

## THE EVOLUTION OF LATIN AMERICA'S SEXUAL HARASSMENT LAW: A LOOK AT MINI-SKIRTS AND MULTINATIONALS IN PERU

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### INTRODUCTION

While Latin America's socioeconomic conditions have been deeply transformed in the past decade, its legal systems remain nascent in addressing new challenges posed by these circumstances. Primarily due to social, political, and legal reforms, most Latin American countries have been able to reach sustained economic growth and desirable levels of political stability. This growth and stability have in turn promoted, increased, and reshaped regional trade.

An important factor in achieving sound economic results throughout the region has been the implementation of aggressive legal frameworks to attract foreign investors. Latin American countries currently participate as members of the World Trade Organization, which has been designed to implement the General Agreement on Trade and Tariffs, a comprehensive international trade agreement aimed at liberalizing trade among member nations.<sup>1</sup> In addition, regional trade agreements implemented in the past decade, like the North American Free Trade Agreement, have led the way to the development of additional local regulation to attract the foreign investor. For exam-

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1. See Keven H. Friedman & Christine R. Mertz, Note, *'Borderline' Sexual Harassment: A Study of Sex Based Discrimination in the United States and Argentina and the Problem of Extraterritorial Application of U.S. Law*, 15 HOFSTRA LAB. & EMP. L.J., 569 (1998).

ple, in 1991, Peru launched a strong campaign eliminating most statutory privileges, subsidies, and state monopolies, thereby demonstrating to the international business community its serious intention to create a genuine free-market system.<sup>2</sup> Peru's message was serious enough to rank it first among developing countries whose markets offered the most interest to investors.<sup>3</sup> Nonetheless, these reforms overlook protection of the individual at the workplace from employment discrimination.

Imbedded in the economic transformation of Latin America, and at the forefront of re-shaping local legal reforms, are the multi-national corporations (MNCs). MNCs shape perspectives, customs, and most local issues. Their operations are often so large in scope as to have a significant impact on regional trade, the rights and lives of the many workers they employ, and the legal systems under which these rights are protected. For instance, U.S.-based MNCs alone employ almost seven million people overseas,<sup>4</sup> while their foreign counterparts hire millions of local and foreign workers throughout Latin America and other parts of the world. A large number of these employees are subject to employment discrimination, including some form of sexual harassment. Despite the increasing number of sex discrimination claims in the United States and at the local level, specific legislation addressing employer liability for sexual harassment is yet to be developed throughout Latin America. In essence, the right of an individual to a workplace free of sexual harassment as a form of employment discrimination can be simply set aside as an additional human right in need of protection.

Employment discrimination regulation of the MNC employer in Latin America will most certainly affect regional trade regimes, individual human rights, and the emergence of adequate legislation. Part I of this article will discuss the cultural challenges MNCs face when operating in a foreign culture and the need to acculturate its employees to the laws of that country. Part II will address the evolution of legislation protecting women in Latin America from the supranational arena to local legislation. Part III of this article will then analyze foreign legislation addressing sexual harassment in the region from a comparative law perspective. Moreover, by using Peru as a case study, this article will discuss how MNCs, governed by foreign legal norms on issues such as sexual harassment and discrimination, face allegations brought by foreign employees under Peruvian law. Part IV will address the extraterritoriality of Title VII of the U.S. Civil Rights Act of 1964 (as amended by the Civil Rights Act of 1991), recent U.S. Supreme Court deci-

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2. See Sandra Orihuela, *Latin America: A New Era For Mining Investment*, 30 INT'L LAW. 31, 49 (1996).

3. See *id.* at 48. As of December 1999, Peru had entered into 332 legal stability guarantee agreements with foreign investors, totaling \$8.2 million. See *Aspectos de Relevancia Económica: Inversión Extranjera*, BOLETIN INFORMATIVO (Rey & De Los Rios Abogados, Lima, Peru), Jan. 2000, at 1(5).

4. See Philp B. Rosen & Felice B. Ekelman, *The Global Impact of U.S. Employment Laws: Pitfalls For the Multinational Employer*, JACKSON LEWIS CORP. CONF. 2000, at 1 (1997).

sions such as *Faragher v. City of Boca Raton*<sup>5</sup> and *Burlington Indus. v. Ellerth*,<sup>6</sup> and their likely impact on the evolution of Latin America's regulation of workplace behavior. Finally, this article will conclude by outlining a vision of the legal framework necessary in Peru to address the challenge of regulating MNCs to minimize workplace discrimination in Latin America.

## I. CULTURAL DIFFERENCES AND SEXUAL HARASSMENT

The new millennium brings with it major global business operations and strengthens the MNCs ability to diversify the workplace like never before. Many corporations are now hiring individuals able to relocate throughout its foreign subsidiaries. These employees, some in supervisory positions, work directly and intimately with diverse groups of people, and must quickly learn customary social and business practices that differ from their own.

For example, sexual harassment for Czechoslovakians is considered "a stupid invention of hysterical American feminists" that you are "supposed to laugh about."<sup>7</sup> "Obscene jokes, suggestive remarks, unwelcome advances, [and] gentle slaps on one's buttocks . . . are all part of a regular day for many [Czech] women who" belong to the workforce.<sup>8</sup> While talking about sex is not considered taboo in many countries, "the concept of sexual harassment is widely perceived as a Western plague that threatens to spoil the 'natural' relations between men and women."<sup>9</sup> For instance, a compliment paid to a secretary in New York by her boss may be frowned upon in the United States, but in other countries the same behavior may be considered harmless flirting, "which makes the working day more enjoyable."<sup>10</sup> By the same token, if a boss grasps a female employee by her shoulders, in many South American countries it might just be considered "graceless paternalism."<sup>11</sup> Depending in what country the conduct takes place, American employers must consider deeply-rooted attitudes, customs, and social climate before alleging "sexual harassment" as defined under U.S. law.

In addition, sexual harassment is not exclusive of men towards women. It also includes harassment of men towards men and women against women. Because of the social tradition of Latin American countries, however, it is women who are in desperate need of protection. Therefore, one must analyze the "traditional" form of harassment by the male employer in a position of authority against women employees.

The different outlook on women throughout the history of Latin Ameri-

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5. 524 U.S. 775 (1998).

6. 524 U.S. 742 (1998).

7. Ladka Bauerova, *Czech Poll: Harassment of Women is Common*, N.Y. TIMES, Jan. 9, 2000, at 7.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

can countries, especially Andean-region countries, is a consequence of the male being the breadwinner for centuries, and thus monopolizing the job market. Women were in the background. It is only in the second half of the twentieth century that females stepped forward to compete with males for different job positions.<sup>12</sup> In 1997, the Peruvian economically active population (EAP) reached 10 million people, of which 3.5 million were women between the ages of eighteen and twenty-four.<sup>13</sup> According to statistics from the National Statistics Institute of Peru, in the year 2015, forty percent of the EAP will be women.<sup>14</sup> Inevitably, the workplace will be affected by the increased interpersonal relationships between men and women.

In addition, the operations of MNCs in Latin America have increased the international exposure of local workers to the rights of their foreign counterparts. Coupled with the precarious legal frameworks specifically addressing sexual harassment in Latin American countries, this exposure is likely to increase the number of lawsuits stemming from foreign subsidiaries. Thus, it is in the best interest of MNCs to familiarize its executives in supervisory positions with acceptable business practices corresponding to the different idiosyncrasies, customs, and rights of its employees.

In practice, however, acculturating executives or supervisors in any corporation to the local employee, as well as acculturating the local employee to the foreign supervisor's way of doing business, can be a difficult task. In countries like Peru, with great influx of Japanese immigrants, the traditional culture expects women to be submissive towards men. It must not then surprise us that one Peruvian author, whose reference book precisely discusses the protection of women in the workplace, has referred to women as "having one more fiber in the heart and one less cell in the brain."<sup>15</sup> Nevertheless, women in Peru do occupy high-ranking positions in Congress, the Judiciary, the Executive, and other key government and business positions; however, they must still defy deeply-rooted attitudes.<sup>16</sup> The absence of legal norms, and the Peruvian traditional culture, however, should never serve as a justification to ignore that discrimination in employment exists.

Although we are far from an international standard as to what conduct constitutes sexual harassment, MNCs, at a minimum, should educate their employees according to an objective standard combining internationally recognized rights and the customs of the country of operation. As a general proposition, a U.S. executive cannot just treat his Peruvian secretary accord-

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12. See Luis Delgado Aparicio, *El Acoso Sexual en el Trabajo* (last modified Sept. 15, 1997) <<http://www.elcomercioperu.com.pe/>>.

13. See *id.*

14. See *id.*

15. TEODOSIO A. PALOMINO, *HOSTIGAMIENTO SEXUAL: LA MUJER EN EL TRABAJO I* (1993).

16. Some women have been denied promotions as executives of corporations because they "would have difficulty conducting business in South America from a hotel room." *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981).

ing to the laws of Peru,<sup>17</sup> but must take into account international standards that go beyond the presently lacking local legislation. Therefore, in countries where there is an absence of specific legislation on sexual harassment, MNCs will face legal situations leading to uncertainty as to the applicable forum or legislation.

## II. INTERNATIONAL CLIMATE

International law on the subject of human rights offers some guidelines for the protection and recognition of women's rights. At the international level, for instance, women gained significant protection through international treaties such as the Convention on the Political Rights of Women<sup>18</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women<sup>19</sup> (which gave treaty status, and thus legal effect, to the Declaration on the Elimination of Discrimination Against Women).<sup>20</sup> While International Organizations like the United Nations, the Organization of American States, and the International Labor Organization urge exacting compliance of international treaties, Latin American countries do not promote a widespread knowledge of these norms. As a result of the lack of dissemination and ineffectual accessibility by the population, there seems to be little or no use of these international guidelines by local legislators in charge of the protection and defense of women's human rights.<sup>21</sup>

Conscious of the discrimination affecting women in developing countries, the governments of Bolivia, Ecuador, Peru, Colombia, Argentina, and Venezuela have all signed and ratified the Convention on the Elimination of All of Forms of Discrimination Against Women.<sup>22</sup> This Convention sought to broaden the interpretation of human rights while recognizing certain cultural and traditional limitations, including stereotypes hindering women in the workplace. The preamble of the Convention called for a modification of the traditional roles of both men and women in society.<sup>23</sup> The specter of women in extreme poverty situations prompted the inclusion of Article 5 of

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17. See e-mail from David E. Block, Managing Partner, *Jackson, Lewis, Schnitzler & Krupman* (Miami Office), to Abigail Montjoy (Mar. 22, 2000) (on file with the *California Western International Law Journal*).

18. Convention on the Political Rights of Women, entered into force July 7, 1976, 27 U.S.T. 1909, 193 U.N.T.S. 135.

19. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1980).

20. Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263, U.N. GAOR, 22d Sess., Supp. No. 16, at 35, U.N. Doc. A/6716 (1967).

21. See Diego García-Sayán & Violeta Bermúdez, *Introduction to INSTRUMENTOS INTERNACIONALES DE PROTECCION DE LOS DERECHOS DE LA MUJER* 5 (1997).

22. See *id.* at 68-71.

23. See Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 19, pmb1; *INSTRUMENTOS INTERNACIONALES DE PROTECCION DE LOS DERECHOS DE LA MUJER*, *supra* note 21, at 50.

the Convention. Poor economic situations in South America force women to accept servile and dependent working conditions impacting, over time, their own conduct. Article 5 of the Convention urged the States members to adopt laws modifying the socio-cultural behavior of men and women, aiming to eliminate prejudices and customary practices based on the idea of inferiority or superiority of the sexes, or on the stereotyped functions of women and men.<sup>24</sup>

It was not until 1994, in the Inter-American Convention to Prevent, Penalize, and Eradicate Violence Against Women (Convention of Belem do Para)<sup>25</sup> that women in the region were explicitly recognized the right to a workplace free of sexual harassment. This instrument was specifically targeted to include countries in Latin America. Consequently, Peru, Bolivia, Ecuador, Venezuela, Argentina, Brazil, and others, signed and ratified it.<sup>26</sup> Thus, in 1994, South American women were finally asserted the right to work in an environment free of discrimination based on sex. Even if this right was yet to be implemented, it provided recognition of a basic individual right to working women in Latin America.

Additionally, the International Labor Organization (ILO) also recognized the importance of protecting women from discrimination through its Conference for the Resolution on Equal Opportunity and Equal Treatment for Men and Women in Employment.<sup>27</sup> The Conference, whose goal was the elimination of all forms of discrimination, specifically stated in its resolution that “[s]exual harassment at the workplace is detrimental to employees’ working conditions and to employment and promotion prospects . . . [and policies should therefore be developed] to include measures to combat and prevent sexual harassment.”<sup>28</sup> Eventually, Argentina codified the resolutions of the ILO’s Conference at the national level in its Law of Contracts regarding employment.<sup>29</sup> Notwithstanding these concerted efforts, on February 26, 2000, the U.S. State Department issued its annual report. The report’s conclusion regarding the situation of human rights violations in Latin America grimly stated that “among other violations of human rights, Latin American countries continue with violence and discrimination against women, abuses to children . . . and an inadequate protection of Indian rights.”<sup>30</sup>

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24. See Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 19, art. 5; INSTRUMENTOS INTERNACIONALES DE PROTECCION DE LOS DERECHOS DE LA MUJER, *supra* note 21, at 54.

25. Inter-American Convention to Prevent, Penalize, and Eradicate Violence Against Women, *adopted* June 9, 1994, G.A. OAS, Inter-American Comm’n of Women, 24th Sess., 33 I.L.M. 1534.

26. See INSTRUMENTOS INTERNACIONALES DE PROTECCION DE LOS DERECHOS DE LA MUJER, *supra* note 21, at 120.

27. See Conference for the Resolution on Equal Opportunity and Equal Treatment for Men and Women in Employment, *cited in* Friedman & Mertz, *supra* note 1, at 616.

28. *Id.*

29. See Friedman & Mertz, *supra* note 1, at 616.

30. *Informe Sobre los Derechos Humanos*, NUEVO HERALD, Feb. 26, 2000, at 1B.

At the local level, the position of women in Peru and most South American countries remains a highly complex matter because it not only varies with class and ethnicity, but also with a change of the position of a woman in society.<sup>31</sup> Unlike women in the United States, who rightfully occupy top corporate positions, most Andean-region women throughout centuries have mostly been involved in agricultural production, transformation of agricultural products at home, and handicraft.<sup>32</sup> Coastal women have been more likely to work in clerical jobs for corporations.<sup>33</sup>

The Peruvian Constitution of 1993 recognized a person's fundamental right to its moral, physical and psychological integrity;<sup>34</sup> to the same treatment under the law without discrimination of any kind;<sup>35</sup> to the right to work freely according to law;<sup>36</sup> to peace;<sup>37</sup> to the right to tranquility, to the enjoyment of free time and to days off from work.<sup>38</sup> Although the Peruvian Constitution grants its citizens the right of equality under its law and calls for dignity as the supreme end of its society and government, it fails to expand on these rights. In actuality, Peru has no specific laws protecting its citizens against discrimination based on sex. The guidelines introduced by international treaties and conventions are yet to reach the workplace, and thus, legislation subjecting the employer to liability for employment discrimination in Peru is yet to be implemented.

### III. COMPARATIVE OVERVIEW OF SEXUAL HARASSMENT LEGISLATION

Sexual harassment was first legislated in the United States around 1975,<sup>39</sup> having great impact on international legislation. At the global level, while many countries have specific legislation on the subject, some regulate the conduct under the criminal code, the labor code, or from a human rights perspective.<sup>40</sup> For instance, in Japan, allegations of sexual harassment may be brought under the civil and criminal codes, and the harasser, if criminally convicted, could face up to seven years in jail.<sup>41</sup> Countries like Costa Rica, Puerto Rico, and Chile, have specific legislation protecting employees from

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31. See Sandra Orihuela, *Sustainable Development: Its Social, Political & Legal Implications Peru, A Case Study*, 4 COLO. J. INT'L & ENVTL. L. & POL'Y 434, 452 (1993).

32. See *id.*

33. See *id.*

34. See Constitución Política del Perú (1993), art. 2(1).

35. See *id.* art. 2(2).

36. See *id.* art. 2(15).

37. See *id.* art. 2(22).

38. See *id.*

39. Proyecto de Ley No. 2842, Antonio Florez & Beatriz Merino, *Exposicion de Motivos*.

40. See *id.*

41. See *Japanese Governor Charged with Sexual Assault*, MIAMI HERALD, Dec. 22, 1999, at 15A.

sexual harassment in the workplace.<sup>42</sup> Other countries, like those of Central Europe, have not codified sexual harassment as a criminal offense, and victims usually sue for violations to the labor code.<sup>43</sup>

In Peru, the 1991 Criminal Code does not include sexual harassment as a specific crime, but instead, a more vaguely defined misdemeanor against "public honor."<sup>44</sup> A woman that has been sexually *assaulted* at work, however, may bring charges under Article 170 of the 1991 Peruvian Criminal Code, if the victim has already performed a sexual act with the employer under intimidation or fear,<sup>45</sup> thus bringing this crime closer to the figure of common law rape. Under Peruvian criminal law, a woman subject to sexual harassment, which does not rise to the level of sexual assault, cannot bring criminal charges against her employer. This means that under the current criminal law, women can only bring forward criminal charges after they have had sexual intercourse with the defendant.<sup>46</sup> Furthermore, allegations of sexual assault require evidence of actual coitus with the defendant under apprehension of fear, threats, or intimidation.<sup>47</sup> Therefore, women in Peru are severely restricted in their rights to file suit against their employer for sexual harassment.

On the other hand, the Criminal Code offers some protection under Article 183 if immoral conduct takes place in a public place.<sup>48</sup> Although the Code does not provide a definition for "public place," it has been construed to mean either in the presence of at least two witnesses, or in a place open to the public.<sup>49</sup> It provides for incarceration of no more than two years to "the person who, *in a public place*, exhibits, gestures, touches or observes any other conduct of obscene nature."<sup>50</sup> Therefore, this recourse is inapplicable to situations where the employer is alone with the victim in an office setting. In contrast, although the Civil Code does not embrace claims for sexual harassment, it may allow monetary compensation.

Unlike the U.S. common law system, however, the civil law system does not award victims millionaire recoveries. Under the doctrine of "civil responsibility," victims may seek limited monetary redress for moral wrongs (*daño moral*).<sup>51</sup> The doctrine of "civil responsibility" consists of the pecuniary obligation to redress an injury or damage, including a moral wrong, that

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42. *See id.*

43. *See* Bauerova, *supra* note 7.

44. *See* PALOMINO, *supra* note 15, at 98.

45. *See id.* at 108.

46. *See id.* at 108-09.

47. *See id.* at 109.

48. *See* Peruvian Criminal Code, art. 183 (1991) (emphasis added), *cited in* PALOMINO, *supra* note 15, at 93.

49. *See* PALOMINO, *supra* note 15, at 98.

50. Peruvian Criminal Code, art. 183 (1991) (emphasis added), *quoted in* PALOMINO, *supra* note 15, at 93.

51. JULIO J. MARTÍNEZ VIVOT, *ACOSO SEXUAL EN LAS RELACIONES LABORALES* 98 (1995).



arises from a previous contract, legal norm, or from the facts of the case.<sup>52</sup> Even in the unlikely event that the employee is successful in litigating a sexual harassment lawsuit, these types of lawsuits are extremely limited in their recovery, given that they require proof of a moral injury outside any contractual obligation on the part of the employer.<sup>53</sup>

Furthermore, on legislation pertinent to sexual harassment, Peru does not yet have a labor code in effect, but Legislative Decree 728 may offer some protection for the employee on this matter.<sup>54</sup> Also known as the "Law of Labor Competitiveness and Productivity," LD 728 is the first Peruvian norm to address sexual harassment generally.<sup>55</sup> Its scope is broad, encompassing "every corporation and every employee abiding by the labor regime of private enterprises."<sup>56</sup> Due to the ongoing campaign to attract foreign investors, LD 728 integrates the concept of treating foreign and local corporations in the private sector alike, offering no preferential treatment. Therefore, foreign subsidiaries are considered local "employers" and its employees can make their rights locally actionable under LD 728.

The sexual harassment conduct covered by LD 728 includes verbal acts against the employee or the employee's family,<sup>57</sup> acts of discrimination based on sex,<sup>58</sup> and specifically, immoral acts, sexual harassment, and all of those acts including dishonest attitudes affecting the employee's dignity.<sup>59</sup> Similar to the affirmative defense established in the *Faragher v. City of Boca Raton*<sup>60</sup> and *Burlington Indus. v. Ellerth*<sup>61</sup> opinions, where the employee is required to take advantage of the employer's complaint procedure in order to initiate an investigation,<sup>62</sup> under LD 728, the employee must first notify her employer in writing prior to initiating legal action. This notification serves the purpose of giving the employer a minimum grace period of six natural days to discharge the harasser or stop the harasser's behavior.<sup>63</sup> While the Decree gives the victimized employee a legal recourse, it does not

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52. JULIA INFANTE LOPE, DICCIONARIO JURIDICO 266 (1984).

53. See MARTÍNEZ VIVOT, *supra* note 51, at 98.

54. See Decreto Legislativo No. 728, Ley de Productividad y Competitividad Laboral [hereinafter LD 728].

55. See *id.*

56. *Id.* art. 4 (Título III, Capítulo II).

57. See *id.* art. 30(e) (Título I, Capítulo IV).

58. See *id.* art. 30(f) (Título I, Capítulo IV).

59. See *id.* art. 30(g) (Título I, Capítulo IV).

60. 524 U.S. 775 (1998)

61. 524 U.S. 742 (1998).

62. Under U.S. law, the employer is entitled to an affirmative defense. "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." John E. McFall & Mary Elaine G. Haden, *New Sexual Harassment Rules-At Home and Abroad*, 790 PRACTICING L. INST. (PLI/COMM) 399, 405 (1999).

63. See LD 728 art. 30(g) (Título I, Capítulo IV).

give the employer any deadline to either investigate the victim's claims, discharge the harasser, stop his conduct, or offer some type of protection to the victim. In addition, the law does not set the standard of immoral acts nor dishonest attitudes, thus creating a sizeable gap of exempt behavior.

While the employee victim of sexual harassment is offered nebulous protection under the current labor law of Peru, the employer is virtually omnipotent. Under LD 728, the employee who considers herself a victim of sexual harassment at work is required to terminate her labor contract first, in order to file suit against her employer.<sup>64</sup> In contrast to the recovery allowed under U.S. federal law for emotional pain and suffering, the only monetary redress the victim is entitled to under LD 728, in the unlikely event of a victory for the plaintiff, is a severance pay equivalent to up to one year of the victim's salary.<sup>65</sup> In the event the victim may have suffered a "moral wrong" (*daño moral*), she may be entitled to some additional monies under the civil law theory of "civil responsibility." In certain rare instances, the courts in Argentina have also granted additional compensation under the doctrine of "moral wrong" to supplement the victim's limited compensation received from the Law of Labor Contracts.<sup>66</sup> This Law regulates the contractual relationship entered into between employee and employer pursuant to the traditional civil law system, in contrast to the U.S. at-will system of employment.

Essentially, the options of the employee are very clear. Either the employee tolerates the sexual harassment and keeps the job, or joins the millions of Peruvians out on the streets without any type of financial support. In third world countries, where labor stability may appear to be respected as a constitutional right,<sup>67</sup> a job is sometimes the only means of financial support for an entire family. In a country like Peru, where the minimum wage in the year 2000 is 345 soles per month,<sup>68</sup> it is preposterous to expect that an employed woman will consider terminating her employment in order to file charges against her employer. Thus, the employer is free to continue his intimidation and harassment with impunity.

The fact that the Peruvian Constitution recognizes equality under the law, the right to safety and dignity, as well as labor stability, raises issues of constitutionality in this respect. The right to have or hold employment is considered a "constitutional right" allowing the victim to have a constitutional claim. Yet in practice, the courts have placed little or no weight to this right. This is another reason to urge Latin American nations to provide specific protection to their employees in respect to sexual harassment at work and from the ineffective judicial process.

Fortunately, not all countries in Latin America lack clear and specific

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64. See *id.* art. 35 (Titulo I, Capitulo V).

65. See *id.* art. 38 (Titulo I, Capitulo V).

66. See Friedman & Mertz, *supra* note 1, at 617 n.396.

67. See, e.g., Constitución Política del Perú art. 2(15) (1993).

68. Currently, the equivalent to one U.S. dollar is 3.49 Peruvian soles. See *El Comercio (Peru)* (visited Apr. 18, 2000) <<http://www.elcomercioperu.com.pe/>>.

legislation granting employees the right to work in an environment free of sexual discrimination. Although far from offering the legal remedies and protections offered in the United States, Argentina explicitly addresses sexual harassment in the public sector.<sup>69</sup> Under Decree No. 2385/93, Argentinean law prohibits its government employees from sexually harassing other employees or using their supervisory position to induce another to accept sexual demands.<sup>70</sup> The law explicitly disregards the requirement of sexual intercourse.<sup>71</sup> Argentina is further considering the passing of a law that sanctions sexual harassment under the Criminal Code.<sup>72</sup>

Additionally, the Argentine Department of Labor has also issued a guide entitled "Sexual Harassment in the Workplace," where it defines this type of conduct. Under Argentinean law, the elements of sexual harassment are:

[1] any pressure of a sexual nature; [2] whether physical or verbal, explicit or implicit; [3] not welcomed by one [who] suffers it; [4] exercised by any person; [5] by virtue of their employment relationship; and [6] which results in a hostile environment affecting the dignity of the worker, conditions of promotion and job retention.<sup>73</sup>

Unlike U.S. law, Argentinean legislation does not require that the employer know or should have known of the harassment and failed to take remedial action.

Argentina defines sexual harassment as conduct occurring between a supervisor and employee, however, specifically within the public sector.<sup>74</sup> Under Argentinean law, rejection of sexual advances by the victim is necessarily required, but it is not required for the victim not to perform the sexual act.<sup>75</sup> On the contrary, it allows the victim to allege that she performed the sexual act in fear of losing her job.<sup>76</sup>

Analogous to the legal situation in Peru, Argentina lacks specific protection for the victimized employee of a private corporation under its current labor law. Its Labor Contract Law (*Ley de Contrato de Trabajo*) requires the employee of a private enterprise to first terminate her employment in order to file charges against her employer.<sup>77</sup> On the other hand, the victim may retain her employment and demand the cessation of such sexual discrimination.<sup>78</sup>

Undisputedly, there is a lack of precise labor laws defining sexual har-

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69. See MARTÍNEZ VIVOT, *supra* note 51, at 75.

70. See *id.* at 77.

71. See *id.* at 78.

72. See *id.*

73. Friedman & Mertz, *supra* note 1, at 611 n.360.

74. MARTÍNEZ VIVOT, *supra* note 51, at 77.

75. Friedman & Mertz, *supra* note 1, at 610-13.

76. See MARTÍNEZ VIVOT, *supra* note 51, at 39.

77. See *id.* at 92.

78. Friedman & Mertz, *supra* note 1, at 617-18.

assment in most Latin American countries. The undesired emotional, judicial, and corporate costs that this lack of legislation generates for Latin American nations is difficult to estimate because sexual intimidation in the work place is mainly a hidden problem. Women are not quick to come forward with charges of sexual harassment. The social embarrassment, humiliation, and stress added to the lack of precise legislation, as well as the unreliable and ineffective forums, and the time, expense and minimal recoveries, if any, do not make the whole effort worthwhile.

The examples of Peru and Argentina are a reflection of Latin American behavior not too unusual for emerging regions. While Latin American countries are quick to draft legislation attracting the foreign investor, they are exceptionally slow in legislating to protect their nationals basic rights—such as a workplace free from sexual discrimination—which are likely to be affected by a larger local workforce and the interaction of foreign and local customs.

#### IV. IMPACT OF U.S. LEGISLATION ON MNCs IN LATIN AMERICA

MNCs doing business in Latin America can be subject to liability arising from the sexual harassment of the employees of their foreign subsidiaries. As previously discussed, under most Latin American legislation, sexual harassment is a vaguely defined violation of an individual's human rights. U.S.-based MNC's, however, may be subject to the more strict and comprehensive U.S. legislation covering employment discrimination. Thus, MNCs can face many challenges in defending allegations of employment discrimination by their subsidiaries overseas. Due to their increased presence in Latin America, many plaintiff employees will be foreign nationals, as opposed to only U.S. citizens, and thus, the MNC conduct will not necessarily be governed by U.S. legislation. Given this conflicting scenario, it is difficult to ascertain the best manner in which MNCs should defend allegations of sexual harassment stemming from its operations in Latin America. This section provides an overview of how U.S. legislation deals with employment discrimination, its extraterritorial reach, as well as the interplay between U.S. and local legislation with respect to MNCs. It further discusses the defenses available to U.S. MNCs while pointing out that litigation in the United States brought by a foreign employee is no longer an idealism.

The key U.S. federal law that applies to allegations of discrimination on the basis of sex is Title VII of the Civil Rights Act of 1964.<sup>79</sup> This law was amended in 1991 to apply extraterritorially to U.S. citizens employed overseas by U.S. corporations or "American controlled" employers.<sup>80</sup> Title VII prohibits discrimination and harassment on the basis of sex, race, national origin, color, and religion.<sup>81</sup>

79. 42 U.S.C.A. §§ 2000e-2 –2000e-17 (West 1998).

80. See Civil Rights Act of 1991, P.L. 102-166, §109, 105 Stat. 1071, 1076 (1991); see also Rosen & Ekelman, *supra* note 4, at 3.

81. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 –2000e-17

In 1998, the U.S. Supreme Court issued two decisions which for the first time defined employer liability under Title VII for purposes of sexual harassment by supervisors with immediate, or successively higher authority, over the employee. In *Faragher v. City of Boca Raton*<sup>82</sup> and *Burlington Indus. v. Ellerth*,<sup>83</sup> the Court sanctioned the employer as automatically liable when any tangible employment action results from a supervisor's sexual harassment of an employee.<sup>84</sup> Only when no tangible employment action results may the employer raise affirmative defenses to avoid liability.<sup>85</sup> Thus, an employer can prevent liability if it proves, as an affirmative defense, that it had a program to prevent sexual harassment, including an effective complaint procedure, and the employee unreasonably failed to utilize it. In order for employers to minimize allegations of sexual harassment, they should have a clearly communicated written policy, in English and other languages if necessary; an effective complaint procedure for its employees, including a well-defined program for retaliation; and a comprehensive program for training supervisors and employees on the contents of the policy and complaint procedure.<sup>86</sup>

The key factor in imputing liability under the *Faragher/Ellerth* decisions is determining whether the alleged harasser has the authority to affect the terms and conditions of the victim's employment.<sup>87</sup> One who has "the power to hire, fire, demote, promote, transfer, or discipline an employee," is considered to have such "authority."<sup>88</sup> Other employees, however, could also subject the employer to liability, but not automatically. In these cases, the courts will focus on whether the employer knew or should have known of the harassing conduct and failed to take prompt remedial action.<sup>89</sup>

The Court's definition of "tangible employment action" is such that constitutes "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>90</sup> This tangible employment action should be an official company act or an act officially documented by the corporation. Thus, if the employee made changes voluntarily, they do not qualify to impute liability to the employer.<sup>91</sup>

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(1999).

82. 524 U.S. 775 (1998).

83. 524 U.S. 742 (1998). This article refers to the Supreme Court's decisions in *Faragher* and *Ellerth* jointly as *Faragher/Ellerth*.

84. See *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 766.

85. See McFall & Hadden, *supra* note 62, at 405.

86. See *New Rules on Sexual Harassment*, PREVENTIVE STRATEGIES SPECIAL REP. (Jackson, Lewis, Schnitzler & Krupman, Miami, Fla.), Summer 1998.

87. See McFall & Haden, *supra* note 62, at 403.

88. *Id.* at 404 (quoting *Parkins v. Civil Constructors, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998)).

89. See *id.*

90. *Id.* at 405 (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998)).

91. See *id.*

In respect to the applicability of Title VII outside U.S. borders, before 1991 there was no specific reference to whether Congress intended to apply Title VII to U.S. citizens working for U.S. companies abroad. In *EEOC v. Arabian American Oil Co.*,<sup>92</sup> Ali Boureslan, a U.S. citizen born in Lebanon, was transferred by his U.S. employer to its Saudi Arabia subsidiary and was subsequently terminated.<sup>93</sup> As a result, he filed suit against the company claiming racial and religious discrimination.<sup>94</sup> The District Court for the Southern District of Texas held that Congress did not express a clear intent that Title VII should apply overseas.<sup>95</sup> On appeal, the Fifth Circuit Court of Appeals affirmed the District Court's decision.<sup>96</sup> When the case reached the Supreme Court, the Court found insufficient evidence to conclude that Congress intended Title VII to apply extraterritorially.<sup>97</sup> Boureslan argued that Congress intended the statute to apply extraterritorially because it had specifically included § 702(b), which excluded *aliens*, and by implication, did not exclude U.S. citizens employed outside the United States.<sup>98</sup> The Court, however, rejected this argument and held that the provision exempted aliens employed outside the United States, and demonstrated Congressional intent to apply Title VII to aliens working *within* the United States only.<sup>99</sup> Thus, up to 1991, foreign and U.S. employees of MNCs working overseas could be discriminated in the workplace.

After the Court's holding in *EEOC*, however, Congress accepted the Court's dictum, which raised the issue of extending Title VII to apply extraterritorially.<sup>100</sup> Only a few months after the Supreme Court decided *EEOC*, Congress passed the Civil Rights Act of 1991.<sup>101</sup> The Act amended Title VII of the Civil Rights Act of 1964 in part by specifically including the section "Protection of Extraterritorial Employment."<sup>102</sup> The Amendments to Title VII expanded the definition of "employee" to include *any* U.S. citizen employed by a U.S. company in a foreign country.<sup>103</sup> The Amendments protect aliens and U.S. citizens alike within the United States, however, outside the United States only U.S. citizens are protected. Aliens were explicitly excluded from protection abroad upon Title VII establishing that "with respect to employ-

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92. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

93. *See id.* at 247.

94. *See id.*

95. *Boureslan v. Arabian American Oil Co.*, 653 F. Supp. 629, 630 (S.D. Tex. 1987).

96. *Boureslan v. Arabian American Oil Co.*, 892 F.2d 1271 (5th Cir. 1990).

97. *See EEOC*, 499 U.S. at 244; *see also* Mary McKlveen Madden, *Strengthening Protection of Employees at Home and Abroad: The Extraterritorial Application of Title VII of the Civil Rights Act of 1964 and The Age Discrimination in Employment Act*, 20 *HAMLIN L. REV.* 739 (1997).

98. *See EEOC*, 499 U.S. at 248; *see also* Rosen & Ekelman, *supra* note 4, at 5.

99. *See EEOC*, 499 U.S. at 255-57; *see also* Rosen & Ekelman, *supra* note 4, at 6.

100. *EEOC*, 499 U.S. at 248.

101. Civil Rights Act of 1991, P.L. 102-166 § 109, 105 Stat. 1071, 1076 (1991).

102. *See id.* § 109.

103. *See id.*

ment in a foreign country, such term includes an individual who is a citizen of the United States.”<sup>104</sup>

As a general proposition, Title VII discriminates based on citizenship. Resident aliens working within the United States may seek redress if they have been sexually harassed, however, if the same resident alien is transferred to a position in Mexico for the same corporation, she loses her protected status. The law within the United States protects U.S. citizens and aliens with a legal right to work, but the United States has no obligation to protect aliens outside its borders. Title VII protects at-will aliens from sexual harassment in the United States, but it does not extend its protection to foreign workers suffering discrimination overseas.

For example, assuming that a Mexican citizen has a legal right to work in the United States, Title VII protects the Mexican alien in the United States, but in the event that she rotates overseas, Title VII no longer applies. If the sexual harassment laws did not apply in the United States then her employer would have the ability to sexually harass at-will aliens.<sup>105</sup> Therefore, legal residents working for an American employer outside the United States are subject to being treated according to the laws of the country where they are presently working. In other words, the U.S. government has the authority to regulate the conduct of its citizens and it also may regulate the conduct of non-citizens who are in the United States, but has no legal obligation to regulate the conduct of foreign nationals working abroad for U.S.-based MNCs. It has no right, for example, to regulate the conduct of one Peruvian towards another Peruvian in Peru.<sup>106</sup>

Nevertheless, the regulation of employers under Title VII is different than that of the individuals working for them. Pursuant to the Civil Rights Act of 1991, American citizens employed abroad are within the protection of Title VII if their employer is American or “controlled by an American employer.”<sup>107</sup> Typically, the place of incorporation dictates the nationality of the employer.<sup>108</sup> However, even if the employer is incorporated outside the United States (or is not a corporation), the Equal Employment Opportunity Commission (EEOC), will consider an employer American if it has numerous contacts with the United States.<sup>109</sup> The EEOC will consider factors like the employer’s place of business, nationality of dominant shareholders, and the location of management, officers, and directors.<sup>110</sup> Although the decision

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104. E-mail from David E. Block, *supra* note 17 (quoting §109 of the Civil Rights Act of 1991).

105. *See id.*

106. *See id.*

107. Civil Rights Act of 1991, P.L. 102-166, §109, 105 Stat. 1071, 1076 (1991).

108. *See Rosen & Ekelman, supra* note 4, at 10.

109. *See id.*

110. *See* EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND ADA TO AMERICAN FIRMS OVERSEAS AND TO FOREIGN FIRMS IN THE UNITED STATES (Oct. 20, 1993), *reprinted in* EEOC MAN. N:2401, N: 2412.

does not rest in any one factor, the EEOC will apply a balancing test and find an employer to be "American" where these factors suggest a significant connection to the United States.<sup>111</sup>

On the other hand, Title VII also allows employees to sue their "American controlled" employers. Title VII presumes that where a U.S. employer controls a corporation in a foreign country, and the corporation engages in discriminatory practices prohibited by Title VII, the U.S. employer did actually engage in the practice.<sup>112</sup> In order to determine whether an employer does or does not control a corporation, Title VII sets out a four-prong test<sup>113</sup> similar to that of the EEOC, that includes the following: "(A) the interrelation of operations; (B) the common management; (C) the centralized control of labor relations; and (D) the common ownership or financial control, of the employer and the corporation."<sup>114</sup>

The single-enterprise test serves a double purpose. Primarily, it determines whether or not an American employer controls a subsidiary doing business in Latin America or in other parts of the world. Secondly, it permits the courts to combine the number of employees of both companies in order for the subsidiary to meet the statutory requirement of fifteen employees.<sup>115</sup> For instance, in *Armbruster v. Quinn*,<sup>116</sup> the Court of Appeals for the Sixth Circuit concluded that two companies were an integrated enterprise, and allowed the combination of employees from both corporations in order to meet the fifteen-employee minimum required to activate Title VII.<sup>117</sup> The importance of the single-enterprise test is that once a court finds that an employer controls a foreign subsidiary, subsequently, the statutory presumption may be immediately activated, possibly imputing liability to the domestic corporation.<sup>118</sup> The extraterritoriality of Title VII, however, has its limits. MNCs that are not incorporated in the United States, or parent corporations that are not found to be "American controlled" under the single-enterprise test, are exempt from allegations of discrimination by a U.S. citizen employee stemming from the employer's foreign operations.

Should a U.S. employer be sued by an employee working for its subsidiary in Latin America, the corporation has various defenses. Section 702(b) of Title VII provides an employer a defense from liability where compliance with this statute may violate the law of a foreign country where the workplace is located.<sup>119</sup> The "foreign law defense" has three elements:

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111. See Rosen & Ekelman, *supra* note 4, at 10.

112. See 42 U.S.C.A. § 2000e(f) (West 1998).

113. Also known as the "single-enterprise test."

114. 42 U.S.C.A. § 2000e-1(c)(2)(West 1998).

115. See Rosen & Ekelman, *supra* note 4, at 10-12.

116. 711 F.2d 1332 (6th Cir. 1983).

117. See *id.* at 1335.

118. See Rosen & Ekelman, *supra* note 4, at 15 n.26.

119. See 42 U.S.C.A. § 2000e-1(b). Section 702(b) of Title VII provides that:



“(1) the action is taken with respect to an employee in a workplace in a foreign country, where (2) compliance with Title VII . . . would cause the [employer] to violate the law of the foreign country, (3) in which the workplace is located.”<sup>120</sup>

In this respect, the EEOC and U.S. courts have attempted to define what constitutes foreign law. This definition is of special interest in dealing with countries like Peru, where the Executive dissolved Congress and created an array of conflicting norms by legislating by way of executive decrees.<sup>121</sup> Under the EEOC’s narrow approach, the foreign law must be specifically legislated or included in a statute.<sup>122</sup> In other words, religion or customs would be excluded.

The foreign law defense would be relevant, however, in cases where the firing of a harasser employee is in contradiction with his labor (or union) contract under Peruvian law. Unlike at-will employment in the United States, employers in Peru are bound by a labor contract where the employee’s right to labor stability is constitutionally protected.<sup>123</sup> The contract prohibits the employer from firing the employee without cause, and the causes are specified in the Peruvian Labor Code.<sup>124</sup> Therefore, the U.S. employer could avoid liability in situations where a U.S. supervisor is committing flagrant sexual harassment, but has been hired under a Peruvian labor contract that does not specify violation of American law as a cause for termination of employment.

Title VII provides the employer yet another defense against allegations of unlawful discrimination. Section 703(e)(1) of Title VII establishes that “religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>125</sup> In order to be successful in raising this defense, an employer must show that all or substantially all of the members of the protected group would be incapable of performing the necessary functions of the position *but for the occupational qualification* (the “BFOQ” defense).<sup>126</sup>

In *Fernandez v. Wynn Oil Co.*,<sup>127</sup> the Court of Appeals for the Ninth Cir-

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It shall not be unlawful under section 2000e- or 2000e-3 for an employer (or a corporation controlled by an employer), labor organization, employment agency . . . to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, . . . to violate the law of the foreign country in which such workplace is located.

*Id.*

120. See EEOC, *supra* note 110.
121. See Orihuela, *supra* note 31, at 438.
122. See Rosen & Eckelman, *supra* note 4, at 18.
123. See PALOMINO, *supra* note 15, at 32, 34.
124. See *id.* at 33.
125. Civil Rights Act of 1964, P.L. 88-352, Title VII, § 703(e)(1), 78 Stat. 255 (1964).
126. See Rosen & Eckelman, *supra* note 4, at 20.
127. 653 F.2d 1273 (9th Cir. 1981).

cuit found masculine gender not to be a BFOQ defense for a U.S. corporation doing business in South America.<sup>128</sup> Wynn Oil Corporation hired the plaintiff, a U.S. citizen, as Administrative Assistant to the Vice President of International Operations.<sup>129</sup> When the acting vice president left the company, plaintiff applied for the position, but the employer rejected her promotion based on its Latin American customers' preference to deal with male executives.<sup>130</sup> The employer felt that "Latin American clients would react negatively to a woman Vice-President of International Operations."<sup>131</sup> The court held that "stereotypic impressions of male and female roles do not qualify gender as a BFOQ" defense.<sup>132</sup> Furthermore, the court stated that a "stereotyped customer preference" does not "justify a sexually discriminatory practice," even when those customer preferences are those of a foreign nation.<sup>133</sup> The court found no BFOQ defense because the essence of the employer's business would not be disturbed if its discrimination against women were to be held unlawful.<sup>134</sup>

The extraterritoriality of anti-discrimination laws is a problematic issue. Not only can an employer be sued under the anti-discrimination laws of the United States, but it may also be subject to the laws applicable to its subsidiary overseas. In addition, a recent trend in U.S. court rulings poses a more significant problem for the U.S. MNC doing business abroad—it may be subject to employment related litigation in the U.S. by a foreign citizen employed by its subsidiary overseas.

In *Rodriguez-Olvera v. Salant Corporation*,<sup>135</sup> the District Court of Maverick County, Texas, held that a U.S. corporation may be subject to jurisdiction, and face liability, in a U.S. court for actions that arise in a foreign country, involving foreign residents, and stemming from actions of the corporation's foreign subsidiary.<sup>136</sup> Twenty-six Mexican workers at the defendant's Mexican subsidiary were killed or injured when the company's bus, en route to their work site, overturned and burned in a sewage ditch.<sup>137</sup> Every Plaintiff in the lawsuit was a citizen and resident of Mexico.<sup>138</sup> The defendant employer was a New York based corporation with subsidiaries in Texas and Mexico.<sup>139</sup>

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128. *See id.* at 1274.

129. *See id.*

130. *See id.*

131. *Id.*

132. *Id.* at 1276.

133. *Id.* at 1277.

134. *See id.* at 1276-77; *see also* Friedman & Mertz, *supra* note 1, at 593 n.396.

135. Case No. 97-07-14605-CV (Dist. Ct. of Maverick County, Tex. 1999).

136. *See id.*

137. *See id.*

138. *See id.*

139. *See* Sergio A. Leiseca et al., *Increased Exposure of U.S. Corporations to Lawsuits in the U.S. Stemming from Operations in Mexico*, LATIN AM. L. & BUS. REP., Dec. 31, 1999, at 16.

The employer defendant moved to dismiss the complaint arguing the existence of an alternative forum in Mexico and that the case should be litigated there.<sup>140</sup> The court denied the motion to dismiss and held that the foreign subsidiary was "American controlled" by the Texas corporation because it made the operating decisions for the corporation's Mexican operations.<sup>141</sup> Appeals by the employer, both to the Fourth District Court of Appeals in Texas and the Texas Supreme Court, against the trial court's ruling were rejected without comment.<sup>142</sup> In the interim, the defendant settled the case for \$30 million on August 16, 1999.<sup>143</sup>

Although the verdicts are not numerous, U.S. courts have permitted sexual harassment claims to be brought against U.S. corporations by foreign plaintiffs. For example, the case of *Aguirre v. American United Global*<sup>144</sup> was filed in 1994 in Los Angeles Superior Court. In this case, a Mexican subsidiary, wholly owned by a Los Angeles-based corporation, was participating in "blatant and disgusting sexual harassment" against Mexican employees.<sup>145</sup> The company held a picnic where 118 female employees were demanded to hold a bikini show for one of its executives to videotape.<sup>146</sup> The 118 plaintiffs filed the action in Los Angeles Superior Court and alleged violations under both Mexican and American law.<sup>147</sup> The defendant's motion for summary judgment was denied and the case was subsequently settled for an undisclosed amount.<sup>148</sup>

In light of these growing lawsuits, U.S. employers who operate in South America must consider the implications of this recent trend in court rulings. As a general proposition, only U.S. citizens can take advantage of Title VII, however, the *Rodriguez-Olvera* case has put fear into parent companies with overseas operations. Although *Rodriguez-Olvera* did not involve allegations of sexual harassment, its importance is paramount to alert U.S. employers of the future increment of lawsuits filed by Latin American employees for actions stemming from its operations in Latin America. If there is "control" over the overseas subsidiary by the U.S. parent, some courts will allow non-U.S. citizens to take advantage of U.S. law and sue in U.S. courts.<sup>149</sup> Because of the favorable outcome in *Aguirre*, Mexican victims of sexual harassment have a new window of opportunity to sue their employers under two different sets of laws in U.S. courts. Because of the tremendous settlement amount

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140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. Case No. BC 118159 (L.A. Super. Ct. Cal. 1994).

145. Leiseca et al., *supra* note 139.

146. *See id.*

147. *See id.*

148. *See id.*

149. *See* E-mail from Jordan W. Cowman, Managing Partner, *Baker & McKenzie* (Dallas, Texas Office), to Sergio A. Leiseca (Feb. 23, 2000) (on file with the *California Western International Law Journal*).

in *Rodriguez-Olvera*, plaintiff's attorneys in the U.S. are eagerly interested in locating and representing allegedly wronged individuals and employees in Mexico.<sup>150</sup>

In addition, MNCs involved in transnational litigation must also take into consideration jurisdictional and forum issues. In *Piper Aircraft Co. v. Reno*,<sup>151</sup> the court held that a plaintiff's choice of forum carried little weight when the plaintiff was not a U.S. citizen or resident.<sup>152</sup> The Court did not find the foreign plaintiff's choice of forum in the U.S. reasonable.<sup>153</sup> A typical foreign plaintiff, however, will bring suit in the United States even if the conduct in question occurred abroad.<sup>154</sup> Under the denominated "forum shopping" doctrine, the foreign plaintiff may try to bring a claim of sexual harassment that occurred abroad under either the courts of the foreign country or the courts in the United States, wherever she feels she will receive the most favorable verdict.

As lawsuits stemming from international operations of MNCs abroad increase, foreign plaintiffs will consider the better chances of lucrative recoveries obtainable in U.S. courts. From a Latin American perspective, where the minimum wage is scarce and jobs are difficult to find, an American company is regarded as having deep pockets. Additionally, the availability of trials by jury, where emotions play a major role, makes U.S. courts even more attractive to foreign plaintiffs. Unlike the United States, civil law countries do not submit cases to a jury of their peers, but to a judge they almost never see. Unfortunately, these factors work to the disadvantage of the defendant employer in contemplation of litigation. Plaintiff's choice of forum may handicap the defendant by making the discovery process burdensome, costly, and inconvenient. The evidence will have to be produced overseas and in a foreign language. The defendant will have to prove its case to a jury that might be conformed of unsympathetic jurors. In most instances, the uncertainty of the outcome of the case will force the defendant to settle in order to avoid costly litigation.

## CONCLUSION

New trade regimes, social, political and legal reforms, increased foreign investment, and the world's interconnection revolutionized traditional ways of behavior and the manner in which business is conducted. The world economy welcomed common markets and eased trade restrictions, applauded the mixture of dissimilar resources, and achieved amazing gains by means of the Internet and the interchange of people. More and more individuals are nowadays exposed to international trends and customs and are no

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150. See Leiseca et al., *supra* note 139, at 17.

151. 454 U.S. 235 (1981).

152. See *id.* at 239.

153. See *id.* at 238.

154. See Rosen & Eckelman, *supra* note 4, at 39.

longer isolated by distance, culture, or gender. Given this scenario, Latin America and other emerging markets are more exposed than ever to the presence of MNCs. Consequently, the increased interaction of diverse groups of people has led to unresolved issues over how and which regulations should apply in solving critical employment matters, such as discrimination relating to sex.

This article emphasized the fact that Peru, as a case study reflective of the present situation in Latin America, needs to improve existing legislation in order to afford adequate protection to its employees. This protection needs to exist in terms of both the local and the foreign employer. In addition, given the internationalization of markets and the business benefits derived by MNCs, these businesses should also expect to derive the "negative" implications that may arise from their presence overseas. One of these negatives, at least from the employer's perspective, is to subject the MNCs to the higher standards of their countries of origin in their labor and employment practices.

The best alternative, however, remains for the local country, which is the direct beneficiary of the presence of the MNC, to possess the adequate protection needed to protect its labor force. As emerging countries, such as Peru, have been able to modify their legal and political systems in such a way as to attract substantial foreign capital and much needed investment, the local country should also strive to raise social protections to the level of its attractive investment policies. In the case of Peru, although a much needed labor code should be a first step towards specifically addressing the issue of discrimination based on sex, this reform alone, could not counter the more serious problems that the country has yet to solve in this respect. For example, in 1999 the Peruvian Congress passed a bill to withdraw the country from the jurisdiction of the Inter-American Court of Human Rights (IACHR), the most important regional human rights body.<sup>155</sup> The decision came at a time when the IACHR was expected to announce several unfavorable decisions regarding human rights violations committed by the Peruvian government. Since 1978, the IACHR has heard cases against the government of Peru when its citizens have claimed that they have been victims of government-sponsored human rights abuses. Therefore, the protection of women through a labor code, or any other means, cannot be seen as a top priority in a country where human rights violations are not punishable, flagrantly overlooked by the government, and in much need of being legislated upon.

In the interim, local workers, especially women, should be afforded specific type of protection. One reasonable approach is to offer this protection by way of the laws of her foreign employer. For instance, for U.S.-based MNC's, extending the protection offered in Title VII independent of citizenship and extraterritoriality limitations. In the specific case of U.S. MNCs,

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155. See *Peru Wants to Get Out of Human-Rights Court*, ORLANDO SENTINEL, July 8, 1999, at A16.

some courts have already allowed foreign plaintiffs to bring their claims to the United States in connection with their employment disputes. Although it could be argued that allowing foreign plaintiffs to litigate in the United States against the U.S. parent of their employer could flood U.S. courts and open a Pandora's box of delicate international issues, mechanisms already in place in this country would most likely prevent such a situation. For instance, the EEOC would be involved in the same manner as if a lawsuit was brought by a U.S. plaintiff, thus screening cases, allowing the employer an opportunity to solve the employment discrimination problems, and permitting only viable cases to continue their way through the courts. Additionally, alternate dispute resolution mechanisms could be mandated before those claims reach litigation. The bottom line is that the socioeconomic conditions that have in fact been transformed during the past decade, mostly by the manner in which business is presently conducted through MNCs, need to be afforded the appropriate legal system, be it locally or internationally. Either way, the legal system cannot be nascent any longer in addressing the challenges posed by these circumstances.