



A US Law or Executive Order to Combat Gender Apartheid at Work in Discriminatory Countries

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A number of countries worldwide have laws that specifically discriminate against women's participation in the workforce, including bans on particular occupations, restrictions on opening bank accounts or taking jobs without a male family member's authority, and restrictions on travel. Such discriminatory laws are associated with considerably lower female labor force participation and with negative consequences for economic growth and sustainable development.¹ They also contradict globally accepted norms and values on gender equality in the workplace.

The US legislation or executive action we propose would encourage US multinationals to mitigate the impact of local discriminatory legislation to the extent possible within the host country's domestic laws by following a code of conduct regarding women's employment, potentially limiting that obligation to the most discriminatory of countries. The proposed legislation is modeled on US anti-apartheid legislation ([P.L. 99-440](#)) that encouraged US firms to hire, train, and promote nonwhites in South Africa in the 1980s. Part of the legislation addresses the actions of the executive branch; this could also form a stand-alone executive order.

Encouraging US Firms to Follow Global Norms on Gender, Globally

There is a strong global norm, fostered not least by US example and leadership, that women should have equal opportunities in their work, training, promotion, job security, and pay.² While the United States itself has not ratified them, a number of major international treaties with widespread global accession mandate gender equality in the workplace, such as the *Convention on the Elimination of All Forms of Discrimination against Women* and the International Labour Organization's *Convention concerning Discrimination in Respect of Employment and Occupation*.³

The United States–implemented [OECD Guidelines for Multinational Enterprises](#) suggests inter alia that in countries where domestic laws and regulations conflict with internationally recognized human rights, “enterprises should seek ways to honour [rights] to the fullest extent which does not place them in violation of domestic law.”⁴ The legislation, or the executive action, we propose would encourage US firms to follow that practice specifically with regard to women's rights at work.⁵

The anticipated change in best practice multinational firm behavior would be minimal: the legislation and executive order are instead designed to bring straggler firms up to existing best practice standards already supported by the United States. Businesses worldwide, including a number of US multinationals, have voluntarily committed to upholding gender equality within the

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workplace by signing onto and tracking their progress according to the [Women's Empowerment Principles](#). Overall, the evidence is suggestive that if the legislation encouraged US straggler firms to meet global best practices in terms of incorporating gender equality into their overseas business practices through a public and transparent process, this would have a zero-to-positive financial impact on firms. More important, the legislation would have potential demonstration impacts on local firms in host countries and serve to highlight discriminatory laws worldwide, helping to stoke pressure for change.

Legislative Proposal

The legislation would mandate a *code of conduct* regarding the employment of women applying to US firms operating anywhere overseas (or more narrowly, in countries that the State Department labels as “of concern on grounds of gender discrimination” or in specific, named countries). It would be based on language that formed part of the anti-apartheid legislation of 1986. Language on a code of conduct adapted from that earlier legislation might read as follows:

United States employers operating overseas are obliged both generally to actively oppose legally enforced policy and practices that discriminate in substantive ways against women and specifically to engage in recruitment and training of women. The following Code of Conduct regarding women's employment and US multinationals mandates (to the extent possible within the host country's domestic laws): (1) providing equal employment opportunity for all employees without regard to gender; (2) assuring that the pay system is applied to all employees without regard to gender; (3) increasing by appropriate means the number of women in managerial, supervisory, administrative, clerical, and technical jobs; and (4) making all reasonable attempts to ensure women can apply to and hold employment positions in order to mitigate the impact of laws and regulations that specifically discriminate against women's right to leave the house, travel, open bank accounts, and open or run businesses.

The proposed code of conduct encompasses measures that serve to mitigate domestic laws that actively discriminate on the basis of gender (i.e., laws that restrict women from working in particular occupations) and (secondarily and partially) the absence of laws that offer affirmative protections on the basis of gender (i.e., equal pay for equal work).

Language on the application and monitoring of that code of conduct adapted from that earlier legislation might read as follows:

Any national of the United States that employs more than 25 persons [in scheduled countries/overseas] shall take the necessary steps to ensure that the Code of Conduct is implemented.

The President shall prepare and transmit to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate within 12 months of the date of enactment of this Act, and every 12 months thereafter, a report on the extent to which progress has been made toward gender equality in the workplace worldwide, and the status of US government and employer compliance with this legislation.

The code could also apply to the operations of the US government. Language adapted from the anti-apartheid legislation might read as follows:

Labor practices used by the United States Government—(1) for the direct hire of women, (2) for the reimbursement out of official residence funds of women, and (3) for the employment services of women arranged by contract—should represent the best of labor practices in the United States and should serve as a model for the labor practices of nationals of the United States globally. The Secretary of State and any other head of a department or agency of the United States carrying out activities in scheduled countries shall promptly take, without regard to any provision of law, the necessary steps to ensure that the labor practices applied to the employment services described in (1) through (3) above are governed by the Code of Conduct. Notwithstanding any other provision of law, the Secretary of State and any other head of a department or agency of the United States carrying out activities in scheduled countries shall, to the maximum extent practicable, in procuring goods or services, make affirmative efforts to assist business enterprises having more than 50 percent beneficial ownership by women.

The legislation might include the following, additional elements:

- Before any funding is agreed upon, applicants for funding for exports to or insurance for investments [in countries of concern] from the Export-Import Bank of the United States (ExIm Bank) and the Overseas Private Investment Corporation (OPIC) could be mandated to submit an operational plan regarding their implementation of the code of conduct in covered exports or investments.⁶
- *Or* the legislation could alter Section 231A of P.L. 87-195 (i.e., that OPIC “may insure, reinsure, guarantee, or finance a project only if the country in which the project is to be undertaken is taking steps to adopt and implement laws that extend internationally recognized worker rights”) to mandate that OPIC may not finance operations in countries of concern and US Code 12 6A I 635(b)(1)(B) to mandate that ExIm Bank may deny financial support to countries of concern on the grounds of human rights considerations [unless additional steps and evaluations are undertaken as part of the application process to ensure women’s economic rights are respected].
- Regarding any new bilateral investment or trade treaties [with a country of concern], the Office of the United States Trade Representative could be mandated to ensure that such treaties include language stipulating that “neither party may require that an enterprise of that party that is a covered investment deny employment on the grounds of race, religion, gender, or sexual orientation.”
- The US Attorney General, in conjunction with the Secretary of the Department of Homeland Security, could be mandated to promulgate rules and regulations clarifying that women from countries [of concern] where the right to free movement or employment is expressly and egregiously limited by law (as well as those individuals denied employment on the grounds of race, religion, gender, or sexual orientation) form part of a particular social grouping potentially eligible for asylum and refugee status.
- Large US firms operating abroad could be encouraged or obliged to report on their adherence to the code of conduct, including gender-disaggregated data on pay, positions, and overall employment. US firms found to be in breach of the code of conduct by the State Department could be denied access to financing from ExIm Bank or OPIC, or both, as well as other support for trade development.
- Countries on the list of states of concern might be declared ineligible for Millennium Challenge Corporation funding.

Executive Order Proposal

Absent legislative authority, an executive order could incorporate the code of conduct and its application to the US government, and the order could instruct ExIm Bank and OPIC not to provide any support to firms that do not follow the code [in countries of concern]. Additionally, an executive order could mandate that OPIC and ExIm Bank use existing authority to deny financing to projects in countries of concern [unless additional steps and evaluations are undertaken as part of the application process to ensure that women's economic rights are respected].

Impact

What might be the potential impact of such legislation or executive order? The impact of overall corporate social responsibility and ethical investing on stock returns is a widely debated topic without clear and general answers.⁷ Regarding gender diversity in particular, some evidence suggests that it is of benefit to the productivity of teams.⁸ While evidence on the economic or policy impact of the requirements on US companies employing South Africans in the case of the anti-apartheid legislation is sparse,⁹ evidence is growing that the activities and behaviors of multinational firms can have an impact on norms and standards in host countries,¹⁰ which suggests that efforts to improve those behaviors may pay dividends.¹¹

Coverage

Where would the code of conduct apply? One answer is that it could simply be a global obligation, applying to all US firms operating overseas (or those with more than 25 employees). Alternatively, it could apply to a subset of countries where specific concerns exist about equality of employment opportunity. The World Bank's *Women, Business and the Law* database provides information on countries' legal status regarding a number of issues related to the ability of women to get a job. Table 1 lists some of those indicators.

One potential cutoff for the focus of legislation would be countries that do not have laws mandating equal remuneration for work of equal value and nondiscrimination based on gender in hiring—such a cutoff would cover a few more than 100 countries. Another would be countries that fail one of the five most basic requirements for a woman to get a job or start a business: the right to travel outside her home, the right to get a job or pursue a trade or profession, the right to sign a contract, the right to register a business, and the right to open a bank account. That would encompass the 28 countries listed in Table 2. A third approach would be to use a broader set of restrictions (all those shown in Table 1) and include countries that perform particularly poorly across the range: perhaps, for example, the 26 countries that answer yes to fewer than 10 of Table 1's questions (Table 3). The code of conduct would apply in below-the-cutoff countries, labeled "countries of concern."

Conclusion

Legislation or an executive order mandating efforts to minimize the discriminatory impact of laws on (potential) women employees by US firms operating overseas would place limited burdens on US firms. While the direct impact of that mandate on labor force participation or prospects might also be marginal in the short run, the mandate would send a powerful signal that the United States is committed to furthering international norms of gender equality and that certain countries are not

living up to their obligations under international human rights standards with regard to women in the workplace.

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Table 1. Freedom from Work-Related Restrictions

Indicator	Number of Countries Answering "Yes"
Can a woman travel outside her home in the same way as a man?	156
Can a woman get a job or pursue a trade or profession in the same way as a man?	156
Can a woman sign a contract in the same way as a man?	171
Can a woman register a business in the same way as a man?	169
Can a woman open a bank account in the same way as a man?	171
Does the law mandate equal remuneration for work of equal value?	71
Does the law mandate nondiscrimination based on gender in hiring?	70
Can non-pregnant and non-nursing women work the same night hours as men?	144
Can non-pregnant and non-nursing women do the same jobs as men?	73
Can non-pregnant and non-nursing women work in jobs deemed hazardous in the same way as men?	121
Can non-pregnant and non-nursing women work in jobs deemed morally or socially inappropriate in the same way as men?	152
Can non-pregnant and non-nursing women work in jobs deemed arduous in the same way as men?	131
Can non-pregnant and non-nursing women work in mining in the same way as men?	103
Can non-pregnant and non-nursing women work in factories in the same way as men?	132
Can non-pregnant and non-nursing women work in construction in the same way as men?	137
Can non-pregnant and non-nursing women work in the same occupations as men?	151
Can non-pregnant and non-nursing women work in metalworking in the same way as men?	141
Can non-pregnant and non-nursing women engage in jobs requiring lifting weights above a threshold in the same way as men?	127
Can non-pregnant and non-nursing women do the same job-related tasks as men?	120

Source: Data from World Bank *Women, Business and the Law* database. Out of 173 economies.

Table 2. Countries Failing at Least One of the Five Most Basic Requirements for a Woman to Get a Job or Start a Business

Fail Four	Fail Three	Fail Two	Fail One
Congo, Dem. Rep.	Not applicable	Syrian Arab Republic	Egypt, Arab Rep.
		Kuwait	Cameroon
		United Arab Emirates	Saudi Arabia
		Bahrain	Mauritania
		Jordan	Afghanistan
		Niger	Chad
		Sudan	Iraq
		West Bank and Gaza	Malaysia
		Yemen, Rep.	Pakistan
		Iran, Islamic Rep.	Oman
		Qatar	Guinea
			Bhutan
			Gabon
			Equatorial Guinea
			Brunei Darussalam
			Suriname

Note: The five most basic requirements are a woman's right to travel outside the home, right to get a job or pursue a trade or profession, right to sign a contract, right to register a business, and right to open a bank account.

Table 3. Full Score

Answer Yes to < 5 Questions	Answer Yes to 5-9 Questions	Answer Yes to 10-15 Questions	
Syrian Arab Republic	UAE	Yemen, Rep.	Bulgaria
Congo, Dem. Rep.	Egypt, Arab Rep.	Mauritania	Burkina Faso
Kuwait	Cameroon	Argentina	China
	Bahrain	Congo, Rep.	Colombia
	Jordan	India	Morocco
	Kyrgyz Republic	South Sudan	Papua New Guinea
	Mali	Vietnam	Sri Lanka
	Moldova	Iran, Islamic Rep.	St. V. & Grenadines
	Russian Federation	Qatar	Tunisia
	Ukraine	Afghanistan	Zimbabwe
	Niger	Chad	Bhutan
	Sudan	Iraq	Gabon
	Azerbaijan	Malaysia	B. & Herzegovina
	Belarus	Pakistan	Macedonia, FYR
	Kazakhstan	Oman	Sierra Leone
	Madagascar	Angola	Turkey
	Tajikistan	Belize	Equatorial Guinea
	West Bank and Gaza	Costa Rica	Algeria
	Saudi Arabia	Dominica	Barbados
	Benin	Lebanon	Chile
	Ethiopia	Mongolia	Ecuador
	Senegal	Montenegro	Guatemala
	Uzbekistan	Nigeria	Honduras
		Poland	Jamaica
		São T. & Príncipe	Korea, Rep.
		Swaziland	Mozambique
		Thailand	Myanmar
		Guinea	Nicaragua
		Bangladesh	Panama
		Bolivia	

¹ Seventy-nine countries restrict the type of jobs women can do on the grounds of their sex alone, including 15 countries that have eight or more such restrictions. Fifteen countries have laws on the books saying husbands may prevent their wives from accepting jobs. Countries that impose work-hour or industry restrictions have lower female labor force participation rates (45 percent compared with 60 percent with no restrictions). Source: www.cgdev.org/blog/increasing-womens-economic-opportunities.

² The International Labour Organization's *Convention concerning Discrimination in Respect of Employment and Occupation* calls for "equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." That includes discrimination on the grounds of sex, "which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." Article 11 of the United Nations' *Convention on the Elimination of All Forms of Discrimination against Women* declares, "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular . . . [t]he right to the same employment opportunities, including the application of the same criteria for selection in matters of employment . . . [t]he right to free choice of profession and employment, the right to promotion, job security."

³ Principle 6 of the United Nations Global Compact states that "businesses should uphold the elimination of discrimination in respect of employment and occupation" (www.unglobalcompact.org/library/261). According to the United Nations' *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, "companies must take proactive steps to understand how existing and proposed activities may affect human rights." This covers discrimination. The principles note that "'doing no harm' is not merely a passive responsibility for firms but may entail positive steps—for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes." In 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" in its Resolution 2003/16.2. Those norms included the right to equality of opportunity and treatment. Although the UN never formally adopted the norms, the contained language might be useful regarding requirements, according to David Weissbrodt and Muria Kruger: "Business enterprises adopting and disseminating their codes of conduct should then implement internal rules of operation in conformity with the Norms. They should train managers and representatives in practices relevant to the Norms and inform all persons and entities that may be affected by dangerous conditions produced by the company. . . . the Norms also address implementation issues with regard to each business' supply chain. First, businesses are to apply and incorporate the Norms into contracts with their business partners, and to ensure that they do business only with others who observe similar standards. The Norms expect companies to adopt and implement their own internal rules of operation to ensure the protections set forth in the instrument. Second, the Norms indicate that businesses will be subject to periodic monitoring that is independent and transparent, and includes input from relevant stakeholders." David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *American Journal of International Law* 97 (2003): 901, available at http://scholarship.law.umn.edu/faculty_articles/243.

⁴ The US Department of State has a National Contact Point on the *OECD Guidelines for Multinational Enterprises*. Were it made the implementing agency for our proposed legislation, it could make the proposed law budget-neutral.

⁵ Examples exist of National Contact Points for the *OECD Guidelines* declaring firms in breach of the guidelines (see Ashley L. Santner, "A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future," *George Washington International Law Review* 43 [2011]: 375). That said, the US National Contact Point publishes limited information on the (few) cases it has handled and has made clear it will not name firms that have breached the guidelines. As of 2007, the US National Contact Point had "never issued a statement concerning an instance of specific implementation," according to Christopher N. Francoise ("A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises," *Boston College International and Comparative Law Review* 30 [2007]: 223). If the National Contact Point framework were to be used as the implementing vehicle for the legislation, that legislation would have to include clear guidelines on the transparency of the process and outcomes.

⁶ Alternatively, if the US State Department's National Contact Point on the *OECD Guidelines for Multinational Enterprises* were charged as the implementing agency of this legislation, firms could be required to verify that they have not been the subject of a complaint to the National Contact Point on the basis of noncompliance with the code of conduct.

⁷ No clear robust relationship (positive or negative) has been established between companies adopting ethical or socially responsible activities and stock performance. See, for example, Luc Renneboog, Jenke Ter Horst, and Chendi Zhang, "The Price of Ethics and Stakeholder Governance: The Performance of Socially Responsible Mutual Funds," *Journal of Corporate Finance* 14, no. 3 (2008): 302–322, and Ioannis Oikonomou, Chris Brooks, and Stephen Pavelin, "The Impact of Corporate Social Performance on Financial Risk and Utility: A Longitudinal Analysis," *Financial Management* 41, no. 2 (2012): 483–515.

⁸ Sander Hoogendoorn, Hessel Oosterbeek, and Mirjam Van Praag, "The Impact of Gender Diversity on the Performance of Business Teams: Evidence from a Field Experiment," *Management Science* 59, no. 7 (2013): 1514–1528.

⁹ Indeed, views are mixed about the impact of the overall bill let alone the impact of the requirements on US investors. See Philip I. Levy, "Sanctions on South Africa: What Did They Do?" *American Economic Review* (1999): 415–420 versus Simon J. Evenett, "The Impact of Economic Sanctions on South African Exports," *Scottish Journal of Political Economy* 49, no. 5 (2002): 557–573.

¹⁰ Multinational corporations originating from countries with more rights of association and collective bargaining and those coming from countries with unions that have strong wage bargaining power are found to pay significantly higher wages to their workers in host countries (Merima Ali and Adnan Seric, *Diffusion of Labor Standards from Origin to Host Countries: Cross County Evidence from Multinational Companies in Africa*, Robert Schuman Centre for Advanced Studies Research Paper 2014/22, European University Institute, 2014). Foreign-owned firms are more likely to protect labor rights than their domestically oriented counterparts (Layna Mosley, "Taking Workers' Rights on the Road? Multinational Firms and the Transmission of Labor Practices," Department of Political Science, University of North Carolina at Chapel Hill, 2013).

¹¹ Potential comparator legislation might be the [Foreign and Corrupt Practices Act](#) (FCPA), which criminalizes the payment of bribes to foreign officials and makes corporations liable for bribes paid by employees. The penalties in that act are considerably harsher than those proposed here. There is [some disagreement](#) on the impact of the FCPA on corruption or on US firm competitiveness, exports, and investments. Note, however, that while it might be plausible that being unable to bribe an official may put a firm at a competitive disadvantage, it is more difficult to imagine that legally hiring a woman would do so.