, it may still be required to comply with the discovery order despite the fact that it violates the law of another country.[71] This doctrine has been limited to foreign laws that are not substantive,[72] and courts have justified its potentially harsh application by emphasizing the need for evidence and the reluctance for U.S. courts to countenance the "suppression of truth."[73]

E. *Application of the Foreign Compulsion Defense to Title VII Actions Arising Before ARAMCO*

Before the Supreme Court struck down the extraterritorial application of Title VII in *ARAMCO*,[74] the EEOC and U.S. Courts had several opportunities to consider the applicability of the foreign compulsion defense to Title VII actions. In many respects, the courts treated employment cases as they had dealt with cases in the antitrust field. In *Abrams v. Baylor College of Medicine*,[75]

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67. Hibbing, *supra* note 1, at 420.

68. RESTATEMENT, *supra* note 58, § 442 reporter's notes 4 & 5.

69. Hibbing, *supra* note 1, at 420. The analysis of the interest of a foreign state in regulating conduct in its own territory seems to run counter to the "act of state doctrine," which "precludes inquiry into the validity of a foreign sovereign's act and requires American courts to respect private claims based on the contention that the damaging act of another country violates American law." Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292-93 (3d. Cir. 1979). Like the presumption against extraterritoriality, the act of state doctrine is another device courts can use to avoid making foreign policy by deciding cases. However, to the extent that the United States desires to apply U.S. law abroad, with a foreign laws defense, the inquiry prohibited by the act of state doctrine is central to any reasoned analysis of individual cases.

70. RESTATEMENT, *supra* note 58, § 442 reporter's note 4 & 5.

71. First Nat'l City Bank, 396 F.2d at 903.

72. RESTATEMENT, *supra* note 58, § 442, reporter's note 4 & 5.

73. First Nat'l City Bank, 396 F.2d at 903.

74. Boureslan v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

75. 805 F.2d 528 (5th Cir. 1986). *See* Bryant v. International Schools Servs., 502 F. Supp. 472, 490 (D.N.J. 1980) (rejecting a claim that the

two Jewish medical school students sued Baylor after a university policy denied them the chance to participate in a school program based in Saudi Arabia.[76] Baylor claimed protection under the foreign compulsion defense, alleging that Saudi authorities would have prohibited the school from employing Jewish students.[77] The court, however, found that Baylor had established the discriminatory policy itself, based on the assumption that Saudi authorities would not permit Jewish students to participate, and that Baylor could not show sufficient proof that it had in fact been compelled by Saudi authorities to establish its discriminatory policy.[78] Absent proof of the foreign government's actual compulsion, the defense could not stand. Baylor's mere speculation concerning Saudi Arabia's laws was not sufficient to mount a defense of foreign compulsion.[79] Rather, "the employer must have a current, authoritative, and factual basis for its belief, and it must rely on that belief in good faith."[80] This requirement has created problems of proof for defendants, who would obviously prefer to raise the defense before they are actually subject to the foreign country's acts. On occasion, U.S. courts have put defendants in a difficult position by not accepting the statements of foreign officials concerning the illegality of the act in the foreign forum.[81] In other words, in close cases, this requirement could have the effect of forcing defendants to actually suffer the foreign compulsion before they can raise it as a defense.[82]

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discriminatory payment of benefits was mandated by the Iranian government, and finding that the discrimination arose from the company's own, voluntarily devised, benefits policy).

76. Abrams, 805 F.2d at 530.

77. *Id.* at 533.

78. *Id.*

79. *Id.*

80. EEOC Decision No. 85-10, 2 Empl. Prac. Guide (CCH) ¶6851 (July 16, 1985).

81. *See* In re Uranium Antitrust Litigation, 617 F.2d 1248, 1254 n.21 (7th Cir. 1980) (rejecting amicus brief from the Canadian government as not sufficiently probative on the issue of the foreign compulsion defense). The EEOC could decide to take a more generous view of such statements than that taken by the courts.

82. The court's reluctance to accept the foreign sovereign's statement appears to run afoul of the act of state doctrine. *See supra* notes 64 & 69. On the other hand, merely accepting these statements uncritically provides foreign officials with a strong incentive to lie, which could dramatically undercut protection for U.S. plaintiffs.

IV. ANALYSIS OF THE *MAHONEY* DECISION

A. *The Facts of Mahoney*

Radio Free Europe/Radio Liberty (RFE/RL) is a non-profit Delaware corporation known globally for its radio broadcast service based in Munich, Germany.[83] In 1982, RFE/RL entered a collective bargaining agreement with a German labor union.[84] The agreement required all workers to retire at the age of sixty-five, a standard provision of German labor agreements.[85] At the time the agreement was negotiated, the ADEA was held not to apply extraterritorially.[86] But when Congress amended the act in 1984 to apply to U.S. companies hiring U.S. citizens abroad,[87] RFE/RL applied to the "Works Council" for an exception to the agreement in order to comply with the ADEA and was denied.[88] RFE/RL appealed the Works Council decision to a Munich labor court, which denied RFE/RL's claim on the grounds that to allow U.S. workers to work past the age of sixty-five would discriminate against similarly situated German workers, and that the labor agreement itself prohibited U.S. citizens from working past the age of sixty-five.[89] Pursuant to that ruling, RFE/RL terminated Mr. Mahoney's employment when he reached the age of sixty-five.[90] Mr. Mahoney's termination was a clear facial violation of the ADEA, and RFE/RL did not contest that legal conclusion.[91] Mr. Mahoney brought suit against RFE/RL for violating the ADEA, and prevailed in federal district court.[92] The decision, however, was overturned by the D.C. Circuit Court of Appeals.[93]

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83. Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 3 (D.D.C. 1992).

84 Mahoney v. RFE/RL, Inc., 47 F.3d 447, 448 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 181 (1995).

85. *Id.*

86. *See infra* note 121.

87. *See* Older Americans Act, Amendments of 1984, Pub. L. No. 98-459, § 802(a), 98 Stat. 1767, 1792 (1984).

88. *Mahoney*, 47 F.3d at 448. German "Works Councils" consist of representatives elected by workers to ensure that the company will adhere to union contracts. Companies may not depart from the terms of a union contract without securing approval from the Works Council. *Id.*

89. *Id.*

90. *Id.* It is worth noting that RFE/RL claimed to have made a good faith effort to renegotiate the contract with the German Works Council, but was unsuccessful in this effort. The two courts took differing views on these efforts, with the district court finding that RFE/RL could have made greater efforts to obtain concessions from the union. *Mahoney*, 818 F. Supp. at 5.

91. *Mahoney*, 47 F.3d at 448.

92. *Mahoney*, 818 F. Supp. at 6.

93. *Mahoney*, 47 F.3d at 451.

Mr. Mahoney appealed the decision to the U.S. Supreme Court, but certiorari was denied.[94]

B. *The District Court Opinion*

The narrow issue addressed was whether the "foreign laws" exception applies when a U.S. company operating overseas would have to breach a collective bargaining agreement with a foreign union in order to comply with the ADEA. The district court determined that the meaning of "the laws of the country" must turn on congressional intent.[95] The court cited no authority, but found it "difficult to imagine" that Congress would have intended "laws" to mean something beyond its normal meaning and to include policies and general practices.[96] By the district court's estimation, the term "laws" was intended to mean positive legislation and nothing more.[97] To support this proposition, the court noted that, on at least one occasion, Congress had taken pains to distinguish between "laws" and the "policies and practices" of foreign governments.[98] Since Congress has chosen specifically to include "policies and practices" in past legislation, but did not do so in the ADEA or Title VII, the court inferred that Congress did not intend to include private or unofficial policies in the word "laws."[99] Consequently, the court interpreted the phrase "laws" to include only the positive legislative laws of the host country.[100] While the labor agreement in question differs somewhat from U.S. private contracts, testimony at trial tended

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94. Mahoney v. RFE/RL, Inc., 116 S. Ct. 181 (1995).

95. There is little meaningful legislative history on congressional intent regarding the foreign laws exception. Judge Posner described the history of the amendment as leaving "totally obscure whether the amendment was meant to change the law, to state more clearly the original meaning of the law, or perhaps just to limit the extraterritorial application of the act." Pfeiffer v. William Wrigley Co., 755 F.2d 554, 559 (7th Cir. 1985).

96. *Mahoney*, 818 F. Supp. at 4.

97. *Id.* The court never explicitly explains its reasoning, but repeatedly emphasizes the word "*laws*" in italics, inferring perhaps that *"laws"* can only be interpreted as referring to legislation. This assumption may or may not be valid. Unlike the ADEA's exception, the exception in Title VII is phrased in terms of "foreign law." So whatever etymological differences might exist between "law" and "laws," those differences are irrelevant because there is no rational reason for congressional intent to differ between the ADEA and Title VII.

98. *Mahoney*, 818 F. Supp. at 4. The court's implicit logic, of course, is that if Congress had taken pains in the past to specifically include "policies and practices," in a situation where it could also have just said "laws," "laws" must refer only to the law and not "policies and practices." *Id.*

99. *Id.* The labor agreement was never sanctioned or approved by the legislature, but it differs from a private contract as understood in the United States. See discussion *infra* part V.B.

100. *Id.*

to show that the contract differed from legislation in that it was not mandated by the German government, nor was it generally applicable to parties not in privity.[101] It certainly could not be called "legislation" under anything but a strained meaning of the term. Consequently, the district court found that the collective bargaining agreement was fundamentally different from legislation and did not rise to the level of "foreign laws."[102] Therefore, the existence of the collective bargaining agreement did not exculpate RFE/RL from liability for its violation of the ADEA.[103]

C. *The Decision of the Court of Appeals*

The court of appeals overturned the district court decision, ruling that the definition of the word "law" is governed by the Supreme Court's pronouncement in *Norfolk and Western Railway v. American Train Dispatchers' Assn.*[104] In that case, the Supreme Court interpreted a statute that contained an exemption from "all other law."[105] Because the court found the "all other law" provisions to be essentially identical to the foreign laws defense, it held that the *Norfolk and Western* reasoning must control.[106] In *Norfolk and Western*, the Supreme Court held that because a contract "depends upon other laws" to enforce it, a breach of contract violates the "law."[107] Based upon this reasoning, the court of appeals held that the meaning of "law" in the foreign laws exception of the ADEA and Title VII was "clear and certain," and

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101. *Id.* at 3.
102. *Id.* at 4.
103. *Id.*
104. *Mahoney*, 47 F.3d at 449 (applying Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n, 449 U.S. 117, 133 (1991)). The court's decision to rely on *Norfolk* is problematic. A large body of law discusses the extraterritorial application of U.S. law, and the foreign compulsion defense in particular. The court based its decision on an entirely domestic case with dubious precedential value in this field.
105. 49 U.S.C. § 11341(a) (1980). "A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including state and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control of franchises acquired through the transaction." *Id.* This statute was designed to facilitate mergers in the railroad industry by removing any and all legal obstacles to the transaction. The purpose for which the word "laws" is construed in this statute is unrelated and irrelevant to the needs of the foreign law defense.
106. *Mahoney*, 47 F.3d at 450.
107. *Norfolk*, 499 U.S. at 130.

held that "law" included the collective bargaining agreement involving *RFE/RL*.[108]

Next, the court distinguished *Mahoney* and *Norfolk and Western* from *American Airlines v. Wolens*,[109] in which the Supreme Court held that, under a statutory provision exempting parties from "any law," the word "law" did not encompass a collective bargaining agreement.[110] The court distinguished *Norfolk and Western* from *American Airlines* by finding that, if the statute in *American Airlines* was interpreted to include collective bargaining agreements, the statute as a whole would have been meaningless or contradictory and would have failed of its essential purpose.[111] Because a *Norfolk and Western* style interpretation would not render the ADEA "senseless," the *American Airlines* definition could not apply.[112]

In closing, the court suggested that a deliberate attempt to violate the ADEA under the cover of the foreign laws exception would be treated differently, but that RFE/RL's conduct showed no evidence of bad faith.[113] Nevertheless, this holding does not give employees any more protection than they had before the ADEA was amended to apply extraterritorially. Even before the ADEA was amended to apply abroad, a deliberate attempt to evade the operation of the ADEA, by hiding behind the presumption against extraterritorial application of the ADEA, would have failed.[114] For instance, if an employer were to transfer an employee overseas for the sole purpose of terminating him outside the protection of the ADEA, courts would have been inclined to overlook the presumption against extraterritoriality and rule on the merits of the discrimination case.[115]

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108. *Mahoney*, 47 F.3d at 449. Strangely, the district court found that this use of language would be "difficult to imagine" and not "clear and certain." *Mahoney*, 818 F. Supp. at 4.

109. 115 S.Ct. 817 (1995).

110. *Id.* at 824

111. *Mahoney*, 47 F.3d at 450.

112. *Id.* The court devoted no more time to considering the policy concerns of the foreign laws exception. It is entirely possible that the interpretation adopted by the court *has* made the extraterritorial application of the ADEA so ineffectual as to be senseless.

113. "There is not, nor could there be, any suggestion that RFE/RL agreed to the mandatory retirement provision in order to evade the Age Discrimination in Employment Act." *Mahoney*, 47 F. 3d at 451.

114. *See Hearings, supra* note 44, 2-7 (statement of Clarence Thomas, Chairman, EEOC). Thomas, then head of the EEOC, explained that such a pretense would not be sufficient to avoid the application of the ADEA, even before its explicit application extraterritorially.

115. *Id.*

D. *Critique of Mahoney's Reasoning*

The court of appeals claimed to use the essential purpose of the statutory schemes in question to construe the "other laws" exceptions, but gave little or no consideration to the policy objectives to be served by the ADEA or the foreign laws exception. Rather, the court attempted to find a literal definition of the word "laws" that would determine the scope of the foreign laws defense. In doing so, the court perpetuates a legal fallacy—that descriptive words have a fixed meaning, and that the meaning provides a useful result whenever it is applied. In *Grant v. McAuliffe*, the California Supreme Court, speaking through Justice Traynor, held that a statute or other rule of law should be characterized "according to the nature of the problem for which a characterization must be made."[116] In *Grant*, the California Supreme Court was faced with a conflicts problem, which was ostensibly resolved by a black letter rule providing that a forum court may apply its own "procedural" laws, whether or not its "substantive" law governed the matter at issue.[117] The court was presented with a finding that the law in question had been characterized as "procedural" in a previous case for the purpose of determining whether or not the law was intended to apply retroactively.[118] The court held that the previous decision was irrelevant to the issue of conflicts because it addressed fundamentally different policy questions.[119] Similarly, the fact that collective bargaining agreements had been characterized as "laws" in some previous domestic action is irrelevant to the issue of whether collective bargaining agreements should be considered "laws" for the purposes of the foreign laws exception. The court, however, made no attempt to address the underlying policy concerns, beyond its conclusory statement, and thus did not consider which interpretation addressed the implicated policy questions most adequately.

V. INTERESTS AT WORK IN *MAHONEY*

The next section discusses the nature and extent of the competing interests at work in *Mahoney*, which will serve as a basis for analyzing the various proposed interpretations of the ADEA and Title VII's foreign laws defense. In the absence of international agreements that could resolve these difficulties, this

116. 264 P.2d 944, 948 (Cal. 1953).
117. *Id.*
118. *Id.*
119. *Id.*

tangle of interests is best served by some variant of the traditional foreign compulsion defense adopted by the district court, and not the definition of foreign "law" advanced in *Mahoney*.

A. *Foreign Compulsion in Mahoney*

One must consider the nature of compulsion potentially faced by RFE/RL, had it been forced to comply with the ADEA. For the purposes of this statutory provision, compulsion can come in three ways: official governmental compulsion, unofficial governmental compulsion, and private compulsion. Beginning in 1982, RFE/RL hired its employees under the terms of a collective bargaining agreement it had negotiated with labor unions in Munich.[120] The agreement set a mandatory retirement age of sixty-five years.[121] When the ADEA was amended to apply extraterritorially, RFE/RL was willing to comply with its provisions and applied to the "Works Council" for an exception to the terms of the agreement.[122] The Works Council refused the exception.[123] RFE/RL appealed to a German labor court, which refused to allow RFE/RL to deviate from the contract on the grounds it would discriminate against German workers.[124]

The D.C. Circuit Court of Appeals held that to require RFE/RL to comply with the ADEA would cause the company to "violat[e] the German laws standing behind such contracts, as well as the decisions of the Munich Labor Court."[125] In doing so, the court found that the German court's order represented the sort of official, governmental compulsion contemplated in the foreign laws defense—a binding order of a foreign sovereign.[126] In

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120. *Mahoney*, 47 F.3d at 448

121. *Id.* Of course, when the agreement was signed in 1982, it was perfectly legal because the ADEA had been held not to apply extraterritorially.

122. The Works Council is a body elected by unionized and non-unionzed employees. Its duty is to ensure that management does not depart from union contracts, and it has sole authority to allow departures from contractual requirements. *Mahoney*, 47 F.3d 447, 448.

123. *Id.*

124. *Id.* Requiring such nondiscriminatory national treatment is potentially a useful defense for employers. If the host country had a law banning discrimination on the basis of nationality, then an employer would violate that law if it negotiated a unilateral change for U.S. workers abroad and did not change the policy for foreign workers. In other words, the presence of one U.S. employee could infect the entire workforce, or the corporation could face discrimination charges from the host country. It seems unlikely that this is the result Congress sought, as it hoped to regulate conditions for U.S. citizens only. *See supra* note 25. Hence, a simple anti-discrimination statute in the host country could pose an interesting obstacle to the extraterritorial application of U.S. employment statutes which protect U.S. citizens abroad.

125. *Id.* at 450.

126. *Id.* at 448.

contrast, the district court understood the compulsion to arise from the terms of the private agreement itself, and not the Works Council or labor court's interpretation of that agreement.[127] In other words, the decision of the German court did not represent a statement of German employment policy, but was a mechanistic act construing and enforcing the terms of a private agreement. Implicitly, the district court held that RFE/RL was under a duty to renegotiate the terms of the private agreement it had entered, and thus remove the grounds for any official compulsion in the form of a court order. The court also found that RFE/RL's attempts to renegotiate had been half-hearted at best.[128] Essentially, the district court held that the potential difficulty of renegotiating a private contract did not represent the sort of compulsion worthy to defeat the action of U.S. law. In contrast, the court of appeals saw the decision of the German labor court as an explicit form of public or governmental compulsion meriting respect under the foreign laws defense. As the law stands, the line between the public and private domains must be carefully drawn to advance important U.S. interests abroad, while at the same time ensuring that U.S. law does not intrude into the legislative and regulatory realm of the host country.

B. *Ways in Which the Works Council and the CBA are Like "Legislation"*

It has been observed that in European countries governed by a civil code, the impact and effect of employment laws and obligations should be "fairly easy to ascertain."[129] Nonetheless, both courts in *Mahoney* struggled to discern the true nature of

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127. Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 3 (D.D.C. 1992). The court explained, "Those decisions simply held that the *union contract* did not permit a retirement age higher than 65; they merely enforced the contract upon the parties to it. . . . They did not hold that anything in *German law* compelled the decisions reached." *Id.*

128. *Id.* "It is clear from the undisputed facts, however, that it could have done more to come into compliance. Most important, the defendant did not fully pursue the possibility of achieving an actual change in the union contract." *Id.* at 5. "The defendant is essentially arguing that the German unions simply will not allow it to eliminate the mandatory retirement policy. But the United States Congress will not allow it to *retain* the policy. Of the two, only Congress makes law." *Id.* at 5-6. In contrast, the court of appeals was not interested in RFE/RL's efforts to renegotiate the contract, noting only that "RFE/RL negotiated with the unions to delete the mandatory retirement provision from the collective bargaining agreement, but to no avail." *Mahoney*, 47 F.3d at 448.

129. Smith, *supra* note 62, at 208. In fact, the true nature of German labor law has confounded every U.S. court confronted with it.

the collective bargaining obligation.[130] There are two distinct components of a German collective bargaining agreement: an "obligatory" part and a "normative" part.[131] "The obligatory part deals with the rights and duties of the parties of the collective agreement, [and] the normative part regulates the working conditions . . . and questions relating to the establishment and its legal structure."[132] With respect to the normative part of the agreement, "the parties of the collective agreement act as if they were a legislator" in that the terms they draft must be adhered to as statutes.[133] The obligatory part binds only the parties in privity to the agreement—i.e., members of the union and the company—while the normative part of the agreement regulates working conditions in the company for union and non-union employees.[134] Normative provisions are treated as having the same binding effect as law. Moreover, these agreements are typically not made between individual companies and individual unions as in the United States, but are usually negotiated between unions and regional or nationwide employer associations.[135] Consequently, German collective bargaining agreements can govern the relationships of thousands of workers and companies in German states or even nationwide.[136] Given the binding force of their provisions and their broad application, German collective bargaining agreements possess qualities similar to legislation. Nonetheless, the agreement is fundamentally different from legislation or regulation in that its

130. For an amusing recount of dialogue at the trial court, where counsel for both parties interpret the expert witness' testimony under questioning from the judge, see Street, *supra* note 8, at 17.

131. MANFRED WEISS, LABOUR LAW AND INDUSTRIAL RELATIONS IN THE FEDERAL REPUBLIC OF GERMANY 124-25 (1987).

132. *Id.* In other words, the obligatory part of the agreement binds only union employees and the employer, while the normative part of the agreement sets standards for all employees in the workplace, even those not in the union. Using this logic, the retirement provision in *Mahoney* would be classified as normative because it applied to Mr. Mahoney even though he was not in the union.

133. *Id.* The German labor court upheld the age limit "mainly on the grounds that the constitutionally guaranteed right of unions and employers to determine employment conditions . . . entitled them to establish rules on the termination of the individual employment relationship for age reasons and to expect that these would be respected in exactly the way statutory provisions must be complied with." Spiros Simitis, *Denationalizing Labour Law: The Case of Age Discrimination*, 15 COMP. LAB. L.J. 321, 322 (1994).

134. WEISS, *supra* note 131, at 124.

135. *Id.*

136. *Id.*

terms are not mandated by the German government at any level.[137]

C. *The German Government's Interest in Early Retirement*

In considering the application of a foreign laws defense to U.S. employment law, courts should consider the interests of the foreign sovereign in regulating its labor markets. These interests may be expressed either as formal legislation, or as informal rules or practices that nonetheless have a significant influence on employment decisions.[138] In this case, the German government has not promulgated any laws requiring a retirement age of sixty-five years,[139] but it has expressed an interest in promoting early retirement by enacting legislation to facilitate early retirement programs.[140] The purpose of these regulations, and many other German labor regulations, is to reduce levels of unemployment by encouraging early retirement and the weekly number of hours worked.[141] German policymakers have traditionally viewed early retirement programs as an acceptable and necessary labor market regulation, and not as invidious discrimination.[142] There is some evidence, however, that Europe is becoming increasingly aware of the evils of age discrimination, and may soon begin to protect older citizens with legislation like the ADEA.[143] Whatever

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137. U.S. collective bargaining agreements possess some of these same qualities. Their terms may govern the working of tens of thousands of employees, and although the union may negotiate the contract terms, those provisions, such as working conditions, may be applicable to non-union workers in the company. Moreover, the contracts embody a number of policies that the government might support, similar to the retirement age provision in *Mahoney*, but which the government does not mandate.

138. *See supra* note 126.

139. See *Mahoney*, 818 F. Supp. at 5.

140. See WEISS, *supra* note 131, at 80. The Act of April 1984 on Facilitating Early Retirement was designed to encourage early retirement by partially subsidizing retirement benefits until the worker reaches the statutory age to receive benefits from the social insurance system. *Id.*

141. *Id.* German unemployment has been over 10% since the early 1990s. John Templman & Bill Javetski, *Kohl's Ax Is Really Aimed at Europe: Will his Reform Ideas Spread?*, BUS. WK., May 27, 1996, at 52, *available in* 1996 WL 761466. In limited circumstances, some German companies have opted for a four-day work week to increase employment levels. Brandon Mitchener, *Europe's Car Makers Predict Dismal 1996*, WALL ST. J., Jan. 18, 1996, at A10. See WEISS, *supra* note 131, at 80.

142. Simitis, *supra* note 133, at 338.

143. *G-7 Nations Meet in Detroit to Discuss the Unemployment Crisis and Ways to Resolve it*, WK. IN GERMANY, Mar. 18, 1994, *available in* 1994 WL 2220131. There are signs that the tide is turning, and early retirement programs are seen as less acceptable today than in the recent past. German Labor Minister Norbert Bleum "cautioned against solving the unemployment crisis through the introduction of early retirement programs," which are used as an "easy answer" to

interest the German government may have in promoting a policy of early retirement, there is no evidence that the application of the ADEA to Germany was viewed with hostility or suspicion. Although there was no explicit mention of German government consternation in *Mahoney*, other U.S. courts in a similar context found it "noteworthy that neither the Department of State nor the German Government . . . expressed any view on [the] case or indicated that, under the circumstances present [in the case], enforcement of the subpoena would violate German public policy or embarrass German-American relations."[144] Likewise, whatever pressures RFE/RL may have felt in complying with the ADEA would not have come from the German government.

D. *The Difficulty of Renegotiating the Collective Bargaining Agreement*

Notwithstanding the earlier discussion of the insignificance of private compulsion to the foreign compulsion defense, it is important to consider the potential burden on U.S. employers working abroad. Any legal interpretation that places undue burdens on employers and hinders international trade, while doing little to combat discrimination, must be reconsidered. This section examines the difficulties RFE/RL would have faced if it had been forced to comply with the ADEA.

If the district court's decision were to have been upheld in *Mahoney*, RFE/RL would have been forced to address the root of its discrimination—the collective bargaining agreement. At trial, RFE/RL claimed that it had been unable to negotiate a change in the contract before the suit, and that continued efforts would have been futile.[145] The district court rejected this argument, finding that RFE/RL had not "pursue[d] serious negotiations with the unions on the issue."[146] By contrast, the court of appeals was more impressed with RFE/RL's good faith efforts to comply with the ADEA, or at least its absence of bad faith. The court noted, "There is not, nor could there be, any suggestion that RFE/RL agreed to the mandatory retirement provision in order to

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unemployment. *Id.* *See also* Simitis, *supra* note 133, at 338 (arguing that "just as it took European laws a number of years to follow the example of the United States in the case of sex discrimination, it is only a matter of time until a change of attitude to the treatment of older people emerges under the impact of reflections comparable to those underlying the ADEA."); Richard Worsley, Letter to the Editor, TIMES (LONDON), Sept. 24, 1996, *available in* LEXIS, News Library, Txtline File (mentioning the greater attention paid to age discrimination recently in the United Kingdom).

144. U.S. v. First Nat. City Bank, 396 F.2d 897, 904 (2d Cir. 1968).

145. *Id.*

146. *Id.*

evade the Age Discrimination in Employment Act."[147] If RFE/RL was forced to attempt more serious negotiations, it would have encountered several structural impediments to gaining concessions, stemming from the nature of German labor agreements. As discussed earlier, German collective bargaining agreements are typically negotiated between labor unions and industry associations that cover large parts of Germany.[148] Consequently, the contracts drafted rarely reflect the circumstances of individual companies.[149] As a result, U.S. employers in Germany, when seeking to renegotiate a contract, might be forced to alter an agreement that governs tens of thousands of German employees to protect the rights of only a few U.S. citizens. Second, because the contracts govern the relationships of many workers and companies, collective bargaining negotiations are frequently politicized and subject to intense public scrutiny.[150] A U.S. company might be viewed unfavorably for attempting to negotiate privileges for its U.S. employees that it denies to others. Given the institutional barriers and public pressures, it is fair to say that an individual U.S. company might pay a substantial price to realize a change in the agreement.

VI. SUGGESTED INTERPRETATIONS OF THE FOREIGN LAWS EXCEPTION AND APPLICATION TO THE FACTS OF *MAHONEY*

A. *Application of the Traditional Foreign Compulsion Defense to the Facts of Mahoney*

Several commentators initially thought that the foreign laws defense was intended to be a codification of the foreign compulsion defense. *Mahoney* suggests otherwise. German collective bargaining agreements serve an important public purpose, have widespread application (unlike typical U.S. contracts), and have the effect and enforceability of some U.S. statutes. Nonetheless, the labor agreements were not mandated

147. *Mahoney*, 47 F.3d at 451. For those who seek to distinguish *Mahoney* from later cases, the collective bargaining agreement was negotiated before the ADEA was amended to cover it. Consequently, the violation of the ADEA can be portrayed as inadvertent, notwithstanding RFE/RL's failure to renegotiate the agreement after the statute was amended. In the case of agreements made after the statute was amended, it will be harder to show that the failure was inadvertent and in good faith.

148. WEISS, *supra* note 128, at 120.

149. *Id.*

150 *Id.*

by any German legislature at any level.[151] The Works Council did not have the unilateral power to declare the law. Rather, it could make binding decisions concerning private, voluntarily entered, labor agreements. Without a formal law or regulation from the German government, this contract simply does not constitute the sort of formal, policy-based compulsion required by the foreign compulsion defense. In considering a somewhat similar case, in which a U.S. company had entered into an anti-competitive agreement with several Swiss watchmakers, the court held the following:

> [D]efendant's activities were not required by the laws of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss Government. It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact that the Swiss Government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate.[152]

The offered defense failed despite the widespread use of anti-competitive contracts and the Swiss public policy they undoubtedly served. In this regard, the traditional foreign compulsion defense does allow U.S. law to interfere concerning a foreign sovereign's regulation of its labor markets.

The requirement of a binding law or regulation has also been criticized for its potential to subject U.S. corporations working abroad to substantial unofficial government pressures.[153] Commentators observe that the distinction made in the foreign compulsion defense between public and private compulsion is not as clear abroad as it is in the United States.[154] In *Mahoney*, for instance, it is not entirely clear to what extent the German government has mandated the requirement age of sixty-five years through its programs facilitating early retirement.[155] This confusion results even in Germany, a civil law country, where the distinctions between public and private compulsion are similar to the United States and should be relatively easy to ascertain.[156] Therefore, it has been argued that U.S. corporations may be

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151. *Mahoney*, 818 F. Supp. at 5.

152. U.S. v. Watchmakers of Switz. Info. Ctr., Inc., 1963 Trade Cas. (CCH) ¶70,600, at 77, 456-57 (S.D.N.Y. 1963).

153. Smith, *supra* note 62, at 212 (citing the *Giri* in Japan and traditional Muslim law as cultural factors that—while not government ordained—"play a very influential role in how an American company operating overseas must conduct its employment practices").

154. *Id.* at 212-13.

155. *See supra* note 140 and accompanying text.

156. *See supra* text accompanying note 151.

genuinely subject to foreign governmental compulsion that is not expressed in the form of legislation, but which does not fall within the narrowly defined foreign compulsion defense.[157] This plea of hardship by the employer must be considered in light of larger policy aims. The presumption against extraterritoriality, the past application of the foreign compulsion defense, and the aims of the ADEA and Title VII have not been shaped to alleviate the potential of hardship to an employer.[158] While the foreign compulsion defense fails to address the possibility of non-legislative foreign government compulsion, that shortcoming is not a fatal flaw.

First, the foreign compulsion defense offers an easy solution for any nation that feels its nonlegislative policies are being frustrated by the operation of U.S. employment law—it can simply pass a "blocking statute" such as those enacted to fight the application of U.S. discovery laws.[159] However, unlike the statutes discussed above, employment statutes would likely be more respected as a substantive law governing an important domestic interest.[160] This view would bring the U.S. employer under the protection of the statute and exculpate it from liability under the ADEA or Title VII. While this solution may sound far-fetched, it is supported by the rapid proliferation of similar blocking statutes in other areas of the law.[161] Assuming a case in which a foreign sovereign was concerned enough to impose punitive sanctions on a U.S. company, it seems reasonable that, given the option, the foreign country would accept the invitation to block the extraterritorial application of U.S. law with an easily drafted statute.[162]

More importantly, in the event of a potential conflict with a foreign government, the EEOC typically consults with the Department of State to ensure that there is no chance of creating foreign relations problems.[163] There is little danger that a foreign nation would fail to express its displeasure with the extraterritorial application of U.S. employment law,[164] and the

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157. *See supra* note 126.

158. *See supra* Parts III.A, III.C and III.B respectively.

159. See RESTATEMENT, *supra* note 58, § 442, reporter's notes 4 & 5.

160. *See supra* text accompanying notes 67-73 (discussing the willingness of U.S. courts to require cooperation with discovery orders despite the existence of foreign blocking statutes).

161. RESTATEMENT, *supra* note 58, § 442 reporter's note 4.

162. For a collection of blocking statutes, see A.V. LOWE, EXTRATERRITORIAL JURISDICTION 79-143 (1983).

163. ZIMMERMAN, *supra* note 26, at 135.

164. *See* David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 188 (1984). In the field of antitrust laws, even traditional allies such as Great Britain have protested the application of U.S. law abroad. There is little doubt that foreign nations would voice their concerns on an even more domestic field of law.

EEOC would have the discretion to decide whether it should accept the statements of foreign officials as probative on the issue of foreign compulsion.[165] By not pursuing actions that threaten to create foreign relations difficulties, the EEOC could protect the interests of U.S. employers that would otherwise be subject to foreign sanctions.

However, the traditional application of the foreign compulsion defense makes no concession for the interests of the U.S. employer subject to private compulsion, no matter how strongly they are expressed. In *Mahoney*, RFE/RL might have been subject to a lengthy and embarrassing negotiation process in order to secure a contract in compliance with the ADEA.[166] While private compulsion may create hardships, it has been observed that cultural norms or instances of private discrimination are difficult to quantify or document, and lend themselves more readily to exaggeration and pretextual claims by U.S. employers.[167] In the realm of international business, there are probably few barriers that cannot be breached through bargaining or consideration. Further, the foreign compulsion defense, the presumption against extraterritoriality, and U.S. anti-discrimination legislation give little weight to the inconveniences that a U.S. corporation abroad would face in dealing with private discrimination.

B. Reasonableness Approach

Before the amendments to Title VII, some commentators suggested that any conflicts of law could be addressed through what is called a "comity analysis."[168] Under the Restatement version of this analysis, a reviewing court may consider a laundry list of factors in determining whether extraterritorial application of a law is reasonable. The factors include: (1) the interest of the foreign state in regulating the activity in question;[169] (2) the character of the activity to be regulated; (3) the importance of the activity to the regulating state; (4) the extent to which other states

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165. *See supra* note 81 and accompanying text.

166. *See supra* text accompanying notes 142-47.

167. Hibbing, *supra* note 1, at 429-30. In discussing a case in which a U.S. company turned down a female applicant for a position in an Arab country, the speaker referred to a picture in National Geographic of a veiled Bedouin woman driving a water truck, contrary to the company's allegation that women in Saudi Arabia are not allowed to drive. This simply illustrates that the cultural norms cited may not be as pervasive or universal as they may first appear, or as a defendant may suggest, and may not be sufficiently potent to justify a discriminatory hiring practice.

168. *Id.* at 420.

169. RESTATEMENT, *supra* note 58, § 403(3).

regulate such activity;[170] and (5) the links between the state seeking to exercise jurisdiction and the parties to the conflict.[171] U.S. courts that have applied a comity analysis have also considered the potential for hardship on the plaintiff.[172] Under the comity analysis, the U.S. court should decline jurisdiction if the interest of the foreign state is clearly greater.[173]

While the reasonableness approach seems sensible at first glance, it provides courts little guidance and can be adapted to serve almost any purpose. Before the ADEA was amended to apply extraterritorially, one commentator argued that the balancing approach could be a useful way to justify the broad application of U.S. jurisdiction over U.S. citizens working abroad.[174] It was argued that the reasonableness test can often justify the application of U.S. law to prevent discrimination, even in the face of a conflicting foreign employment law.[175] On the other hand, after the amendments to Title VII, which applied the statute extraterritorially (limited by the foreign laws defense), another commentator suggested that the application of the Restatement's reasonableness test could alleviate the potentially harsh effects of the foreign laws defense, which was presumed at the time to be a codification of the rather limited foreign compulsion defense.[176] The fact that the test leads, apparently reasonably, to such diverse results indicates its elasticity and lack of utility. Further, the sort of decisionmaking required by the reasonableness standard resembles the formulation of foreign policy, which prompted the presumptions and defenses in the first place.[177] This was exactly the sort of controversy that courts

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170. *Id.* § 403(2)(c).

171. *Id.* § 403(2)(b).

172. *See* Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 613 (9th Cir. 1976).

173. RESTATEMENT, *supra* note 58, § 403(3). U.S. courts are quite familiar with comity-style balancing tests, as it is frequently the method used to resolve "choice of law" issues involving conflicting state law. U.S. choice of law rules have evolved from a black letter system, which used legal standards such as *lex loci delicti* (the law of the place of the wrong) in a much more sophisticated analysis of each state's interest in having its law applied to resolve the dispute. *See In re* Air Crash Disaster, 86 F.3d 498, 542 n.26 (6th Cir. 1996). In cases involving the extraterritorial application of the ADEA or Title VII, the court will be faced with a U.S. plaintiff pleading the protection of U.S. law opposed by a U.S. defendant pleading the compulsion of its host country and invoking the host country's interest in regulating its domestic workplaces.

174. *See* Debra L.W. Cohn, Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. REV. 1288, 1316-24 (1987).

175. *See id.* at 1316.

176. *See* Mary Claire St. John, Note, *Extraterritorial Application of Title VII: The Foreign Compulsion Defense and Principles of International Comity*, 27 VAND. J. TRANSNAT'L L. 869, 892-94 (1994).

177. *See id.* at 889.

prefer to avoid. With the EEOC and the State Department acting as a filter for actions that threaten to create diplomatic confrontations, courts would rarely have any need to engage in the balancing test or policy analysis discussed.[178]

The reasonableness test is difficult to apply to extraterritorial employment discrimination cases because the competing interests are so powerful. These interests include the powerful remedial impulse of U.S. anti-discrimination legislation, the undeniable interest of foreign countries in regulating their own labor markets, and the strong desire of courts to avoid international disputes. One U.S. court that considered the possibility of applying the reasonableness test declined the opportunity, citing the difficulty of balancing such interests fairly, as well as the tendency for courts to favor U.S. interests and to apply the law extraterritorially.[179] This tendency is supported by "the fact that balancing tests almost invariably yield the same result: jurisdiction lies."[180] Consequently, the reasonableness or balancing test would probably fail to promote comity or protect U.S. employers significantly more than the foreign compulsion defense, while abandoning the relative predictability of the defense.

C. The Mahoney Standard

By defining the term "law" to include the requirements of a collective bargaining agreement, the *Mahoney* decision protects RFE/RL from liability where it would likely have been subject to damages under either a foreign compulsion or reasonableness analysis. In effect, the *Mahoney* decision has elevated speculative private compulsion—RFE/RL's anticipated difficulties in renegotiating the collective bargaining agreement—to the level of official foreign governmental compulsion. To the extent that *Mahoney* protects U.S. employers from the travails of private foreign compulsion, the decision favors an interest that has consistently been given low priority by the courts in construing

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178. This is not to suggest that the EEOC would have untrammelled discretion in these actions, but only that the EEOC's finding would be entitled to the same deference that other administrative decisions enjoy.

179. *See* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 948 (D.C. Cir. 1984).

180. Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1325 (1985). Since 1909, "not a single United States appellate court has found jurisdiction wanting in a reported extraterritorial antitrust case." *Id.* In addition, foreign interests rarely receive anything more than a "perfunctory nod" from U.S. courts. *Id.* at 1324-25. On the other hand, the foreign forum's interests in regulating its workplaces are undoubtedly much stronger than in the antitrust arena.

the foreign compulsion defense, the ADEA and Title VII, and the presumption against extraterritoriality.

The decision also sacrifices the powerful national interest in preventing discrimination in the extraterritorial workplace. Since many workplace policies are delineated in contract, and the *Mahoney* standard requires corporations to neither breach the contract to comply with the ADEA nor negotiate a non-discriminatory contract, the *Mahoney* decision seems to allow U.S. employers simply to contract out of the terms of the ADEA. The court clearly stated that an employer's efforts, or the lack thereof, to negotiate a non-discriminatory contract were irrelevant to the defense.[181] A company does not have to plead impossibility or impracticability to succeed in its defense. The company only needs to show the existence of the binding contract, and possibly the absence of bad faith, to succeed in its defense. This standard also has the unfortunate effect of encouraging foreign private parties, opposed to fair employment practices, to adopt an unreasonable stance in negotiations. If the foreign party is aware that its unreasonableness can essentially force the U.S. corporation to contract out of the employment law, it has no incentive to bargain otherwise.

As compared with the traditional foreign compulsion doctrine, the *Mahoney* standard does not avoid international conflicts pragmatically, which was the policy goal that drove the presumption against extraterritoriality and the foreign compulsion defense. In this particular case, the German government had expressed no opinion on the controversy, and it does not appear that deciding to force RFE/RL to comply with the ADEA would have implicated any delicate foreign policy matters.[182] Relations between the United States and Germany are friendly, and the provision in question, a national practice of early retirement, is certainly less controversial than the vast majority of social and political practices that a court would expect to encounter in the extraterritorial application of U.S. employment law.[183] In short, there was no legitimate foreign policy reason to restrict the application of the ADEA in this case. The only reason to exclude RFE/RL from the application of the ADEA may be to prevent inconvenience to the employer.

The *Mahoney* decision sets a troubling precedent for future extraterritorial application of the ADEA and Title VII. It threatens to significantly undermine the remedial scope of U.S. employment law without significantly advancing any interest that has historically been valued in this field of law. More importantly,

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181. *Mahoney*, 47 F.3d at 451.
182. *Mahoney*, 818 F. Supp. at 6.
183. *See* Smith, *supra* note 62, at 212.

Mahoney seems to be motivated by the historic and well-founded reluctance of U.S. courts to involve themselves in international disputes or to make foreign policy. Although Congress may have overcome the presumption against extraterritoriality in the ADEA and Title VII, the fact remains that "whenever the United States attempts to apply its labor policy within the territory of another sovereign, conflicts will arise."[184] Such reality, combined with the courts' reluctance to become involved in international controversy, seems to be the key factor in *Mahoney*.

VII. CONCLUSION

The court's ruling in *Mahoney* stems from the fact that, in hastily amending Title VII and the ADEA to apply extraterritorially, Congress has effectively required courts to make foreign policy decisions, with the attendant risks of international conflict and the threat of trampling on the executive branch's prerogative to make foreign policy. Of the approaches discussed above, the traditional foreign compulsion defense appears to balance existing policy concerns most effectively, and should advance non-discrimination policies without the excessive risks of international conflict. Nonetheless, courts would still be required to make decisions that create foreign policy. Worse yet, in a case like *Mahoney*, litigation may center around a private dispute that involves two private parties, which may lead to a resolution with public implications, and could place the United States at odds with a foreign country.[185]

The ideal solution to this problem would require the executive branch to evaluate the foreign policy risks involved at an early stage and to determine whether the risks of conflict are sufficient to justify an exception from U.S. employment law. Such involvement by the executive would relieve courts of the sole responsibility for making policy decisions in this field and mark any suit with the imprimatur of the executive branch. In addition, it would eliminate a court's fear of treading on the executive branch's dominion over foreign policy, given that the

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184. Barella, *supra* note 27, at 919.

185. Indeed, employment questions similar to these are addressed in treaty provisions, such as the U.S.-Japan treaty governing the application of U.S. employment law to Japanese companies operating in the United States. *See* Papaila v. Uniden Am. Corp., 51 F.3d 54, 55-56 (5th Cir.), *cert. denied*, 116 S.Ct. 187 (1995) (holding that the discriminatory hiring practices of a Japanese subsidiary corporation operating in the United States were permitted by the U.S.-Japan Treaty of Friendship, Commerce, and Navigation, which permits high-level positions to be allocated in what would otherwise be allocated in an illegal manner).

suit will have been initiated by that branch. As it happens, there is an institutional framework in place that could easily perform this screening function. The EEOC is already responsible for reviewing employee complaints and for issuing a letter of "right to sue."[186] Under current law, it is essentially immaterial whether the EEOC issues the letter of right to sue, since a plaintiff can proceed individually without the letter.[187] Amidst delicate issues of policy, Congress should require individual plaintiffs to bring their claims through the EEOC, and not allow individuals the right to bring an action without approval from the EEOC. Consequently, any suit would have the implicit approval of the executive branch and would remove the sources of apprehension for courts in this area. If the executive branch were to make the policy decision to pursue the suit and weather any consequences, courts would be free to perform their function—to declare what the law is—and apply the foreign laws exception as it was intended, and not as a means to avoid making foreign policy.[188]

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186. *See* Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO. ST. L.J. 1, 8-10 (1996) (noting that while the EEOC is already overburdened, the international context seems an especially appropriate forum for agency intervention and the beneficial use of such resources).

187. *See* McDonnell Douglas Corp. v Green, 411 U.S. 792, 798-99 (1973). Congress could override this rule and require that all extraterritorial claims be brought through the EEOC, with the advice of the State Department. Such action would ensure that private claims do not create diplomatic incidents and would free courts to perform the necessary judicial analysis.

188. *See supra* text accompanying notes 33-35. In the domestic context, few would accept the notion that courts simply discover the law, but would assert that courts make policy decisions in deciding cases. In the international context, however, courts seem more comfortable when clear guidance from the legislative branch exists.

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