# ***NOTE:* EQUAL EMPLOYMENT OPPORTUNITY FOR AMERICANS ABROAD.**

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**Text**

**[\*1288]** INTRODUCTION

Despite a worldwide consensus against employment discrimination, [[1]](#footnote-2)1 such discrimination, often officially sanctioned, is still a pervasive international problem. [[2]](#footnote-3)2 In fact, many American businesses operating outside the territorial United States defy United States policy as well as international human rights agreements by discriminating among United States citizens [[3]](#footnote-4)3 on the basis of race, religion, sex, and national origin. [[4]](#footnote-5)4 Large numbers of United States nationals work abroad. [[5]](#footnote-6)5 As more women and minorities join the workforce [[6]](#footnote-7)6 increasing numbers may desire overseas employment. As American business becomes less the preserve of white men and more international, the United States legal guarantees of equal employment opportunity will increasingly conflict with discriminatory customs and laws of other nations.

**[\*1289]** The employment of United States citizens by United States companies [[7]](#footnote-8)7 is governed by Title VII of the Civil Rights Act of 1964, [[8]](#footnote-9)8 which Congress enacted to eliminate discrimination in employment. [[9]](#footnote-10)9 Reflecting traditional American adherence to a view of equality rooted in individual rights, [[10]](#footnote-11)10 Congress declared it "a national policy to protect the right of persons to be free from such discrimination." [[11]](#footnote-12)11 Courts have acknowledged that Congress hoped that Title VII "would not only achieve the optimum use of our labor resources, but, and more importantly, would enable individuals to develop as individuals." [[12]](#footnote-13)12 Congress enacted Title VII to remove barriers that impede equal employment opportunity for all. [[13]](#footnote-14)13

When United States companies employ United States citizens in other countries, the United States's commitment to equal employment opportunity demonstrated in Title VII and in executive orders [[14]](#footnote-15)14 coincides **[\*1290]** with a second United States goal -- promoting the international human rights consensus against discrimination. [[15]](#footnote-16)15 These two goals sometimes conflict with a third guiding principle -- the legal tradition of international comity, which respects the sovereignty and laws of other nations. [[16]](#footnote-17)16 However, the obligation of comity expires when foreign law contravenes strong United States public policy. [[17]](#footnote-18)17 This is the case when United States businesses operate in countries that encourage or require discriminatory practices, such as Saudia Arabia [[18]](#footnote-19)18 or South Africa. [[19]](#footnote-20)19

Employers wishing to avoid application of Title VII to their foreign employment practices offer several arguments: first, that United States employment discrimination law does not apply to the foreign operations of United States companies; [[20]](#footnote-21)20 second, if it does apply, that Title VII's statutory exceptions exempt discrimination required by foreign countries; [[21]](#footnote-22)21 and third, that if the statutory exceptions do not apply and a conflict between Title VII and foreign law cannot be avoided, justifiable deference to the foreign law excuses noncompliance with Title VII. [[22]](#footnote-23)22

Very few courts have addressed the extraterritoriality of Title VII and conflicts with host country customs or law. All that have addressed the issue agree that the statutory language, [[23]](#footnote-24)23 legislative history, [[24]](#footnote-25)24 **[\*1291]** and administrative interpretation [[25]](#footnote-26)25 of Title VII support its extraterritorial application to United States citizens employed in the foreign operations of United States companies. [[26]](#footnote-27)26 They disagree, however, about whether any of the employers' arguments justify discriminatory practices abroad. [[27]](#footnote-28)27

This Note rejects the employers' explicit and implicit arguments excusing discrimination. It contends that Title VII prohibits United States companies operating abroad from discriminating in the employment of United States citizens. [[28]](#footnote-29)28 In Part I, the Note demonstrates that prohibiting **[\*1292]** United States companies from discriminating in the foreign employment of United States citizens is consistent with the general justifications for the extraterritorial application of United States law: protection of United States citizens from harm; prevention of substantial adverse effects to United States domestic interests; promotion of United States foreign policy; and enforcement of international norms and law. The Part thus makes clear that congressional regulation of the foreign employment practices of United States companies is consistent with both United States and international law.

Part II examines whether statutory exemptions to Title VII permit discrimination in foreign employment. This Part concludes that frequently profferred claims that customer preference, safety concerns, and foreign laws constitute bona fide occupational qualifications (BFOQs) [[29]](#footnote-30)29 and thus excuse discrimination have no more weight in the international context than they do in the United States, where they have been rejected. Similarly, employers claiming religious exemptions can only succeed to the limited extent that such claims would excuse discrimination within the United States.

Part III examines two related approaches used to resolve actual conflicts between Title VII and host country laws -- the foreign compulsion defense [[30]](#footnote-31)30 and the *Restatement (Third) of Foreign Relations Law'*s reasonableness test [[31]](#footnote-32)31 -- and concludes that, in light of the international human rights goal of equal employment opportunity, it is reasonable to enforce Title VII.

Part IV addresses the options of United States companies operating abroad when compliance with Title VII requires violating foreign customs or laws. It argues that companies resisting Title VII application have overstated the resulting problems. The Note therefore concludes that the United States commitment to equal employment opportunity and international human rights can be implemented by the enforcement of Title VII with few detrimental consequences.

**[\*1293]** I

JUSTIFICATION FOR REGULATING FOREIGN EMPLOYMENT PRACTICES OF UNITED STATES EMPLOYERS

Applying United States law to activities and persons outside the United States is not a new venture. [[32]](#footnote-33)32 Although territoriality is the traditional basis for jurisdiction, [[33]](#footnote-34)33 both United States and international law recognize that countries may regulate the behavior of their nationals outside their territorial borders. [[34]](#footnote-35)34 Because United States courts attribute United States nationality to the overseas operations of companies incorporated in the United States [[35]](#footnote-36)35 or companies controlled by United States persons or entities, [[36]](#footnote-37)36 the United States exercises extraterritorial jurisdiction over a great many persons, entities, and activities.

United States laws may properly apply extraterritorially when they promote one of four goals: [[37]](#footnote-38)37 protection of United States nationals and their interests; [[38]](#footnote-39)38 prevention of substantial adverse effects to United States **[\*1294]** domestic interests; [[39]](#footnote-40)39 promotion of United States foreign policy; [[40]](#footnote-41)40 and enforcement of international norms and law. [[41]](#footnote-42)41

*A. Protection of Nationals Abroad*

International law increasingly recognizes extraterritorial jurisdiction to protect nationals' interests in matters such as wills and succession, divorce and family rights and, in some cases, liability for injury. [[42]](#footnote-43)42 In addition, a state may apply its law to acts committed outside its territory when the victim of the act is its national. [[43]](#footnote-44)43 Protecting nationals from harm extends to protecting United States citizens from employment discrimination outside the territorial borders of the United States. For example, in the mid-1970s the League of Arab Nations [[44]](#footnote-45)44 pressured United States companies to join a boycott of Israel that affected the trade practices of United States companies and encouraged discrimination based on national origin and religion. [[45]](#footnote-46)45 The boycott thereby threatened the rights of individual Americans and interfered with the United States policy of equality. President Gerald Ford responded with a number of programs to prevent discrimination against Americans on the basis of race, color, religion, national origin, or sex that might arise from foreign boycotts. In addition, Congress amended the Export Administration Act of 1969 [[46]](#footnote-47)46 in **[\*1295]** large measure to ensure that the boycott did not encourage discriminatory employment practices in the United States. [[47]](#footnote-48)47 Although the United States's past experience with foreign boycotts may not be dispositive of its general willingess or ability to apply its laws extraterritorially, its response to the Arab Boycott is significant because it demonstrates the nation's commitment to protecting its citizens' interest in equality in the face of strong international pressure to discriminate.

*B. Protection of Domestic Interests*

United States laws also apply extraterritorially to regulate foreign behavior that might adversely affect the United States's domestic interest. [[48]](#footnote-49)48 Congress frequently regulates "*entirely foreign . . . commerce which has a substantial effect on commerce between . . . the United States and foreign countries*" [[49]](#footnote-50)49 by enacting legislation regulating the foreign operations of United States corporations that conduct business with foreign corporations and foreign nations. [[50]](#footnote-51)50

Although employment discrimination abroad may appear to take place in another nation, much of the covered conduct may occur within the territorial United States or have a substantial effect here. For example, many companies frequently advertise opportunities for foreign employment, accept applications, screen and interview applicants, and **[\*1296]** ultimately hire individuals within the territorial United States for foreign employment. [[51]](#footnote-52)51 Similarly, because foreign service may be a prerequisite to promotion within the hierarchy of American multinational enterprises, [[52]](#footnote-53)52 allowing companies to discriminate on the basis of race, religion, sex, or national origin in the assignment of employees abroad will often lead to discriminatory promotional practices at home. [[53]](#footnote-54)53 Discriminatory practices abroad thus directly affect Americans in the domestic work force. Avoiding the adverse effects of these practices justifies the extraterritorial application of United States civil rights laws.

*C. Promotion of Foreign Policy*

The advancement of United States foreign policy is the third justification for the extraterritorial application of United States law. [[54]](#footnote-55)54 The United States has long imposed trade controls regulating exports and imports for political ends. [[55]](#footnote-56)55 For example, restrictions on United States corporations and their foreign subsidiaries in South Africa, [[56]](#footnote-57)56 Poland, [[57]](#footnote-58)57 Afghanistan, [[58]](#footnote-59)58 and the Soviet Union [[59]](#footnote-60)59 have constituted both symbolic gestures [[60]](#footnote-61)60 and arguably effective instruments for advancing human **[\*1297]** rights. [[61]](#footnote-62)61 By regulating the trade practices of United States companies, the United States expresses its condemnation of human rights violations abroad. Similarly, by prohibiting United States companies from discriminating on the basis of race, religion, sex or national origin in their foreign as well as domestic operations, the United States expresses its opposition to discrimination abroad and may also help to end it.

*D. Enforcement of International Law*

The fourth goal of extraterritoriality is the enforcement of international law and norms. [[62]](#footnote-63)62 A growing international consensus against discrimination based on race, religion, sex, and national origin is embodied in many international treaties and instruments. [[63]](#footnote-64)63 For example, the preamble **[\*1298]** and several articles of the United Nations Charter obligate members to respect and enforce human rights without regard to race, sex, or religion. [[64]](#footnote-65)64 Similarly, the Universal Declaration of Human Rights prohibits discrimination based on race, sex, and religion. [[65]](#footnote-66)65 In particular, there is a growing consensus against discrimination in employment; international treaties and agreements as well as the proposed Draft Code of Conduct on Transnational Corporations [[66]](#footnote-67)66 prohibit discrimination in hiring, [[67]](#footnote-68)67 pay, [[68]](#footnote-69)68 and promotions. [[69]](#footnote-70)69 Not only have most nations become signatories to international agreements condemning discrimination, [[70]](#footnote-71)70 but **[\*1299]** the laws and constitutions of many nations also reflect this commitment. [[71]](#footnote-72)71

Obviously, the existence of international agreements on human rights does not negate the fact that many governments violate these norms, either through official acts [[72]](#footnote-73)72 or by toleration of private violations. [[73]](#footnote-74)73 However, such violations neither invalidate the existence of an international consensus to promote human rights nor undermine its importance. The international agreements demonstrate that ending discrimination based on race, sex, and religion is an international goal. [[74]](#footnote-75)74

The United States has demonstrated its support for this goal in several ways. Not only is it a signatory to many of the relevant international agreements, [[75]](#footnote-76)75 but it also codified its opposition to discrimination with the enactment of the Civil Rights Act of 1964. [[76]](#footnote-77)76 Title VII of the Act unquestionably applies to both foreign and United States companies operating in the United States. [[77]](#footnote-78)77 In addition, the United States enforces the right to be free from discrimination by applying certain laws extraterritorially. [[78]](#footnote-79)78 For example, the 1977 Amendments to the Export Administration Act forbid United States companies, including those operating overseas, from participating in foreign boycotts that require "discriminat[ion] against any United States person on the basis of race, religion, sex or national origin." [[79]](#footnote-80)79

It would be highly inconsistent for the United States to sign international agreements, enact domestic laws, and vocally support human rights while permitting a United States company to discriminate abroad simply because a boycott does not exist. [[80]](#footnote-81)80 At a minimum, the United **[\*1300]** States commitment to the international consensus on ending discrimination calls for the extraterritorial application of United States civil rights laws to the foreign operations of United States companies employing United States citizens. [[81]](#footnote-82)81

This examination demonstrates that applying Title VII to the foreign operations of United States companies serves all four goals of extraterritoriality. [[82]](#footnote-83)82 Nevertheless, despite the support of United States and international law, there may be opposition to the United States's regulating the employment practices of United States corporations operating abroad. In the past, some countries opposed the extraterritorial application of United States law when the United States claimed to reasonably exercise its jurisdiction to prescribe. [[83]](#footnote-84)83 For example, Canada, Australia, Switzerland, and the United Kingdom have opposed the extraterritorial application of United States antitrust laws and discovery orders. [[84]](#footnote-85)84 However, foreign nations are less likely to object or are less likely to object with reason when extraterritoriality promotes a widely held goal. [[85]](#footnote-86)85 For **[\*1301]** example, many nations supported restrictions on business conducted in and with Rhodesia, [[86]](#footnote-87)86 and more recently endorsed similar sanctions against business in and with South Africa. [[87]](#footnote-88)87 Because Title VII is consistent with the widely endorsed right of equality in employment opportunity, [[88]](#footnote-89)88 opposition to its extraterritoriality by foreign nations and United States companies should be muted or at least not compelling.

II

TITLE VII STATUTORY DEFENSES: THE INAPPLICABILITY OF THE BONA FIDE OCCUPATIONAL QUALIFICATION AND RELIGIOUS EXEMPTIONS

Statutory exemptions within Title VII permit discrimination when a bona fide occupational qualification (BFOQ) is reasonably necessary to the normal operation of that particular business [[89]](#footnote-90)89 or when the employment is at a religious institution that performs work connected with the propagation of a particular religion. [[90]](#footnote-91)90 Because Title VII applies extraterritorially, [[91]](#footnote-92)91 United States companies are legally barred from discriminating in the foreign employment of United States citizens unless one of these exemptions applies. Not surprisingly, employers operating in countries with customs or laws hostile to equal employment opportunity often stretch and even distort these exemptions in an effort to excuse discriminatory practices. This Part reviews these exemptions and concludes that United States employers can justify employment discrimination in their foreign operations only in the very few situations in which such practices would be tolerated domestically.

*A. The BFOQ Exemption*

The scope of the BFOQ exemption to Title VII is very narrow. [[92]](#footnote-93)92 **[\*1302]** Although a few members of Congress wanted to exempt a broad range of activities from Title VII coverage, [[93]](#footnote-94)93 legislative history indicates that an intent to create "a very limited exception" prevailed. [[94]](#footnote-95)94 Guidelines issued by the Equal Employment Opportunity Commission (EEOC) define BFOQs very narrowly, tolerating discrimination in only a few limited cases [[95]](#footnote-96)95 in which business operations *require* the discrimination. [[96]](#footnote-97)96

A BFOQ exists only when substantially all persons of the specified class are unable to perform a job. [[97]](#footnote-98)97 Although this definition appears to permit the use of the BFOQ defense based on group rather than individual characteristics, [[98]](#footnote-99)98 courts have limited this use of the defense. [[99]](#footnote-100)99 First, employers cannot deny jobs to members of a class based on stereotypical assumptions about the class that lack a factual basis. [[100]](#footnote-101)100 For example, employers cannot deny women strenuous jobs, such as railroad operator, on the assumption that no women can safely lift thirty pounds. [[101]](#footnote-102)101 Second, even when there is a factual basis for those assumptions, employers must whenever possible evaluate individual capacities to perform the job duties. [[102]](#footnote-103)102 Some courts limit BFOQs to instances in which characteristics of an individual employee, as distinguished from characteristics that correlate with a particular class, are crucial to the successful performance of a job. [[103]](#footnote-104)103 Under this interpretation, a BFOQ exists only where every member of a class cannot perform the job. As a result, no BFOQs based on race, [[104]](#footnote-105)104 and very few based on religion, sex, or national origin can exist. For example, sex can be a BFOQ only when it is a biological prerequisite to successful job performance, as in the case of employment as a **[\*1303]** wet nurse. [[105]](#footnote-106)105

Several United States employers with operations abroad have claimed BFOQs based on customer preferences, [[106]](#footnote-107)106 safety, [[107]](#footnote-108)107 and conflicting host country laws. [[108]](#footnote-109)108 Employers' arguments repeat those made and rejected as justifications for discrimination within the United States. Employers' reliance on each of these arguments is no more persuasive in the international arena than within the territorial United States.

*1. Customer Preference*

Employers frequently claim that the preference of customers or co-workers not to associate with members of a particular class constitutes a BFOQ in foreign employment. [[109]](#footnote-110)109 For example, in *Fernandez v. Wynn* ***Oil*** *Co.,* [[110]](#footnote-111)110 an international petrochemical manufacturer based in California refused to promote a female administrative assistant to vice-president of international operations. An official of the employer testified that he felt Latin American clients would react negatively to a female vice-president. [[111]](#footnote-112)111 The employer claimed that its discriminatory practice was justified because the job was to be performed in foreign countries where custom bars women from business. [[112]](#footnote-113)112

The defense raised in *Fernandez,* known as "customer preference," [[113]](#footnote-114)113 has never won acceptance as the basis of a BFOQ in domestic employment. [[114]](#footnote-115)114 When enacting Title VII, Congress rejected an amendment that would have permitted employers making hiring decisions to consider business good will and, therefore, customer attitudes and preferences. [[115]](#footnote-116)115 Congress recognized that equal employment opportunity is a fiction if clients or consumers can dictate discriminatory practices. [[116]](#footnote-117)116 **[\*1304]** Tolerating discriminatory customer preferences is antithetical to the purpose of the Civil Rights Act; EEOC regulations state that Title VII prohibits "[t]he refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers." [[117]](#footnote-118)117

Courts have repeatedly rejected customer preferences as a defense to discrimination on the basis of race [[118]](#footnote-119)118 and sex [[119]](#footnote-120)119 in this country. [[120]](#footnote-121)120 Only when customer preferences essentially amount to privacy claims have some courts found a BFOQ. [[121]](#footnote-122)121 Thus, courts have found that being the same sex as the customer or co-worker is a BFOQ for certain employees: those at youth centers who supervise daily showers and perform body searches of juvenile offenders, [[122]](#footnote-123)122 masseurs who have male clients, [[123]](#footnote-124)123 bathroom attendants, [[124]](#footnote-125)124 and nurses in hospital labor and delivery areas. [[125]](#footnote-126)125

Customer preference is no more a defense to discrimination in employment abroad than it is at home. [[126]](#footnote-127)126 For, as the Ninth Circuit recently wrote, to accept the defense in the foreign context "would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here." [[127]](#footnote-128)127 Thus, the United States refuses to let other countries' biases dictate discrimination in the hiring or appointment of United States government employees located abroad. [[128]](#footnote-129)128 Given the United States's commitment to equality in employment, **[\*1305]** a judicial interpretation of Title VII to give similar protection to the United States citizens employed in the foreign operations of United States companies is appropriate.

Moreover, the arguments advanced by employers to justify deference to foreign customer preferences and tolerance of employment discrimination in foreign employment are flawed. Some argue that because American sensitivities about privacy are accorded BFOQ status, deeply ingrained foreign customs merit similar treatment. [[129]](#footnote-130)129 Yet, domestic privacy claims are recognized only when they relate to the essence of a job. [[130]](#footnote-131)130 Privacy claims by foreign customers can therefore be accorded BFOQ status only when they meet this test. Some contend that the cultural differences between the United States and other countries require that customer preferences in host countries be given greater respect than domestic customs. [[131]](#footnote-132)131 However, because Title VII does not apply to nationals of the host country, [[132]](#footnote-133)132 the alleged effects on local sensibilities are minimized. [[133]](#footnote-134)133 Even if that were not true, the United States often acts without concern for the cultural autonomy of other nations when it wishes to promote human rights abroad. [[134]](#footnote-135)134 When employers comply with Title VII, they not only adhere to United States policy and law but also promote an international consensus on human rights and against discrimination in employment. [[135]](#footnote-136)135

At least two commentators argue that failing to respect the host country's customer preferences is contrary to the legislative intent because Congress enacted Title VII to alter attitudes in the United States, not in foreign countries. [[136]](#footnote-137)136 This argument fails to recognize that promoting **[\*1306]** equal employment opportunity of United States citizens overseas helps eradicate discriminatory practices and change preferences in the United States, thus fulfilling, not thwarting, congressional intent. [[137]](#footnote-138)137 Second, the argument assumes that changing American attitudes is Title VII's only purpose; in fact, the primary purpose of the legislation was to ensure equal employment opportunity for all individuals. [[138]](#footnote-139)138

*2. Safety*

A second claim made by employers is that a particular religion, sex, or national origin is a BFOQ because members of other groups would not be safe working in the host country. For example, in ***Kern*** *v. Dynalectron Corp.,* [[139]](#footnote-140)139 a United States helicopter company required all pilots who flew from Jeddah to Mecca, Saudi Arabia, to be Moslem. [[140]](#footnote-141)140 The company argued this was necessary because Saudi law prohibited the entry of non-Moslems into Mecca under penalty of death. [[141]](#footnote-142)141 The Fifth Circuit affirmed without opinion [[142]](#footnote-143)142 a Texas district court finding that the company had not violated Title VII. [[143]](#footnote-144)143

The Supreme Court has rejected safety of an employee as a justification for almost all cases of discrimination in the domestic context. [[144]](#footnote-145)144 It is antithetical to the purpose of Title VII -- equal employment opportunity **[\*1307]** -- to deny an individual the right to decide whether to take a dangerous job. Of course, the employer must adequately warn the prospective employee of the dangers she may encounter. Only if she makes an informed decision can she adequately assume the risks. [[145]](#footnote-146)145 But as long as a prospective employee is well informed about the possible dangers of foreign employment, Title VII requires that the decision be left to the individual. [[146]](#footnote-147)146 There is nothing inherent in foreign employment that transforms the safety of employees into a legitimate basis for a BFOQ. [[147]](#footnote-148)147

Employers also claim that religion, sex, or national origin constitute a BFOQ when hiring a member of a particular group endangers the safety of others. In the domestic context, this defense has been accepted in very narrow circumstances. In *Dothard v. Rawlinson,* the Court upheld discrimination against women guards in a prison with male prisoners because sex offenders would more likely assault women than men, thereby threatening the "control of the penitentiary and protection of its inmates." [[148]](#footnote-149)148 Several courts have upheld discrimination against pregnant flight attendants by citing the possibility that pregnancy-related incapacitation might interfere with the flight attendants' performance of emergency duties, thereby threatening the safety of the passengers. [[149]](#footnote-150)149 These decisions permit discrimination against women only because the courts presumed that all or substantially all pregnant women were physically unable to perform the job. [[150]](#footnote-151)150

**[\*1308]** Safety of others, then, can be the basis of a BFOQ exemption only when the employee can no longer perform her job duties. This narrow reach of the exemption is best illustrated by judicial interpretation of the Age Discrimination in Employment Act, [[151]](#footnote-152)151 a statute modeled on Title VII. [[152]](#footnote-153)152 In *Western Air Lines v. Criswell,* [[153]](#footnote-154)153 the Supreme Court reaffirmed that because physical ability is often independent of age, age qualifications must be "'reasonably necessary . . . to a particular business,' and that is only so when the employer is compelled to rely on age as a proxy for the safety-related job qualifications." [[154]](#footnote-155)154 The Court emphasized that BFOQs are concerned with the biological capacity to perform, not with cultural attitudes toward the elderly. [[155]](#footnote-156)155 Accordingly, safety can justify discrimination outside the United States only if it could do so domestically -- if the employee is unable to perform the duties required by the job.

*3. Host Country Laws*

United States employers also argue that host country laws prohibiting persons of a certain religion, sex, or national origin to hold certain jobs are BFOQs. [[156]](#footnote-157)156 This argument may be attractive to courts anxious to avoid the need for problematic conflict-of-laws analysis to determine whether Title VII or host country laws are controlling. Under this approach, a BFOQ exemption would permit United States employers to discriminate as required by the host country law. For example, in ***Kern*** *v. Dynalectron Corp.,* the employer required pilots flying to Mecca to be or become Moslem because Saudi law prohibited the entry of non-Moslems under penalty of death. The district court agreed with the employer that the Saudi law made being Moslem a BFOQ for the job of helicopter **[\*1309]** pilot. [[157]](#footnote-158)157 Construing Title VII to permit religious discrimination, the court avoided the need to resolve a conflict between enforcement of Title VII and Saudi law. [[158]](#footnote-159)158

However, because religion does not determine the capacity of an individual to fly a helicopter, the ***Kern*** court erroneously invoked the BFOQ defense. In fact, a post-***Kern*** EEOC decision rejected the argument that compliance with host country laws requiring violation of Title VII is grounds for a BFOQ defense. [[159]](#footnote-160)159 The Commission stated that the BFOQ defense is not available to a United States company that discriminates against applicants on the basis of sex in order to comply with a host country law prohibiting the employment of females in positions in which they would have contact with the opposite sex. [[160]](#footnote-161)160 The Commission noted that the sex of the applicant did not interfere with her ability to be an air traffic controller: "all or substantially all women" are not unable to perform the job. [[161]](#footnote-162)161

The use of the BFOQ defense to justify compliance with host country laws is problematic for several reasons. First, this defense would not be available to all United States employers facing host country laws that conflict with United States civil rights laws. Title VII specifies that a BFOQ defense may be based only on religion, sex, or national origin. [[162]](#footnote-163)162 Specifically omitted is discrimination based on race. [[163]](#footnote-164)163 Thus, if host country laws were a legitimate basis for BFOQs, United States employers could discriminate against a Jew or a woman in a Moslem country but not against a black in South Africa. Yet, an American woman or Jew in Saudi Arabia may encounter as much local hostility and as many discriminatory laws as would an American black in South Africa. Congress created a BFOQ provision for religion, sex, and national origin not because such customer preferences are stronger or more worthy of respect, but because on rare occasions these characteristics are essential to the duties of a job: [[164]](#footnote-165)164 for example, male gender to be a sperm donor, Jewish religion to be a rabbi, or appropriate national origin to be a waiter at an ethnic restaurant. [[165]](#footnote-166)165 Therefore, the mere existence of the BFOQ provision **[\*1310]** does not provide a consistent principle for permitting discrimination.

Permitting United States laws to trump host country laws requiring racial discrimination but requiring deference to foreign laws requiring discrimination based only on religion, sex, or national origin would be inconsistent with the purpose of Title VII -- to eliminate discrimination so that all individuals are treated according to their skills and abilities and not according to others' biases. [[166]](#footnote-167)166 Moreover, such an interpretation would be inconsistent with the nature of the BFOQ defense. [[167]](#footnote-168)167 Invoking the BFOQ defense to justify discrimination required by host country laws fundamentally distorts the BFOQ concept. This narrow defense addresses the job, not the community in which it is to be performed. It applies only when all or substantially all persons of a particular religion, sex, or national origin are unable to perform a job. [[168]](#footnote-169)168 An employer cannot discriminate on the basis of religion, sex, or national origin to satisfy the customer preferences of a foreign nation simply because those preferences are expressed in national legislation.

*B. Religion*

An additional statutory exemption from Title VII coverage is available to religious institutions that wish to employ "individuals of a particular religion to perform work connected with the carrying on . . . of [their] activities." [[169]](#footnote-170)169 An employer seeking to invoke this provision must meet the threshold requirement that it be "a religious corporation, association, educational institution, or society." [[170]](#footnote-171)170 Courts assessing the claims of these employers focus their inquiry on both the initial and current character and purposes of an entity, [[171]](#footnote-172)171 as well as its ties to expressly **[\*1311]** religious institutions. [[172]](#footnote-173)172 Merely doing business with religious institutions or religious customers or having religious board members does not qualify an employer as a religious entity. [[173]](#footnote-174)173

United States companies with foreign operations should have to pass the same scrutiny. Under this test, United States organizations that provide services abroad cannot discriminate on the basis of religion simply because they do business with religious individuals, entities, or states, but only if they could have qualified for such exemption within the United States. [[174]](#footnote-175)174

Thus, only in very limited cases does Title VII permit United States companies operating abroad to discriminate. The religious exemption is available to very few employers. A BFOQ can never exist based on race and can only rarely be based on religion, sex, or national origin. Customer preferences and host country laws never form the basis for a legitimate BFOQ defense. Safety concerns rarely do. These claims are no more compelling simply because they involve foreign employment and, thus, should be subject to the same scrutiny as similar claims offered domestically.

III

CONFLICT OF LAWS AND THE FOREIGN COMPULSION DEFENSE

In the typical discrimination case, neither the bona fide occupational defense nor the religious institution exception is available, so that Title VII prohibits United States companies from discriminating in their foreign as well as domestic operations. When host country laws require employment discrimination, a conflict with Title VII is unavoidable. **[\*1312]** Conflicts between the extraterritorial application of United States laws [[175]](#footnote-176)175 and foreign laws are not new. [[176]](#footnote-177)176 However, neither United States law nor international law provides an easy resolution. [[177]](#footnote-178)177 On the one hand, the strength of the United States's legal commitment and the international consensus against employment discrimination militate against allowing other nations to dictate American policy. [[178]](#footnote-179)178 On the other hand, the tradition of respecting the sovereignty and laws of another nation -- international comity [[179]](#footnote-180)179 -- weighs against enforcing United States laws when a violation of the laws of a friendly nation would result. [[180]](#footnote-181)180

The few courts that have confronted a conflict between Title VII and host country laws have not developed a systematic approach to the problem. [[181]](#footnote-182)181 At least one lower court [[182]](#footnote-183)182 and one commentator [[183]](#footnote-184)183 have **[\*1313]** suggested that employers can successfully claim foreign compulsion as a defense to violating Title VII. However, this Note argues that the reasonableness test found in the *Restatement (Third) of Foreign Relations Law of the United States* [[184]](#footnote-185)184 is more appropriate for resolving such conflicts.

*A. The Foreign Compulsion Defense*

The foreign compulsion defense emerged as courts increasingly confronted conflicts between the extraterritorial application of United States laws and host country laws. [[185]](#footnote-186)185 The defense was frequently claimed in cases involving the extraterritorial application of antitrust and other United States laws when a United States court issued orders of production or other discovery sanctions that conflicted with foreign nondisclosure laws. [[186]](#footnote-187)186 Courts recognized that it was reasonable to protect a party "from being caught between the jaws of [a] judgment and the operation of laws in foreign countries where it does its business." [[187]](#footnote-188)187 The foreign compulsion defense is a corollary to the act of state doctrine, [[188]](#footnote-189)188 which prohibits United States courts from adjudicating the validity of acts of another sovereign nation. [[189]](#footnote-190)189 Like the act of state doctrine, the foreign **[\*1314]** compulsion defense is not concerned with the validity or legality of the foreign government's order. [[190]](#footnote-191)190 The foreign compulsion defense provides that acts of businesses compelled by the host country's laws should be considered acts of the sovereign itself and hence protected from liability for violating United States laws. [[191]](#footnote-192)191

The proponent of the foreign compulsion defense bears the burden of establishing that it was compelled to violate United States laws. [[192]](#footnote-193)192 A foreign sovereign's mere approval, [[193]](#footnote-194)193 authorization, [[194]](#footnote-195)194 support, [[195]](#footnote-196)195 or even involvement in the act [[196]](#footnote-197)196 does not constitute compulsion. Neither **[\*1315]** unnecessarily broad interpretations of vague laws [[197]](#footnote-198)197 nor government actions solicited by the defendant [[198]](#footnote-199)198 satisfy the compulsion burden. Rather, the acts that violate United States law must be required by foreign law and the penalty for violation must be harsh. [[199]](#footnote-200)199 Even if a foreign law requires a violation of a United States law, the proponent of the foreign compulsion defense must show that it has exhausted all local remedies to eliminate the conflict. [[200]](#footnote-201)200 Similarly, the foreign compulsion defense is not available to businesses that decide to locate in a country that they know requires violating United States laws. [[201]](#footnote-202)201

United States employers confronting host country laws hostile to Title VII often claim foreign compulsion, although sometimes without expressly invoking the formal defense. [[202]](#footnote-203)202 In both *Abrams v. Baylor College of Medicine* [[203]](#footnote-204)203 and *Bryant v. International Schools Services,* [[204]](#footnote-205)204 employers failed to establish foreign compulsion so neither court faced a choice between nonenforcement of Title VII and compelling a violation **[\*1316]** of the host country's labor laws. [[205]](#footnote-206)205 However, when the EEOC recently confronted the choice between enforcing Title VII or yielding to a host country's labor laws, it implicitly accepted the foreign compulsion defense. [[206]](#footnote-207)206 The EEOC held that when a host country's labor laws severely limit the employment opportunities of women, there is a legitimate nondiscriminatory reason for not hiring a woman as an air traffic controller. [[207]](#footnote-208)207 The EEOC stressed that an employer's mere conjecture about the policies of the foreign country cannot justify discrimination; rather, the employer must have a "current, authoritative, and factual basis for its belief, and it must rely upon that belief in good faith." [[208]](#footnote-209)208 In this case the EEOC found a "legitimate nondiscriminatory justification" for denying equal employment opportunities that did not fit any exception contemplated in Title VII or EEOC regulations. [[209]](#footnote-210)209 Although the EEOC implicitly relied on a foreign compulsion argument, it has never expressly accepted its application to Title VII cases. [[210]](#footnote-211)210

*B. Reasonableness Test*

Although the *Restatement (Third)* appears to accept the foreign compulsion defense for United States companies operating in countries requiring discriminatory employment practices, [[211]](#footnote-212)211 it also recognizes that **[\*1317]** the mere existence of a conflicting foreign law should not always excuse a violation of United States law. [[212]](#footnote-213)212 The defense, therefore, is not available to defendants when the "exercise of jurisdiction by the territorial state would be unreasonable" under the factors of section 403(2). [[213]](#footnote-214)213 When the foreign compulsion defense is asserted, the *Restatement (Third)* urges a state to balance eight factors to determine if it should enforce its laws in the face of conflicting foreign laws: effects of the regulated activity, [[214]](#footnote-215)214 contacts with the regulating state, [[215]](#footnote-216)215 character of the regulated activity, [[216]](#footnote-217)216 expectation of enforcement, [[217]](#footnote-218)217 importance of the regulated activity, [[218]](#footnote-219)218 conforming with the international system, [[219]](#footnote-220)219 interests of other states, [[220]](#footnote-221)220 and conflict with other states. [[221]](#footnote-222)221 This list incorporates the 1965 *Restatement (Second)'*s balancing test but adds several additional factors that weigh the degree of international consensus over the relevant law. [[222]](#footnote-223)222 While the earlier formulation resolved conflicts of law by counseling states to moderate the enforcement of laws that they are authorized to prescribe, [[223]](#footnote-224)223 the reasonableness inquiry seeks to avoid such conflicts by **[\*1318]** limiting a state's jurisdiction to prescribe, that is, to enact laws and regulations. [[224]](#footnote-225)224

Although courts have upheld the extraterritorial application of Title VII as a matter of statutory construction, [[225]](#footnote-226)225 such an interpretation assumes that Congress reasonably exercised its jurisdiction to prescribe. [[226]](#footnote-227)226 Once the reasonableness of the extraterritorial application of Title VII is conceded, courts applying the *Restatement (Third)* must consider section 403(2)'s factors to resolve conflicts between the Act and foreign laws. [[227]](#footnote-228)227 The *Restatement (Third)* provides that "[w]hen more than one state has a reasonable basis for exercising jurisdiction . . . but the prescriptions by two or more states are in conflict, each state is expected to evaluate its own as well as the other state's interest" using the same factors that determined whether the exercise of jurisdiction to prescribe was reasonable and deferring to the other state if that state's interest is greater. [[228]](#footnote-229)228 As every state is entitled to enforce its own laws, parties challenging that right because another state's statute conflicts assume the burden of showing that the interests of the foreign state are superior to those of the United States. [[229]](#footnote-230)229 Consequently, the employer wishing to avoid Title VII enforcement bears the burden of showing that the host country's interests in requiring discrimination outweigh those of the United States in baring it. Applying the reasonableness test of the *Restatement (Third)* to the regulation of discriminatory employment practices demonstrates that **[\*1319]** the enforcement of Title VII is reasonable even in the face of conflicting foreign law. As the *Restatement (Third)* lists eight factors that, if considered independently, would produce overlapping inquiries, [[230]](#footnote-231)230 this Note avoids duplication by identifying four issues that address all the concerns raised in the *Restatement* list: territoriality, [[231]](#footnote-232)231 contacts, [[232]](#footnote-233)232 national interests, [[233]](#footnote-234)233 and international consensus. [[234]](#footnote-235)234

*1. Territoriality and Effects*

The first issue, rooted in the territoriality and effects principles of jurisdiction, considers "the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory." [[235]](#footnote-236)235 In overseas employment, much of the conduct covered by Title VII may occur within the territorial United States. For example, companies may hire employees in this country for employment overseas and companies may make promotion decisions in the United States. [[236]](#footnote-237)236 However, even when such employment decisions take place in a foreign country, [[237]](#footnote-238)237 there will be a substantial, direct, and foreseeable effect upon interests in the United States, [[238]](#footnote-239)238 such as the hiring and promotion prospects of women and minorities. Of course, conflicts between the extraterritoriality of Title VII and foreign laws will arise only when both the employer and the employee have United States citizenship. [[239]](#footnote-240)239 Therefore, it is not necessary to assess other contacts to establish the strong interest of the United States. Although the territoriality and effects factor will rarely be decisive in Title VII litigation involving foreign employment, analysis of this factor suggests that enforcement is often proper.

*2. Contacts*

The second consideration in determining whether United States or host country laws should apply is "the connections, such as nationality, residence, or economic activity, between the regulating state and the person **[\*1320]** principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect." [[240]](#footnote-241)240 This factor analyzes the character of the activity [[241]](#footnote-242)241 and the participants for connections between the two nations asserting jurisdiction and between the employer and the employee. The company must be a United States national before Title VII will apply. [[242]](#footnote-243)242 Sometimes nationality is disputed because a company may be incorporated in one nation, owned or controlled in another, and have its principle place of business in a third. [[243]](#footnote-244)243 The company will necessarily be involved in economic activity with both the United States and the foreign country. However, because Title VII focuses on United States nationals, [[244]](#footnote-245)244 the connections between the regulating states and "those whom the law or regulation is designed to protect" [[245]](#footnote-246)245 weigh toward enforcement of United States laws. Therefore, although significant connections are likely to exist with both the United States and the host nation, this second factor will generally favor enforcement of Title VII.

*3. National Interests*

The third factor focuses on "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted." [[246]](#footnote-247)246 This factor assesses the national interest of each of the countries in enforcing its regulation. [[247]](#footnote-248)247 Courts have allowed United States interests such as preventing tax evasion [[248]](#footnote-249)248 and stemming narcotics trade [[249]](#footnote-250)249 to trump foreign laws barring document disclosure while occasionally permitting discovery rules to fall to foreign nondisclosure laws. [[250]](#footnote-251)250 States, of course, have "as **[\*1321]** great an interest in affording adequate protection" to individuals who are employed by companies incorporated there and work outside the state as to employees within the state. [[251]](#footnote-252)251 For example, the Fifth Circuit recognized that the United States's interest in its national labor policy extends to protecting the rights of its citizens employed abroad to enter enforceable labor contracts. [[252]](#footnote-253)252 There is no doubt that the United States is committed to ensuring equal employment opportunity for United States nationals. [[253]](#footnote-254)253 Although employment activities are traditionally characterized as "predominantly local," [[254]](#footnote-255)254 the United States, through legislation such as the 1977 Amendments to the Export Administration Act [[255]](#footnote-256)255 and executive action such as the programs designed to prohibit compliance with the Arab boycott of the 1970s, [[256]](#footnote-257)256 has demonstrated its commitment to ensuring that United States companies do not impermissibly **[\*1322]** discriminate among United States citizens. President Ford reaffirmed the United States commitment to equal employment opportunity in foreign employment when he announced measures forbidding discrimination in official overseas assignments.

The community of nations often proclaims universal principles of human justice and equality. These principles embody our own highest national aspirations. The anti-discrimination measures I am announcing today are consistent with our efforts to promote peace and friendly, mutually beneficial relations with all nations, a goal to which we remain absolutely dedicated. [[257]](#footnote-258)257

President Carter also expressed his support for "the right of Americans to engage in international commerce without . . . discrimination." [[258]](#footnote-259)258

Of course, a foreign nation may have a strong interest in the enforcement of its regulation. For example, nations may have a legitimate and sometimes fierce interest in maintaining control over employment practices as a means of minimizing interference with local customs. [[259]](#footnote-260)259 At least one American court has recognized that a foreign nation may also have a legitimate interest in preventing the disclosure of documents physically located within its borders regarding atomic energy and uranium that may be stronger than the United States's interest in enforcing discovery orders in a breach of contract case. [[260]](#footnote-261)260

Once a court identifies the national interests of the United States and the host country in enforcing their respective employment laws, it must weigh them. [[261]](#footnote-262)261 For example, one court concluded that the United States's interest in the integrity of labor contracts and industrial democracy is greater than a host country's interest in maintaining local public service companies. [[262]](#footnote-263)262 In Title VII cases, this requires balancing the host country's wish to minimize cultural interference and promote national employment with the United States's interest in ensuring equal employment opportunity for United States citizens. Where few foreign nationals are employed, the host country's regulation is likely to be less weighty **[\*1323]** because there will be less risk of undermining local customs. However, economic and social circumstances may require the employment of more foreign nationals. [[263]](#footnote-264)263 In this case, the host country's interest in regulation may increase commensurate with its interest in preserving local customs. [[264]](#footnote-265)264 When the regulation directly implicates conflicting interests about the same policy matter, as is the case with employment discrimination, the balancing of interests is difficult and inconclusive. [[265]](#footnote-266)265

*4. International Consensus*

Several factors listed in *Restatement (Third)* section 403(2) address the degree of international consensus over the regulations: "the degree to which the desirability of such regulation is generally accepted," [[266]](#footnote-267)266 "the importance of the regulation to the international political, legal, or economic system," [[267]](#footnote-268)267 and "the extent to which the regulation is consistent with the traditions of the international system." [[268]](#footnote-269)268 These factors weigh decisively toward enforcement of Title VII.

First, if a host country is a signatory to an international agreement condemning employment discrimination, it is not reasonable for that country to enforce a law that requires such discrimination. [[269]](#footnote-270)269 Even if the host country is not a signatory to such an agreement, the international consensus against employment discrimination makes such discrimination unreasonable. Given this international consensus, [[270]](#footnote-271)270 enforcement of Title VII is certainly reasonable. Moreover, there is a growing consensus that, although a multinational enterprise should respect the local customs of the host country, this sensitivity and respect does not require toleration of human rights violations. For example, while the most recent United Nations Draft Code of Conduct on Transnational Corporations [[271]](#footnote-272)271 requires that transnational corporations respect the social and **[\*1324]** cultural traditions of the countries in which they operate, [[272]](#footnote-273)272 it also requires respect for human rights and fundamental freedoms, including the right to be free from employment discrimination. [[273]](#footnote-274)273 The prevalence of international agreements endorsing the right to be free from discrimination in employment demonstrates that the desirability of regulations like Title VII "is generally accepted." [[274]](#footnote-275)274 Because enforcement of Title VII is "consistent with the traditions of the international system" [[275]](#footnote-276)275 and is important to the international legal system, it would violate the *Restatement's (Third)* reasonableness test not to enforce it.

Consideration of the extraterritorial application of Title VII in light of the factors set out in section 403(2) of the *Restatement (Third)* demonstrates that it is reasonable to compel United States companies to comply with Title VII in their foreign as well as domestic operations. Although the territoriality, contacts, and national interest factors are sometimes difficult to weigh and not dispositive, the international consensus factor demonstrates decisively that it is reasonable to enforce Title VII extraterritorially even when it is in direct conflict with a host country law.

IV

CONSEQUENCES OF THE EXTRATERRITORIALITY OF TITLE VII

Because a conflict between Title VII and host country customs or laws requiring discrimination usually cannot be avoided by asserting statutory exceptions to Title VII [[276]](#footnote-277)276 or resolved in favor of host country laws by relying on a reasonableness inquiry, [[277]](#footnote-278)277 United States courts must enforce Title VII extraterritorially. As a result, United States companies employing United States nationals that wish to operate in countries hostile to equal employment opportunities have three options: (1) to comply with Title VII and suffer the consequences imposed by the host country, [[278]](#footnote-279)278 (2) to defer to host country customs or laws and be subject to Title **[\*1325]** VII sanctions, or (3) to comply with Title VII and host country laws by replacing United States nationals with foreign nationals. [[279]](#footnote-280)279

*A. Compliance*

If a United States company complies with Title VII in violation of a host country law, the host country may respond several ways. First, it may penalize the United States company. [[280]](#footnote-281)280 For example, host countries could use or threaten a variety of measures to deter the United States company from complying with Title VII, [[281]](#footnote-282)281 including enactment of statutes that expressly contravene United States law by requiring discrimination [[282]](#footnote-283)282 and nationalization of United States companies that continue prohibited employment practices. [[283]](#footnote-284)283 In addition, the host country may retaliate against other United States companies or the United States itself. [[284]](#footnote-285)284 Ultimately, of course, the foreign state can prohibit a foreign company that provides equal employment opportunities from operating within its borders. [[285]](#footnote-286)285

**[\*1326]** On the other hand, the host country may tolerate the action [[286]](#footnote-287)286 or even formally exempt the United States company from its laws. [[287]](#footnote-288)287 Past experience suggests that many host countries will accommodate the need of United States companies to comply with Title VII extraterritorially. As early as 1969, General Motors obtained exemptions from South African requirements that specific work be reserved for whites and that white employees be replaced only by other whites. [[288]](#footnote-289)288

Another recent episode illustrates that host countries will accommodate United States companies when equal employment practices are mandated by law. In 1977, when Congress amended the Export Administration Act of 1969 [[289]](#footnote-290)289 to prohibit United States companies from participating or complying with the boycott of Israel promoted by the League of Arab Nations, [[290]](#footnote-291)290 American companies lobbied strenuously against this bill, fearing "damage to commercial opportunities in the Middle East." [[291]](#footnote-292)291 Once Congress enacted the amendments and the Department of Commerce instituted enforcement proceedings, many United States corporations ceased to comply with the boycott. Numerous Arab countries accommodated United States companies by administering their discriminatory laws flexibly, [[292]](#footnote-293)292 formally exempting United States companies, [[293]](#footnote-294)293 or, in some cases, repealing the laws altogether. [[294]](#footnote-295)294

These experiences undermine the most common argument offered for exempting United States companies operating overseas from Title **[\*1327]** VII: that enforcement will prevent these companies from competing effectively with companies of the host and other countries by preventing only United States companies from complying with foreign laws. The successful experience of United States companies complying with the Export Administration Act amendments in violation of Arab boycott laws demonstrates that enforcement of Title VII can promote equal employment opportunity without significantly hampering the international operations of United States companies. [[295]](#footnote-296)295

Even if enforcement of Title VII adversely affects United States companies operating overseas, this should not justify permitting United States companies to discriminate against United States citizens. When an important policy concern overrides the national interest in international commerce, the United States will regulate the foreign conduct of United States corporations even when economic losses may result. For example, alleged loss of business abroad does not justify disobeying a subpoena. [[296]](#footnote-297)296 Trade regulation is frequently used for political ends despite subsequent losses to American business. [[297]](#footnote-298)297 For example, following the Soviet Union's invasion of Afghanistan, President Carter imposed a grain embargo depriving United States farmers of a major export market of approximately 6.5 million metric tons per year. [[298]](#footnote-299)298 Similary, responding to the repression of Polish trade unionists and the Solidarity movement, the United States revoked and halted the issuance of all licenses authorizing export to the Soviet Union, cancelling export contracts of companies such as Caterpillar and General Electric. [[299]](#footnote-300)299 More recently, President Reagan issued an executive order prohibiting certain trade and other transactions with South Africa. [[300]](#footnote-301)300 In fact, when Congress enacted the Foreign Corrupt Practices Act of 1977, [[301]](#footnote-302)301 it refused to create an exception for United States companies that claimed they would be forced to forgo sales and other economic transactions that were contingent on payment of bribes. [[302]](#footnote-303)302 Certainly, ensuring equal opportunity for all United **[\*1328]** States citizens and promoting international human rights is as important as preventing corruption in foreign trade. Just as economic losses do not create a BFOQ exception, claims of competitive disadvantage cannot justify United States employers' discriminating against United States citizens in foreign employment.

Thus, although companies that choose to comply with Title VII may be exposed to the risk of sanctions in host countries, they are unlikely to suffer actual harm. The national commitment to equal employment opportunity requires compliance with Title VII even on the rare occasions where economic loss results.

*B. Violation*

If United States companies choose to comply with host country laws and violate Title VII, they are subject to a wide range of equitable remedies, [[303]](#footnote-304)303 including injunctions prohibiting unlawful employment practices, [[304]](#footnote-305)304 affirmative relief such as reinstatement or hiring of employees, [[305]](#footnote-306)305 and seniority [[306]](#footnote-307)306 and transfer adjustments. [[307]](#footnote-308)307 Title VII also provides for the possibility of back pay [[308]](#footnote-309)308 with interest. [[309]](#footnote-310)309 Of course, different factual circumstances require different remedies. [[310]](#footnote-311)310 To some extent, remedies in the domestic and international arenas cannot be identical. The scope of extraterritorial injunctive relief, for example, often must be more limited because United States courts do not have the power to require host countries to change their laws or provide exemptions to United States companies operating within their borders. However, to the extent that a United States company has failed to exhaust all possible means to gain waivers to host country laws, it can be required to do so. [[311]](#footnote-312)311 In addition, when a company has operations in countries other than the host country, other hiring or promotional opportunities should be explored such as placement with the companies' other foreign affiliates.

Additional legislation may be necessary to strengthen the enforcement of equal employment opportunity by United States companies operating **[\*1329]** overseas. For example, tax measures should be enacted to ensure that no United States company benefits from discriminatory practices. [[312]](#footnote-313)312 A United States company that violates United States civil rights laws in a foreign country requiring discrimination should not be accorded any tax benefits. Companies that violate the Export Administration Act, for example, are denied tax credits for taxes paid to a host country. [[313]](#footnote-314)313 Companies that make payments to a foreign official in violation of the Foreign Corrupt Practices Act cannot deduct those payments as ordinary and necessary business expenses. [[314]](#footnote-315)314 Companies violating Title VII abroad should be similarly penalized. Legislation providing such sanctions would help ensure that American taxpayers do not subsidize discrimination by United States companies against United States citizens.

A second legislative initiative that would strengthen sanctions against United States companies that violate Title VII can be modeled on the penalty provisions of Executive Order 11,246, which requires companies granted government contracts to adopt affirmative action plans. [[315]](#footnote-316)315 Companies that violate the order are barred from future government contracts. [[316]](#footnote-317)316 Regardless of where the violation occurs, United States companies that discriminate against United States citizens should be sanctioned.

*C. Hiring Host Country Nationals*

Of course, United States employers caught between Title VII, which requires equal employment for United States citizens, and a host country law that requires discrimination can comply with both laws by hiring host country nationals. Many American companies successfully operate abroad with a workforce primarily consisting of host country nationals. [[317]](#footnote-318)317 The extent to which American companies can comply with Title VII and host country laws by hiring host country nationals may depend on their willingness and ability to train them in the skills of the American workers they are to replace. [[318]](#footnote-319)318

A United States company that complies with Title VII risks little **[\*1330]** economic loss, given past experience with host country accommodation. On the other hand, violating Title VII subjects the company to judicial and legislative sanctions. By strengthening these sanctions, Congress can encourage compliance with Title VII and the international human rights consensus.

CONCLUSION

Applying Title VII to United States employees of United States corporations operating abroad promotes two goals: the national policy of equal employment opportunity for all regardless of race, religion, sex, or national origin, and the international human rights consensus for ending discrimination. The United States is justified in regulating the foreign employment of United States citizens by United States companies. Congress reasonably exercised its jurisdiction to prescribe such laws when it enacted Title VII. None of the arguments offered by employers to avoid Title VII coverage are persuasive. First, statutory exceptions to Title VII rarely offer relief. Employers' argument that several factors -- customer preference, safety, and host country laws -- constitute bases for bona fide occupational qualifications distorts the nature of this very narrow defense. In effect, employers argue that their noncompliance with Title VII is excused by the existence of conflicting foreign laws. However, a reasonableness inquiry demonstrates that, given the international human rights consensus as well as the nationality of the parties, it is reasonable to enforce Title VII extraterritorially, even when host country laws conflict. Moreover, United States companies have greatly exaggerated the consequences of compliance. Once the United States makes clear that it plans to enforce Title VII extraterritorially, and, if necessary, strengthen the sanctions applied to United States companies that discriminate, many host countries are likely to accommodate the needs of United States companies. Moreover, the importance of equal employment opportunity to the national and international agenda requires compliance even in the rare case where compliance may result in economic loss.

Although many countries tolerate private discrimination and others officially sanction it, numerous international treaties, resolutions, and agreements make clear the commitment of the community of nations to making the international goal of equality a reality. By ensuring that United States companies comply with Title VII of the Civil Rights Act in their international as well as domestic activities, the United States can contribute to this end.

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1. 1 See, e.g., N. Hevener, International Law and the Status of Women (1983); T. Meron, Human Rights Law Making in the United Nations 11, 73-77, 208-09 (1986); Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace 132-47 (1985) [hereinafter World Conference Report]; see also notes 63-74 and accompanying text infra. [↑](#footnote-ref-2)
2. 2 See Centre for Social Development and Humanitarian Affairs, United Nations, Law and the Status of Women: An International Symposium, reprinted in 8 Colum. Hum. Rts. L. Rev. 1 (1976) [hereinafter Law and the Status of Women]; World Conference Report, supra note 1, at 111-12. [↑](#footnote-ref-3)
3. 3 This Note is concerned only with the employment of United States citizens by United States companies. For arguments that United States companies operating abroad should not discriminate in the employment of foreign as well as United States nationals, see, e.g., Dehner, Multinational Enterprise and Racial Non-Discrimination: United States Enforcement of an International Human Right, 15 Harv. Int'l L.J. 71 (1974); Note, United States Labor Practices in South Africa: Will a Mandatory Fair Employment Code Succeed Where the Sullivan Principles Have Failed? 7 Fordham Int'l L.J. 358 (1984); Lee, Activist Holders Target Northern Ireland: Campaign Against U.S. Firms Stirs Concern, Wall St. J., Jan. 20, 1987, at 12. [↑](#footnote-ref-4)
4. 4 See notes 63-74 and accompanying text infra. [↑](#footnote-ref-5)
5. 5 In 1970, some 680,060 United States citizens worked overseas in private employment (excluding merchant marines). Social & Economic Statistics Admin., Bureau of the Census, U.S. Dep't of Commerce, Americans Living Abroad (1973) (reporting 1970 census). In 1987, 35,000 to 40,000 Americans lived in Saudi Arabia alone. Saudis Impose an Income Tax on Foreigners, N.Y. Times, Jan. 5, 1988, at A1. [↑](#footnote-ref-6)
6. 6 In 1986, 66.4% of American women ages 20-64 worked outside the home. As a result, 44% of the labor force was female in 1986, for a total of approximately 49,000,000 women. Council of Economic Advisors, Economic Report of the President 282 (1987). In 1986, 10,814,000 blacks were in the labor force, up from 7,802,000 in 1972. Id. [↑](#footnote-ref-7)
7. 7 This Note adopts the definition of "United States company" used by the United States Treasury. See 7 Fed. Reg. 2504 (1942); notes 35-36 infra. [↑](#footnote-ref-8)
8. 8 42 U.S.C. §§ 2000e to 2000e-17 (1982). Title VII establishes that it is unlawful employment practice for an employer:

   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

   Id. § 2000e-2(a). [↑](#footnote-ref-9)
9. 9 See H.R. Rep. No. 914, 88th Cong., 2d Sess. 10, reprinted in 1964 U.S. Code Cong. & Admin. News 2391, 2401 [hereinafter House Report].

   The centrality of the equality principle to Title VII is emphasized by the fact that while Title VII was passed pursuant to the commerce clause, see 110 Cong. Rec. 7210-12 (1964) (statement of Sen. Clark); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245-46 (1964), the 1972 amendments extending Title VII coverage to state and local governments, Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e (1982)), were enacted pursuant to the equal protection clause of the fourteenth amendment, Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976). [↑](#footnote-ref-10)
10. 10 See, e.g., U.S. Const. amends. I-X; D. Richards, Toleration and the Constitution 296-303 (1986). [↑](#footnote-ref-11)
11. 11 House Report, supra note 9, 1964 U.S. Code Cong. & Admin. News at 2401. [↑](#footnote-ref-12)
12. 12 Diaz v. Pan Am. World Airways, 442 F.2d 385, 385-86 (5th Cir.), cert. denied, 404 U.S. 950 (1971). [↑](#footnote-ref-13)
13. 13 Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). [↑](#footnote-ref-14)
14. 14 Executive orders also prohibit discriminatory employment practices. See, e.g., Exec. Order No. 11,246, 3 C.F.R. 567 (1966), reprinted as amended in 42 U.S.C. § 2000e app. at 28-31 (1982) (requiring nondiscrimination clauses in government contracts above specified dollar amount); see also B. Schlei & P. Grossman, Employment Discrimination Law 872 n.2 (2d ed. 1983); Note, The Multinational Corporation and Employment Discrimination: A Strategy for Litigation, 16 U.S.F. L. Rev. 491, 493-502 (1982). Although this Note does not specifically address the impact of executive orders on the employment practices of United States companies operating abroad, many of its arguments also apply to executive orders because the standards for liability as well as for the exceptions that permit discrimination under executive orders are similar to if not more stringent than those of Title VII. [↑](#footnote-ref-15)
15. 15 See note 1 supra; notes 63-74 and accompanying text infra. [↑](#footnote-ref-16)
16. 16 See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 107 S. Ct. 2542, 2555 n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."); In re Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962) ("[W]e also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own."); see also C. Hyde, International Law § 199, at 640 (rev. 2d ed. 1945); L. Oppenheim, International Law § 144a, at 327-28 (8th ed. 1955); Note, Extraterritorial Application of United States Law: The Case of Export Controls, 132 U. Pa. L. Rev. 355, 368-69 (1984); notes 177-80 and accompanying text infra. [↑](#footnote-ref-17)
17. 17 E.g., Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984); see also Hilton v. Guyot, 159 U.S. 113, 164 (1895). [↑](#footnote-ref-18)
18. 18 See, e.g., S. Altorki, Women in Saudi Arabia (1986). [↑](#footnote-ref-19)
19. 19 See, e.g., U.S. Dep't of State, Country Reports on Human Rights Practices for 1986, at 274-94 (1987) [hereinafter Country Reports]; Law and Status of Women, supra note 2, at 1. [↑](#footnote-ref-20)
20. 20 See, e.g., Bryant v. International School Servs., 502 F. Supp. 472, 481 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982). [↑](#footnote-ref-21)
21. 21 See, e.g., Abrams v. Baylor College of Medicine, 805 F.2d 528, 531 (5th Cir. 1986); Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273, 1275 (9th Cir. 1981); ***Kern*** v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd mem., 746 F.2d 810 (5th Cir. 1984). [↑](#footnote-ref-22)
22. 22 See, e.g., Bryant, 502 F. Supp. at 490. [↑](#footnote-ref-23)
23. 23 Section 2000e-1 states that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State." 42 U.S.C. § 2000e-1 (1982). The deliberate exclusion of aliens outside the United States suggests that Title VII applies both to aliens inside this country, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973), and to United States citizens outside the country, EEOC Dec. No. 85-16, 2 Empl. Prac. Guide (CCH) P6857, at 7072 (Sept. 16, 1985).

    Courts rejecting the extraterritoriality of other employment laws, such as the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986), have emphasized that those laws lacked a statutory provision such as Title VII's section 702 (§ 2000e-1) that could provide the basis for an inference of extraterritoriality. See, e.g., Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 559 (7th Cir. 1985); Clearly v. United States Lines, 728 F.2d 607, 609 (3d Cir. 1984). [↑](#footnote-ref-24)
24. 24 See Interpretative Memorandum of Title VII of H.R. 7152, 88th Cong., 2d Sess., 110 Cong. Rec. 7212 (1964) [hereinafter Interpretative Memorandum] (submitted jointly by Senators Clark and Case, floor managers). [↑](#footnote-ref-25)
25. 25 The Department of Justice and the Equal Employment Opportunity Commission (EEOC), the agencies responsible for administering Title VII, agree that the statute applies extraterritorially. During legislative debate over proposals to prohibit United States employers from participating in foreign boycotts requiring religion-based employment discrimination, Justice Scalia, then Assistant Attorney General, argued that the amendments were not necessary because Title VII already prohibited employment discrimination. See Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 1st Sess. 88 (1975) [hereinafter Hearings] (statement of Antonin Scalia, Assistant Attorney General). EEOC General Counsel William A. Carey agreed that Title VII applies extraterritorially. Referring to § 2000e-1 he wrote: "If [that section] is to have any meaning at all, it is necessary to construe it as expressing a Congressional intent to extend coverage in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute." Letter from William A. Carey, EEOC General Counsel, to Sen. Frank Church (Mar. 17, 1975), reprinted in Note, Civil Rights, Employment and the Multinational Corporations, 10 Cornell Int'l L.J. 87, 102-03 (1976). [↑](#footnote-ref-26)
26. 26 See, e.g., Abrams, 805 F.2d at 528; Fernandez, 653 F.2d at 1273; Lavrov v. NCR Corp., 600 F. Supp. 923, 932 (S.D. Ohio 1984); ***Kern***, 577 F. Supp. at 1197; Bryant v. International School Serv., 502 F. Supp. 472, 482 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3rd Cir. 1982); Love v. Pullman, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978); EEOC Dec. No. 85-16, 2 Empl. Prac. Guide (CCH) P6857, at 7070-75 (Sept. 16, 1985); EEOC Dec. No. 85-10, 2 Empl. Prac. Guide (CCH) P6851, at 7052 (July 16, 1985). [↑](#footnote-ref-27)
27. 27 Compare ***Kern***, 577 F. Supp. at 1201 (religious discrimination permissible when host country prohibits non-Moslems from entering city where job is to be performed) with Fernandez, 635 F.2d 1273 (sex discrimination not permissible where custom of host country bars women from business). [↑](#footnote-ref-28)
28. 28 Title VII does not prohibit employment discrimination on the basis of alienage. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (employer's refusal to hire aliens because of lack of citizenship not discrimination on basis of national origin); see Note, Title VII, United States Citizenship and American National Origin, 60 N.Y.U. L. Rev. 245 (1985). For a discussion of the ability of United States companies operating overseas to discriminate on the basis of alienage, see Lewis & Ottley, Title VII and Friendship, Commerce, and Navigation Treaties: Prognostication Based upon Sumitomo Shoji, 44 Ohio St. L.J. 45 (1983). [↑](#footnote-ref-29)
29. 29 Title VII permits an employer to hire employees on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1982); see also notes 92-168 and accompanying text infra. [↑](#footnote-ref-30)
30. 30 See, e.g., Restatement (Third) of Foreign Relations Law of the United States § 441 (Tent. Draft No. 6, 1987) [hereinafter Restatement (Third)]. [↑](#footnote-ref-31)
31. 31 Id. § 403. [↑](#footnote-ref-32)
32. 32 See A. Lowe, Extraterritorial Jurisdiction (1983); see also text accompanying note 186 infra. [↑](#footnote-ref-33)
33. 33 See, e.g., Laker Airways v. Sabena, Belgian World Airways, 731 F.2d 909, 921 (D.C. Cir. 1984); Restatement (Third), supra note 30, § 402(1)(a) & comment c. [↑](#footnote-ref-34)
34. 34 See, e.g., Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952); Skiriotes v. Florida, 313 U.S. 69, 73 (1941); Blackmer v. United States, 294 U.S. 421, 436 (1932); Restatement (Third), supra note 30, § 402(2). [↑](#footnote-ref-35)
35. 35 Kronstein, The Nationality of International Enterprises, 52 Colum. L. Rev. 983, 986 (1952); cf. Restatement (Third), supra note 30, § 213 ("For purposes of international law, a corporation has the nationality of the state under the laws of which it is organized."). [↑](#footnote-ref-36)
36. 36 See, e.g., In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1144-45 (N.D. Ill. 1979); In re Investigation of World Arrangements, 13 F.R.D. 280, 285 (D.D.C. 1952). Generally, United States control of a corporation can be established by showing any or all of the following factors: (1) ownership by United States nationals of substantial voting shares of the foreign corporation; (2) management by a United States office; (3) principal indebtedness to a United States entity; (4) United States control over significant decisions; and (5) principal place of business in the United States. Restatement (Third), supra note 30, § 213 comment d, § 414(2).

    Similar factors also determine a parent company's liability for its subsidiary's discriminatory employment practices. See Baker v. Stuart Broadcasting Co., 560 F.2d 389, 392 (8th Cir. 1977) (involving Title VII); Williams v. New Orleans Steamship Ass'n, 341 F. Supp. 613 (E.D. La. 1972) (same); Liberty Mutual Ins. Co. v. Friedman, 485 F. Supp. 695, 701 n.8 (D. Md. 1979) (involving executive order), rev'd on other grounds, 639 F.2d 164 (4th Cir. 1981).

    Because a more detailed discussion of the controversy over corporate nationality is beyond the scope of this Note, it will assume that jurisdiction can be based on place of incorporation, control, or ownership. [↑](#footnote-ref-37)
37. 37 The *Restatement (Third)* identifies eight factors that determine when it is reasonable for a state to exercise jurisdiction to prescribe law extraterritorially. See Restatement (Third), supra note 30, § 403(2). Based on an examination of the theoretical underpinnings of these factors and the experience of extraterritorial application of United States law, this Note identifies four goals promoted by the extraterritoriality of United States laws. [↑](#footnote-ref-38)
38. 38 See id. § 402 comments f-g; I. Brownlie, Principles of Public International Law 303 (3d ed. 1979); Marcuss & Richard, Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory, 20 Colum. J. Transnat'l L. 439, 445 (1981). [↑](#footnote-ref-39)
39. 39 See Restatement (Third), supra note 30, §§ 402(1)(c), 403(2)(a); United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945) (Hand, J.). [↑](#footnote-ref-40)
40. 40 See, e.g., Restatement (Third), supra note 30, § 402(3); S. Rep. No. 169, 96th Cong., 1st Sess. 2, reprinted in 1979 U.S. Code Cong. & Admin. News 1147, 1148 [hereinafter Senate Report]. [↑](#footnote-ref-41)
41. 41 See Restatement (Third), supra note 30, § 403(2)(e)-(f); see also Exec. Order No. 12,532, 3 C.F.R. § 387 (1986), reprinted in 50 U.S.C. § 1701 (Supp. III 1985) (reference by President Reagan to United Nations Security Council Resolutions as partial authority for limited sanctions on South Africa); President Ford's Statement on U.S. Policy Toward the Arab Boycott, 11 Weekly Comp. Pres. Doc. 1305 (Nov. 20, 1975) [hereinafter President's Statement] (describing consideration of United States foreign policy interests and sovereign rights of other nations in decision to amend Export Administration Act to prohibit United States exporters and service organizations from discriminating against United States citizens on basis of race, religion, sex, or national origin). [↑](#footnote-ref-42)
42. 42 Restatement (Third), supra note 30, § 402 comment e; see also Marcuss & Richard, supra note 38, at 477. [↑](#footnote-ref-43)
43. 43 See I. Brownlie, supra note 38, at 303 (describing this type of jurisdiction as increasingly accepted as applied to terrorist acts and political assassinations); see also Restatement (Third), supra note 30, § 402 comment g (same). [↑](#footnote-ref-44)
44. 44 The League of Arab Nations was founded to facilitate cooperation among Arab countries in political, economic, cultural, social, and health matters. A. Lowenfeld, Trade Controls for Political Ends 310 (2d ed. 1983). [↑](#footnote-ref-45)
45. 45 H.R. Rep. No. 190, 95th Cong., 1st Sess. 5, reprinted in 1977 U.S. Code Cong. & Admin. News 362, 366 [hereinafter House Report]; A. Lowenfeld, supra note 44, at 335; see also Boycott Rep., Mar. 1977, at 6 (reporting that President Carter pledged to oppose Arab boycott and to ensure right of Americans to engage in international commerce without being subject to discrimination on basis of race or religion). [↑](#footnote-ref-46)
46. 46 See Export Administration Amendments of 1977, Pub. L. No. 95-52, §§ 201-205, 91 Stat. 235, 244-48 (expired 1979), reenacted without change as the Export Administration Amendments of 1979, Pub. L. No. 96-72, § 8, 93 Stat. 503, 521 (codified at 50 U.S.C. app. § 2407 (1982)). [↑](#footnote-ref-47)
47. 47 House Report, supra note 45, at 5, 1977 U.S. Code Cong. & Admin. News at 366. [↑](#footnote-ref-48)
48. 48 See Restatement (Third), supra note 30, §§ 402(1)(c), 403(2); see also Dunfee & Friedman, The Extra-Territorial Application of United States Antitrust Laws: A Proposal for an Interim Solution, 45 Ohio St. L.J. 883, 886-87 (1984); Marcuss & Richard, supra note 38, at 442; Nothstein & Ayres, The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act, 10 Cornell Int'l L.J. 1, 29 & n.111 (1976). [↑](#footnote-ref-49)
49. 49 Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 641 (2d Cir. 1956) (emphasis added). [↑](#footnote-ref-50)
50. 50 See, e.g., Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, § 403, 96 Stat. 1246 (codified as amended at 15 U.S.C. § 45(a)(3) (1982)) (stating that Sherman Act applies to commerce with foreign nations that has direct, substantial, and reasonably foreseeable effect on domestic or export trade); Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 103-104, 91 Stat. 1494, 1495-96 (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-2 (1982)) (prohibiting corporate attempts to influence foreign officials in host country by offering bribes); Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)) (prohibiting contracts, trusts, or conspiracies in restraint of trade with foreign nations); Federal Trade Commission Act, ch. 49, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §§ 44-45 (1982)) (regulating unfair trade practices and methods of competition with foreign nations that have direct, substantial, foreseeable effect in United States); Clayton Act, ch. 323, § 1, 38 Stat. 730, 730 (1914) (codified as amended at 15 U.S.C. § 12 (1982)) (prohibiting unfair trade practices in commerce with foreign nations); Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44 (1982 & Supp. III 1985)) (regulating financial transactions with enemy nations); Export Administration Amendments of 1979, Pub. L. No. 96-72, § 8, 93 Stat. 503, 521 (codified as amended at 50 U.S.C. app. § 2407 (1982)) (restricting export of goods that might aid foreign military). [↑](#footnote-ref-51)
51. 51 See, e.g., Abrams v. Baylor College of Medicine, 805 F.2d 528, 530-31 (5th Cir. 1986) (doctors recruited in Houston for employment in Saudi Arabia); EEOC Dec. No. 85-10, 2 Empl. Prac. Guide (CCH) P6851 (July 16, 1985) (radar air traffic controller position in foreign country advertised in United States professional publication; orientation program, interviews, and selection conducted in United States). [↑](#footnote-ref-52)
52. 52 S. LaPalombara & S. Blank, Multinational Corporations and Developing Countries 162 (1979) (managers "get points for taking on a tough overseas assignment" advancing their promotional prospects in United States). [↑](#footnote-ref-53)
53. 53 Cf. Watkins v. Scott Paper Co., 530 F.2d 1159, 1192-93, (5th Cir.) (discriminatory practices can prevent employees from gaining experience employer deems necessary for supervisors), cert. denied, 429 U.S. 861 (1976). [↑](#footnote-ref-54)
54. 54 See, e.g., Export Administration Act, 50 U.S.C. app. § 2407(b) (1982 & Supp. III 1985); Senate Report, supra note 40, at 2, 1979 U.S. Code Cong. & Admin. News at 1148; International Emergency Economic Powers Act, 50 U.S.C. §§ 1701(a), 1703(b)(2) (1982). [↑](#footnote-ref-55)
55. 55 See M. Doxey, Economic Sanctions and International Enforcement 1-28 (2d ed. 1980) (describing use of international economic sanctions in twentieth century); see also House Comm. on Foreign Affairs, Anti-Apartheid Act of 1985, H.R. Rep. No. 76, 99th Cong., 1st Sess. 10-11 (1985) [hereinafter House Report]. [↑](#footnote-ref-56)
56. 56 See, e.g., Exec. Order No. 12,532, 3 C.F.R. § 387 (1986), reprinted in 50 U.S.C. § 1701 (Supp. III 1985). [↑](#footnote-ref-57)
57. 57 See, e.g., A. Lowenfeld, supra note 44, at 277-78 (reporting that, in response to 1981 imposition of martial law, mass arrests, and deprivations of human rights in Poland, United States revoked and halted issuance of licenses and authorization for export of sophisticated technology to Soviet Union). [↑](#footnote-ref-58)
58. 58 See, e.g., id. at 233-39 (following Soviet Union's invasion of Afghanistan, President Carter imposed embargo barring export of United States grain to Soviet Union). [↑](#footnote-ref-59)
59. 59 See, e.g., Section Export Administration Regulations, 15 C.F.R. § 385.2c (1987) (prohibiting corporations owned or controlled by United States nationals, including corporations organized in United States, from exporting certain goods to Soviet bloc countries without authorization by Office of Export Administration). [↑](#footnote-ref-60)
60. 60 See, e.g., House Report, supra note 55, at 10-11; Exec. Order No. 12,532, 3 C.F.R. § 387 (1986), reprinted in 50 U.S.C. § 1701 (Supp. III 1985); Moyer & Mabry, Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases, 15 Law & Pol'y Int'l Bus. 1, 156-58 (1983). [↑](#footnote-ref-61)
61. 61 See Anti-Apartheid Act of 1985, Conf. Rep. No. 242, 99th Cong., 1st Sess. 2 (1985) (sanctions can be vehicle to enforce human rights); M. Daoudi & M. Dajoni, Economic Sanctions, Ideals and Experience 159-73 (1983) (sanctions may not achieve original goals, but can induce political change of target regime, produce severe economic dislocation, and deter war); Christopher, Human Rights: The Diplomacy of the First Year, reprinted in Dep't St. Bull., Mar. 1978, at 30 (sanctions bring about significant human rights improvements). [↑](#footnote-ref-62)
62. 62 See Restatement (Third), supra note 30, § 403(2)(e)-(f)(identifying "the importance of the regulation to the international political, legal, or economic system" and "the extent to which the regulation is consistent with the traditions of the international system" as two of the factors that determine whether it is reasonable to exercise jurisdiction to prescribe law with respect to activities having connections with another state).

    International law binds the United States in a variety of ways. Treaties "made . . . under the Authority of the United States shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2; see also Restatement (Third), supra note 30, § 321. However, to be effective as domestic law, non-self-executing treaties require enacting legislation. Restatement (Third), supra note 30, § 321; L. Henkin, Foreign Affairs and the Constitution 156-67 (1972).

    Treaties are not the only source of international law. I. Brownlie, supra note 38, at 633-40; see, e.g., Statute of the International Court of Justice art. 38(11)(b). The rules of customary international law that bind all nations are found in treaties, international conventions, actual state practice, and the works of jurists and commentators in the field. E.g., The Paquete Habana, 175 U.S. 677, 700 (1900); Filartiga v. Pena-Irala, 630 F.2d 876, 880-84 (2d Cir. 1980).

    Evaluating whether each of the international instruments cited in this Note is a self-executing or non-self-executing treaty, or a source of customary international law, is beyond the scope of the Note. Regardless of the binding effects of various international agreements and customs, Congress declared a national policy of ending discrimination based on sex, race, religion, and national origin when it enacted Title VII. See note 11 and accompanying text supra. [↑](#footnote-ref-63)
63. 63 all recent international instruments relating to human rights, as well as numerous interpretative resolutions, have emphasized the importance of nondiscrimination and equality of treatment as an international obligation. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 53, 55-56, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49-50, U.N. Doc. A/6316 (1966); International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9233/Add. 1 (1973); Convention on Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965); Declaration on Social Progress and Development, G.A. Res. 2542, 24 U.N. GAOR Supp. (No. 30) at 49, U.N. Doc. A/7630 (1969); Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples, G.A. Res. 2037, 20 U.N. GAOR Supp. (No. 14) at 40, U.N. Doc. A/6014 (1965); Charter of the Organization of American States, April 30, 1948, art. 5(j), 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3; Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93, 96; see also T. Meron, supra note 1, at 7 (stating that "respect for and observance of human rights and fundamental freedoms for all, without distinction as to race" is "fundamental norm . . . now accepted into the corpus of customary international law"). Although several international agreements prohibit discrimination based on national origin, see, e.g., International Covenant on Civil and Political Rights, supra, arts. 3, 25, the international consensus against this form of discrimination does not seem as strong as against others. For example, neither the United Nations Charter nor the Universal Declaration of Human Rights bans discrimination based on national origin. See U.N. Charter art. 53(c); Universal Declaration of Human Rights arts. 2, 7. [↑](#footnote-ref-64)
64. 64 See, e.g., U.N. Charter preamble & arts. 1, 13(a)(b), 55(c), 56, 62(2). [↑](#footnote-ref-65)
65. 65 See Universal Declaration of Human Rights arts. 2, 7. [↑](#footnote-ref-66)
66. 66 U.N. Comm'n on Transnational Corporations: Report on the Special Session, U.N. Doc. E/1983/17/Rev. 1 (1983) [hereinafter Transnational Corporations Code]. [↑](#footnote-ref-67)
67. 67 See, e.g., Universal Declaration of Human Rights art. 23(1); Convention on the Elimination of All Forms of Discrimination Against Women art. 11(1)(b), (c), G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979) [hereinafter Convention on Discrimination Against Women]; Convention on Elimination of All Forms of Racial Discrimination, supra note 63, art. 5(e) at 49; Convention concerning Employment Policy, July 9, 1964, art. 1(2)(c), 569 U.N.T.S. 65; Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 [hereinafter ILO Convention]. [↑](#footnote-ref-68)
68. 68 See, e.g., ILO Convention, supra note 67; ILO Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 [hereinafter ILO Convention Concerning Equal Remuneration]; Convention on Discrimination Against Women, supra note 67, art. 11(d); Universal Declaration of Human Rights art. 23(2); International Convenant on Economic, Social and Cultural Rights, supra note 63, arts. 2, 3, 7(a); N. Hevener, supra note 1, at 103 (calling equal pay for equal work major objective of first session of U.N. Commission on the Status of Women). [↑](#footnote-ref-69)
69. 69 See, e.g., Convention on Discrimination Against Women, supra note 67, art. 11(1)(c); International Covenant on Economic, Social and Cultural Rights, supra note 63, art. 7(c). [↑](#footnote-ref-70)
70. 70 See N. Hevener, supra note 1, at 215 (reporting that Convention on Discrimination Against Women, supra note 67, was ratified by vote of 130-0 with 10 abstentions on December 18, 1979). Moreover, there are over one hundred signatories to the Convention Concerning Discrimination in Respect of Employment and Occupation. See id. at 163-64. For background on the international consensus against discrimination, see id.; Law and the Status of Women, supra note 2. [↑](#footnote-ref-71)
71. 71 See Filartiga v. Pena-Irala, 630 F.2d 876, 882 n.10 (2d Cir. 1980) (18 nations have incorporated Universal Declaration of Human Rights into their constitutions); G. Flanz, Comparative Women's Rights and Political Participation in Europe (1983) (comparative analysis of 34 European nations' commitment to equality); Dehner, supra note 3, at 92 (nearly all nations condemn racial discrimination; most have constitutional or statutory prohibitions against public and private discrimination). But see E. Rhoodie, Discrimination in the Constitutions of the World (1984). [↑](#footnote-ref-72)
72. 72 See Country Reports, supra note 19; Amnesty Int'l, Annual Report (1986); see also note 2 supra. [↑](#footnote-ref-73)
73. 73 See note 70 supra. [↑](#footnote-ref-74)
74. 74 See Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 Am. U.L. Rev. 1, 12 (1982). [↑](#footnote-ref-75)
75. 75 E.g., U.N. Charter; International Covenant on Economic, Social and Cultural Rights, supra note 63. [↑](#footnote-ref-76)
76. 76 See Pub. L. No. 88-352, 78 Stat. 255 (1965) (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (1982)); House Report, supra note 9, at 2401. [↑](#footnote-ref-77)
77. 77 E.g., Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) (finding Title VII applicable to United States-based subsidiary of Japanese company). [↑](#footnote-ref-78)
78. 78 See notes 50, 54, 59 and accompanying text supra; see also A. Lowenfeld, supra note 44, at 223-306. [↑](#footnote-ref-79)
79. 79 50 U.S.C. app. § 2407(a)(1)(B) (1982). [↑](#footnote-ref-80)
80. 80 The enactment of amendments to the Export Administration Act of 1969 forbidding participation in foreign boycotts of countries friendly to the United States, see Export Administration Amendments of 1977, Pub. L. No. 95-52, §§ 201-205, 91 Stat. 235, 244-48 (expired 1979) (current version at 50 U.S.C. app. § 2407 (1982)), does not demonstrate an intention to prohibit employment discrimination only when a boycott exists. In fact, during legislative debate over the amendments, Justice Scalia, then Assistant Attorney General, stressed that Title VII already prohibited employment discrimination in the foreign operations of United States companies. See note 25 supra. [↑](#footnote-ref-81)
81. 81 Some commentators argue that a commitment to equal employment opportunity bars foreign affiliates of United States companies from discriminating in the employment of foreign as well as United States nationals. See note 3 supra. Although many of the policy arguments raised by this Note support that position, other factors implicated by the employee's nationality -- such as fewer contacts with the United States -- place the issue beyond the scope of this Note. [↑](#footnote-ref-82)
82. 82 See text accompanying notes 37-41 supra. [↑](#footnote-ref-83)
83. 83 See A. Lowe, supra note 32, at 79-225. Jurisdiction to prescribe represents a state's authority to enact laws governing conduct, relations, status or interest, operations or things, whether by legislation, executive act, or administrative rule or regulation. Restatement (Third), supra note 30, § 401(a). In contrast, jurisdiction to enforce describes a state's authority to compel compliance or impose sanctions for noncompliance with statutes or administrative or judicial orders. Id; see also FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1315 (D.C. Cir. 1980). Both *Restatement (Second) of Foreign Relations Law of the United States* and *Restatement (Third)* seek to resolve conflicts between the United States and host country laws; the former limits jurisdiction to enforce, see Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) [hereinafter Restatement (Second)], and the latter limits jurisdiction to prescribe, see Restatement (Third), supra note 30, § 403. [↑](#footnote-ref-84)
84. 84 See, e.g., Foreign Proceedings (Excess of Jurisdiction) Act, 1 Austl. Acts P. 18 (1984); Uranimum Information Security Regulations, 3 Can. Cons. Regs. ch. 366 (1978); Protection of Trading Interests Act, 1980, ch. 11, §§ 1-4 (United Kingdom). [↑](#footnote-ref-85)
85. 85 Cf. United Kingdom of Great Britain and Northern Ireland: Revised Draft Resolution, 21 U.N. SCOR Supp. at 169, U.N. Doc. S/7621/Rev. 1 (1966), reprinted in A. Lowenfeld, supra note 44, at 442-44 (calling on member states to impose extraterritorial regulations of economic transactions by nationals with Southern Rhodesia to end threat to international peace and security). [↑](#footnote-ref-86)
86. 86 See A. Lowenfeld, supra note 44, at 445-46. African nations condemned the United States retreat from regulation of trade and economic transactions by United States companies in Rhodesia. Id. at 470. [↑](#footnote-ref-87)
87. 87 N.Y. Times, Oct. 21, 1985, at A6, col. 1 (Commonwealth nations); N.Y. Times, Sept. 11, 1985, at A1, col. 3 (Common Market nations); N.Y. Times, Aug. 20, 1985, at A6, col. 6 (Organization of African National Unity and group of nonaligned countries). [↑](#footnote-ref-88)
88. 88 See notes 66-69 and accompanying text supra. [↑](#footnote-ref-89)
89. 89 See note 29 supra. [↑](#footnote-ref-90)
90. 90 Section 702 of Title VII provides: "This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1 (1982); see also notes 169-74 and accompanying text infra. [↑](#footnote-ref-91)
91. 91 See notes 23-26 and accompanying text supra. [↑](#footnote-ref-92)
92. 92 See Dothard v. Rawlinson, 433 U.S. 321, 334 (1976); B. Schlei & P. Grossman, supra note 14, at 341. [↑](#footnote-ref-93)
93. 93 See, e.g., 110 Cong. Rec. 13,170 (1964) (statement of Sen. Byrd); see Also Sirota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification, 55 Tex. L. Rev. 1025, 1032 (1977). [↑](#footnote-ref-94)
94. 94 See house Report, supra note 9, 1964 Code Cong. & Admin. News at 2403; see also Interpretative Memorandum, supra note 24, at 7213; Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 & n.3 (5th Cir. 1969). [↑](#footnote-ref-95)
95. 95 See 29 C.F.R. § 1604.2(a) (1987). [↑](#footnote-ref-96)
96. 96 See Phillips v. Martin-Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring); Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971). [↑](#footnote-ref-97)
97. 97 Weeks, 408 F.2d at 235. [↑](#footnote-ref-98)
98. 98 B. Schlei & P. Grossman, supra note 14, at 348. [↑](#footnote-ref-99)
99. 99 See, e.g., Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) (male gender not BFOQ for job lifting 35 pounds; each employee must have opportunity to show he or she can lift the weight); Weeks, 408 F.2d at 235 n.5 (male gender not BFOQ for telephone switchman position). [↑](#footnote-ref-100)
100. 100 Dothard v. Rawlinson, 433 U.S. 321, 333-34 (1977); Usery v. Tamiami Trail Tours, 531 F.2d 224, 235-36 (5th Cir. 1976). [↑](#footnote-ref-101)
101. 101 Weeks, 408 F.2d at 235-36. [↑](#footnote-ref-102)
102. 102 E.g., Bowe, 416 F.2d at 718; Weeks, 408 F.2d at 235 n.5. [↑](#footnote-ref-103)
103. 103 See, e.g., Phillips v. Martin-Marietta Corp., 400 U.S. 542, 545-47 (1971) (Marshall, J., concurring); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971). [↑](#footnote-ref-104)
104. 104 See note 118 infra. [↑](#footnote-ref-105)
105. 105 Rosenfeld, 444 F.2d at 1224. [↑](#footnote-ref-106)
106. 106 See, e.g., Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273 (9th Cir. 1981); Collins, Jobs, Jobs, Jobs . . . and Too Few Saudis to Fill Them, Christian Sci. Monitor, Jan. 26, 1983, at 12; see also notes 109-38 and accompanying text infra. [↑](#footnote-ref-107)
107. 107 See, e.g., ***Kern*** v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd mem., 746 F.2d 810 (5th Cir. 1985); see also notes 139-55 and accompanying text infra. [↑](#footnote-ref-108)
108. 108 See, e.g., Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986); see also notes 156-68 and accompanying text infra. [↑](#footnote-ref-109)
109. 109 See Note, Employment Discrimination -- U.S. Employers in Foreign Countries: Is Customer Preference a Bona Fide Occupational Qualification? -- Fernandez v. Wynn ***Oil*** Co., 31 U. Kan. L. Rev. 183 (1982). [↑](#footnote-ref-110)
110. 110 653 F.2d 1273 (9th Cir. 1981). [↑](#footnote-ref-111)
111. 111 Id. at 1274. [↑](#footnote-ref-112)
112. 112 Id. at 1275. [↑](#footnote-ref-113)
113. 113 B. Schlei & P. Grossman, supra note 14, at 341. [↑](#footnote-ref-114)
114. 114 See, e.g., Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971); see also Sirota, supra note 93, at 1055-56 (EEOC rejects customer preferences as BFOQ). [↑](#footnote-ref-115)
115. 115 See Sirota, supra note 93, at 1056. [↑](#footnote-ref-116)
116. 116 See Diaz, 442 F.2d at 389. [↑](#footnote-ref-117)
117. 117 29 C.F.R. § 1604.2(a)(1)(iii) (1987). [↑](#footnote-ref-118)
118. 118 See, e.g., Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982); Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980). [↑](#footnote-ref-119)
119. 119 See, e.g., Gerdom v. Continental Airlines, 692 F.2d 602, 609 (9th Cir. 1982); Diaz, 442 F.2d at 389. [↑](#footnote-ref-120)
120. 120 But see EEOC v. Sambo's, Inc., 530 F. Supp. 86, 91 (N.D. Ga. 1981) (requiring Sikh employee whose religion forbids shaving facial hair to shave does not violate Title VII because clean-shaven employees are necessary to success of family restaurant). [↑](#footnote-ref-121)
121. 121 See, e.g., United States v. Gregory, 818 F.2d 114, 117-18 (4th Cir. 1987); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), cert. denied, 446 U.S. 966 (1980). [↑](#footnote-ref-122)
122. 122 See City of Philadelphia v. Pennsylvania Human Relations Comm'n, 7 Pa. Commw. 500, 510, 300 A.2d 97, 102-03 (1973) (interpreting Pennsylvania statute modeled on Title VII). [↑](#footnote-ref-123)
123. 123 See Wigginess v. Fruchtman, 482 F. Supp. 681, 692 (S.D.N.Y. 1979). But see Ciancirolo v. City Council, 376 F. Supp. 719 (E.D. Tenn. 1974) (no BFOQ for position of masseuse). [↑](#footnote-ref-124)
124. 124 See Brooks v. ACF Indus., 537 F. Supp. 1122, 1132 (S.D. W. Va. 1982). [↑](#footnote-ref-125)
125. 125 See EEOC v. Mercy Health Center, 29 Fair Empl. Prac. Cas. (BNA) 159 (W.D. Okla. 1982). [↑](#footnote-ref-126)
126. 126 Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981); Promotion, Educational Requirement and Assignment Bias, EEOC Decisions (CCH) No. 72-0697, P6317 (Dec. 27, 1971). [↑](#footnote-ref-127)
127. 127 Fernandez, 653 F.2d at 1273 (dictum); see also American Jewish Congress v. Carter, 23 Misc. 2d 446, 450-51, 190 N.Y.S.2d 218, 223 (Sup. Ct. 1959), aff'd, 10 A.D.2d 833, 199 N.Y.S.2d 157, aff'd, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961). [↑](#footnote-ref-128)
128. 128 Title VII applies to employees and officials of the State Department. President v. Vance, 627 F.2d 353, 360 (D.C. Cir. 1980); see also Ososky v. Wick, 704 F.2d 1264, 1268 (D.C. Cir. 1983); (discussing Equal Pay Act, 29 U.S.C. § 206 (1982), and concluding that rights available to federal employees generally are available to foreign service employees); cf. Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) (World Bank not subject to Title VII because legislation grants international organizations immunity).

     Although many considerations affect the selection of government employees and diplomats assigned abroad, the practice of the United States government demonstrates its commitment to equality in employment. See Boycott Rep., Sept.-Oct. 1983, at 10 (United States refused to submit additional names when countries rejected proposed United States ambassadors who happened to be Jewish); see also President's Statement, supra note 41 (prohibiting heads of departments and agencies from discriminating in overseas assignments). [↑](#footnote-ref-129)
129. 129 See, e.g., Lewis & Ottley, supra note 28, at 87. In recognition of this argument, this Note equates customer and co-worker preferences in the host country with local customs. [↑](#footnote-ref-130)
130. 130 B. Schlei & P. Grossman, supra note 14, at 355. [↑](#footnote-ref-131)
131. 131 See, e.g., Lewis & Ottley, supra note 28, at 87. [↑](#footnote-ref-132)
132. 132 See 42 U.S.C. § 2000e-1 (1982). [↑](#footnote-ref-133)
133. 133 The cultural impact of employing United States citizens may vary with the degree of interaction between United States and host country nationals. See Collins, supra note 106, at 12. Of course, if the cultural impact is too grave, the host country is always free to ask a foreign company to hire foreign nationals or to leave. The problems raised by enforcement of Title VII are discussed at length in text accompanying notes 276-302 infra. [↑](#footnote-ref-134)
134. 134 See text accompanying notes 78-79 supra. [↑](#footnote-ref-135)
135. 135 See notes 63-74 and accompanying text supra. [↑](#footnote-ref-136)
136. 136 See Lewis & Ottley, supra note 28, at 87. But see Note, Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers, 31 Stan. L. Rev. 947, 969 (1979). [↑](#footnote-ref-137)
137. 137 See text accompanying notes 52-53 supra. [↑](#footnote-ref-138)
138. 138 See House Report, supra note 9, 1964 Code Cong. & Admin. News at 2393-94; Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). Another reason customer preferences in other nations should not be recognized is that some American companies operating only within the United States may depend as much on foreign business and customers as United States companies with foreign operations. Cf. Note, supra note 136, at 969 n.114 (noting that American companies may depend on foreign business as much as foreign companies operating in United States). If customer preference justifies discrimination in foreign employment, companies within the United States that do foreign business logically could claim the same exemption from Title VII. See Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 189 n.19 (1982) (leaving open possibility that Japanese nationality may be BFOQ for positions in Japanese-controlled United States-based company requiring great familiarity with Japanese language, culture, customs, and business practices). [↑](#footnote-ref-139)
139. 139 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd mem., 746 F.2d 810 (5th Cir. 1984). [↑](#footnote-ref-140)
140. 140 Id. at 1198. [↑](#footnote-ref-141)
141. 141 Id. at 1201-02. [↑](#footnote-ref-142)
142. 142 See 746 F.2d 810 (5th Cir. 1984). [↑](#footnote-ref-143)
143. 143 577 F. Supp. 1196. [↑](#footnote-ref-144)
144. 144 See Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.") According to the *Dothard* Court, safety of the employee can justify discrimination only in the rare case in which providing security is the purpose of the business. See id. at 336; see also Tracy v. Oklahoma Dep't of Corrections, 10 Fair Empl. Prac. Cas. (BNA) 1 (W.D. Okla. 1974) (male gender not BFOQ for job of probation officer for male probationers and parolees). [↑](#footnote-ref-145)
145. 145 See Dothard, 433 U.S. at 335. [↑](#footnote-ref-146)
146. 146 Of course, even though Title VII guarantees equal employment opportunity unimpaired by employer paternalism, other legislation or regulations, such as the Occupational Safety and Health Act, 29 U.S.C. §§ 651-668 (1982), require employers to provide a safe working environment to employees. Only in rare cases will the workplace or a substance to which workers must be exposed be necessarily more dangerous to women than men. Being male would be a BFOQ only in these cases. See Williams, Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with the Employment Opportunity Goals Under Title VII, 69 Geo. L.J. 641, 667 (1981). [↑](#footnote-ref-147)
147. 147 But cf. ***Kern***, 577 F. Supp. at 1201 (finding that, because Saudi law subjected non-Moslem pilots to the death penalty, being Moslem was BFOQ reasonably necessary to normal operation of that particular business). ***Kern*** is not a typical safety case because a host country law required the employer to violate Title VII. For a discussion of cases in which host country law conflicts with Title VII, see text accompanying notes 156-68, 175-265 infra. [↑](#footnote-ref-148)
148. 148 433 U.S. 321, 336 (1977); see also Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.) (safety of prison employees basis for BFOQ), cert. denied, 446 U.S. 966 (1980). However, more recent decisions have rejected BFOQs for the position of prison guard. See United States v. Gregory, 818 F.2d 1114 (4th Cir. 1987); Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982); Bagley v. Watson, 579 F. Supp. 1099, 1103-05 (D. Or. 1983). Unlike *Dothard,* these cases considered BFOQ claims based on male prisoners' privacy rights, and not on security issues. See Gregory, 818 F.2d at 1117-18; Hardin, 691 F.2d at 1373-74; Bagley, 579 F. Supp. at 1104-05. For discussion of privacy-based BFOQs, see text accompanying notes 129-33 supra. [↑](#footnote-ref-149)
149. 149 See, e.g., Levin v. Delta Air Lines, 730 F.2d 994, 997-98 (5th Cir. 1984). [↑](#footnote-ref-150)
150. 150 Of course, the courts' assumptions about women's biological capabilities can be disputed. Courts do not agree at what stage of pregnancy a BFOQ for flight attendants is triggered. Compare Burwell v. Eastern Air Lines, 633 F.2d 361, 365-73 (4th Cir. 1980) (en banc) (BFOQ after twelfth week), cert. denied, 450 U.S. 965 (1981) with In re National Airlines, 434 F. Supp. 249 (S.D. Fla. 1977) (no BFOQ until twentieth week). In addition, several courts have found that women can be effective prison guards in correctional institutions. See, e.g., Gregory, 818 F.2d at 1118; Hardin, 691 F.2d at 1373-74; Bagley, 579 F. Supp. at 1104. Although these debates are beyond the scope of this Note, it is important to realize that, even in these cases, the courts did not base BFOQs on stereotypes about gender, but rather on beliefs, albeit questionable ones, about biological capacities. [↑](#footnote-ref-151)
151. 151 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986); see Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976); Hodgson v. Greyhound Lines, 449 F.2d 859, 863 (1974). [↑](#footnote-ref-152)
152. 152 See Western Air Lines v. Criswell, 472 U.S. 400, 408 (1985). [↑](#footnote-ref-153)
153. 153 472 U.S. 400 (1985). [↑](#footnote-ref-154)
154. 154 Id. (quoting Usery, 531 F.2d at 244) (holding that airline rule requiring flight engineers to retire at 60 violated Age Discrimination Employment Act). [↑](#footnote-ref-155)
155. 155 See id.; see also Usery, 531 F.2d at 224; Hodgson, 499 F.2d at 863. Safety claims based on cultural attitudes are merely surrogates for customer preference arguments. See notes 109-38 and accompanying text supra. [↑](#footnote-ref-156)
156. 156 See ***Kern*** v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd mem., 746 F.2d 810 (5th Cir. 1984). [↑](#footnote-ref-157)
157. 157 See id. at 1203. [↑](#footnote-ref-158)
158. 158 See id. at 1202. [↑](#footnote-ref-159)
159. 159 EEOC Dec. No. 85-10, 2 Empl. Prac. Guide (CCH) P6851 n.2 (July 16, 1985). [↑](#footnote-ref-160)
160. 160 Id. [↑](#footnote-ref-161)
161. 161 Id. [↑](#footnote-ref-162)
162. 162 See 42 U.S.C. § 2000e-2(e) (1982), quoted in note 90 supra. [↑](#footnote-ref-163)
163. 163 See Knight v. Nassau County Civil Serv. Comm'n, 649 F.2d 157, 162 (2d Cir.), cert. denied, 454 U.S. 818 (1981). [↑](#footnote-ref-164)
164. 164 See Sex as a Bona Fide Occupational Qualification, 29 C.F.R. § 1604.2(a)1 (1987) (setting forth BFOQ exemption). [↑](#footnote-ref-165)
165. 165 See, e.g., Interpretative Memorandum, supra note 24, at 7212-13. Although Congress clearly contemplated that a specific national origin could be a BFOQ for employment as a waiter at an ethnic restaurant, this distorts the justification for the BFOQ exemption; a person's national origin does not determine his or her ability to be an effective waiter. [↑](#footnote-ref-166)
166. 166 House Report, supra note 9, 1964 U.S. Code Cong. & Admin. News at 2393-94; Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). [↑](#footnote-ref-167)
167. 167 See B. Schlei & P. Grossman, supra note 14, at 340-41 (stating that BFOQ exception has been narrowly construed). [↑](#footnote-ref-168)
168. 168 See 42 U.S.C. § 2000e-2 (1982); see, e.g., Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). [↑](#footnote-ref-169)
169. 169 See 42 U.S.C. § 2000e-1 (1982). Section 703(e)(2) of Title VII specifically permits educational institutions to employ individuals of a particular religion if the institutions are owned, controlled, or supported by a particular religion or if their curriculum is directed toward the propagation of a particular religion. See 42 U.S.C. § 2000e-2(2) (1982). Numerous commentators have suggested that § 703(e)(2) is superfluous because § 702 covers educational institutions and few cases have arisen concerning this exemption as it relates to religion. See, e.g., B. Schlei & P. Grossman, supra note 14, at 244. Thus, this Note discusses only § 702. [↑](#footnote-ref-170)
170. 170 42 U.S.C. § 2000e-1 (1982). [↑](#footnote-ref-171)
171. 171 See, e.g., EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. Unit A July 1981); EEOC v. Mississippi College, 626 F.2d 477, 487 (5th Cir. 1980); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), cert. denied, 409 U.S. 896 (1972); Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791, 799 (D. Utah 1984), rev'd on other grounds, 107 S. Ct. 2862 (1987); Fike v. United Methodist Children's Home, 547 F. Supp. 286, 289-90 (E.D. Va. 1982); B. Schlei & P. Grossman, supra note 15, at 33 (Cum. Supp. 1983-1984); cf. Amos, 107 S. Ct. at 2873 (Brennan, J., concurring) (nonprofit organizations more likely than profit corporations to involve religious principles). [↑](#footnote-ref-172)
172. 172 See, e.g., Feldstein v. Christian Science Monitor, 555 F. Supp. 974, 978 (D. Mass. 1983). [↑](#footnote-ref-173)
173. 173 See, e.g., Fike, 547 F. Supp. at 290. If merely doing business with religious institutions or other religious customers were sufficient to exempt an employer from Title VII coverage, § 702 would negate the EEOC and case law tenet that customer preferences do not justify discrimination. See notes 109-38 and accompanying text supra. [↑](#footnote-ref-174)
174. 174 See McClure, 460 F.2d at 560 (application of Title VII to Salvation Army activities within United States violates first amendment).

     Of course, even if an employer meets the requisites for the religious exemption, it remains subject to the provisions of Title VII with regard to race, color, sex, and national origin. EEOC v. Fremont Christian School, 781 F.2d 1362, 1366 (9th Cir. 1986); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985); EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1982); McClure, 460 F.2d at 558. [↑](#footnote-ref-175)
175. 175 This Note specifically addresses conflicts between a federal civil rights law and foreign laws requiring discrimination. However, conflicts may also arise between state laws and foreign laws. See, e.g., Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984) (employment practices of Greek company based in United States violated Michigan civil rights laws); American Jewish Congress v. Carter, 23 Misc. 2d 446, 450-51, 190 N.Y.S.2d 218, 223-24 (Sup. Ct. 1959) (Saudi policy to deny entry to Jews conflicted with New York state law requiring equal employment opportunity), aff'd, 10 A.D.2d 833, 199 N.Y.S.2d 157, aff'd, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961). Although these conflicts with state law involve many of the issues this Note discusses, see, e.g., Restatement (Third), supra note 30, § 441 comment g, they also raise federalism concerns making full discussion here impossible. [↑](#footnote-ref-176)
176. 176 See A. Lowe, supra note 32; Dam, Extra-Territoriality and Conflicts of Jurisdiction, in Extra-Territorial Application of Laws and Responses Thereto 25 (C. Olmstead ed. 1984). [↑](#footnote-ref-177)
177. 177 See United States v. First Nat'l City Bank, 379 U.S. 378, 384 (1965) ("[O]verseas transactions are often caught in a web of extraterritorial activities and foreign law beyond the ken of our federal courts or their competence."); accord Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 557 (7th Cir. 1985); Restatement (Second), supra note 83, § 37 comment a ("In most situations international law does not provide rules for a choice among the different bases of jurisdiction that international law recognizes."). [↑](#footnote-ref-178)
178. 178 See Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273, 1277 (9th Cir. 1983); American Jewish Congress, 19 Misc. 2d at 206, 190 N.Y.S.2d at 223-24; see also notes 9-14, 63-74 and accompanying text supra. [↑](#footnote-ref-179)
179. 179 Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 107 S. Ct. 2542, 2555 n.27 (1987) (domestic tribunals approach cases touching laws and interests of other sovereign states with spirit of cooperation); United States v. Belmont, 301 U.S. 324, 330 (1937) (countries recognize laws and judgments of another as matter of courtesy); Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) (recognition of decisions of foreign tribunals in domestic courts "fosters international cooperation and encourages reciprocity"). However, "the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." Laker, 731 F.2d at 937. [↑](#footnote-ref-180)
180. 180 In re Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960); see also C. Hyde, supra note 16, § 199, at 640; L. Oppenheim, supra note 16, § 144a, at 327-28; Note, supra note 16, at 368. [↑](#footnote-ref-181)
181. 181 Compare ***Kern*** v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983) (accepting employer's claim that Saudi law and custom made being Moslem a BFOQ for helicopter pilots flying to Mecca), aff'd, 746 F.2d 810 (5th Cir. 1985) with Bryant v. International Schools Serv., 675 F.2d 562 (3d Cir. 1982) (reversing lower court's suggestion that foreign compulsion may be defense to violating Title VII when host country law requires discrimination), rev'g, 502 F. Supp. 472, 490 (D.N.J. 1980); cf. Abrams v. Baylor College of Medicine, 805 F.2d 528, 534-35 (5th Cir. 1986) (concluding that refusal of hospital to place Jewish doctors in Saudi Arabian hospital violated Title VII but suggesting that showing that Saudi law barred Jewish employees might produce different result). A viable BFOQ defense would permit employers to discriminate and thus avoid violating the foreign law. In contrast, the foreign compulsion defense assumes that the foreign and United States laws conflict and seeks to resolve the conflict. Because employers continue to rely on the BFOQ defense, no court yet has relied expressly on the foreign compulsion defense to resolve a conflict between Title VII and a foreign law. See notes 202-10 and accompanying text infra. [↑](#footnote-ref-182)
182. 182 See Bryant, 502 F. Supp. at 490. [↑](#footnote-ref-183)
183. 183 See Note, supra note 16, at 489 n.145. [↑](#footnote-ref-184)
184. 184 See Restatement (Third), supra note 30, § 403. Courts have long relied on the *Restatement (Second)* as an authority on international law, see, e.g., Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 259 (1983); Weinberger v. Rossi, 456 U.S. 25, 29 (1981); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429 n.30 & 431 n.35 (1963), and as an authority on United States law on foreign policy issues, see, e.g., Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 501 (1970); cf. Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 708 app. (1975) (State Department submission relying on *Restatement (Second)*).

     At least one court has already relied on the *Restatement (Third)* to resolve conflict-of-laws problems. See United States v. Davis, 767 F.2d 1025, 1033-34 (2d Cir. 1985). [↑](#footnote-ref-185)
185. 185 See Note, Foreign Sovereign Compulsion in American Antitrust Law, 33 Stan. L. Rev. 131, 131 (1980) [hereinafter Note, Foreign Sovereign Compulsion]; Note, Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation, 88 Yale L.J. 612, 614-15 & 615 n.15 (1979) [hereinafter Note, Foreign Nondisclosure Laws]. [↑](#footnote-ref-186)
186. 186 See, e.g., Societe Internationale v. Rogers, 357 U.S. 197 (1958); In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992 (10th Cir. 1977); Arthur Anderson & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977). [↑](#footnote-ref-187)
187. 187 United States v. General Elec. Co., 115 F. Supp. 835, 878 (D.N.J. 1953). [↑](#footnote-ref-188)
188. 188 See, e.g., Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 606 (9th Cir. 1976). [↑](#footnote-ref-189)
189. 189 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) (recognizing act of state doctrine); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (same). Courts recognize several exceptions to the act of state doctrine: (1) treaty or other unambiguous agreement, see, e.g., Sabbatino, 376 U.S. at 428; (2) investigatory or criminal cases, see, e.g., In re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817, 831-32 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985); (3) express representations by the executive branch that applying the doctrine would not advance American foreign policy (the "Bernstein" exception), see First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972); Restatement (Second), supra note 83, § 41 comment h; and (4) commercial conduct (the commercial exception), see, e.g., Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 695 (1976) (plurality opinion). See generally Jacobs, King, & Rodriguez, Comments: The Act of State Doctrine: A History of Judicial Limitations and Exceptions, 18 Harv. Int'l L.J. 677 (1977) (calling for development of rational and fair standards to promote judicial consistency in act-of-state cases). In the rare case when resolving conflicts between Title VII and a host country's laws involves the act of state doctrine, the international consensus against discrimination in employment should satisfy the treaty or unambiguous international law exception allowing United States courts to challenge the foreign country's laws. See Sabbatino, 376 U.S. at 428 ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it."). [↑](#footnote-ref-190)
190. 190 Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979); In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1149 (N.D. Ill. 1979); Note, Development of the Defense of Sovereign Compulsion, 69 Mich. L. Rev. 888, 897 (1971). [↑](#footnote-ref-191)
191. 191 Timberlane, 549 F.2d at 606; Zenith Radio Corp. v. Matsushita Elec. Indus., 513 F. Supp. 1100, 1194 n. 123 (E.D. Pa. 1981), aff'd in part and rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983) ("Although the actions of a private party are at issue rather than actions of the sovereign itself, as in the act of state doctrine, the defense is applicable when those private actions were compelled by the sovereign."), rev'd on other grounds, 475 U.S. 574 (1986); Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970) ("When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign."); see also Dunfee & Friedman, supra note 48, at 900. [↑](#footnote-ref-192)
192. 192 United States v. Vetco, Inc., 644 F.2d 1324, 1332 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); Mannington Mills, 595 F.2d at 1293. [↑](#footnote-ref-193)
193. 193 Mannington Mills, 595 F.2d at 1293; Timberlane, 549 F.2d at 606; United States v. Watchmakers Information Center, 1963 Trade Cas. (CCH) P70,600, at 77,456 (S.D.N.Y. 1962); United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 182, 629 P.2d 231, 258 (1980), appeal dismissed, 451 U.S. 901 (1981); Dunfee & Friedman, supra note 48, at 901. [↑](#footnote-ref-194)
194. 194 Continential Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962); United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927); Restatement (Third), supra note 30, § 441 comment d. [↑](#footnote-ref-195)
195. 195 Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 398 n.29 (D. Del. 1978); Restatement (Third), supra note 30, § 441 comments c-d. [↑](#footnote-ref-196)
196. 196 Cf. Restatement (Third), supra note 30, § 441 comment d ("For the foreign compulsion defense to succeed, however, it is not enough that the government of a foreign state tolerated or licensed the activity at issue. . . ."); Cantor v. Detroit Edison Co., 428 U.S. 579, 592-93 (1976) (no defense that state law authorizes or encourages action in violation of Sherman Act). [↑](#footnote-ref-197)
197. 197 In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1147-48 (N.D. Ill. 1979) ("[A] refusal to produce which rests on an overbroad and unjustified interpretation of the foreign laws will not be honored here."). [↑](#footnote-ref-198)
198. 198 Mannington Mills, 595 F.2d at 1293; Uranium Antitrust Litig., 480 F. Supp. at 1147; see Note, Foreign Sovereign Compulsion, supra note 185, at 147 n.74. [↑](#footnote-ref-199)
199. 199 See, e.g., Mannington Mills, 595 F.2d at 1293. Although fear of criminal prosecution in a foreign country satisfies the compulsion burden, see, Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958), its absence is not dispositive if civil penalties are sufficently harsh, see Restatement (Third), supra note 30, § 441 comment c ("This section applies . . . when the other state's requirements are embodied in binding laws or regulations subject to penal or other severe sanction . . . ."). At least one court criticized the standard that all criminal penalties, no matter how small, satisfy the compulsion burden while other more onerous government responses, such as the revocation of a necessary license, do not. See United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968) (dictum). Nevertheless, the *First National City Bank* court rejected as compulsion the possibility that the defendant might be exposed to civil liability or lose customers. See id. at 901-02 (satisfaction of compulsion burden by fear that necessary license will be revoked invites company to speculate about future and effectively eliminates compulsion burden). [↑](#footnote-ref-200)
200. 200 Note, Foreign Sovereign Compulsion, supra note 185, at 147. [↑](#footnote-ref-201)
201. 201 See Restatement (Third), supra note 30, § 441 comment c ("denial of opportunity for new [business] arrangements would probably not" give rise to foreign compulsion defense); Note, Foreign Sovereign Compulsion, supra note 185, at 147 n.74 (defense unavailable to companies establishing business in foreign country *knowing* that government there will compel behavior contrary to antitrust laws). [↑](#footnote-ref-202)
202. 202 Compare Abrams v. Baylor College of Medicine, 805 F.2d 528, 533 (5th Cir. 1986) (although "Baylor [College of Medicine] simply never arrived at a theory of its case," it argued that Saudi hostility toward Jews justified discrimination against Jewish doctors) with Bryant v. International Schools Servs., 502 F. Supp. 472, 490 (D.N.J. 1980) (school asserted without proof that Iranian authorities required discriminatory employment practices), rev'd on other grounds, 675 F.2d 562, 565 (3d Cir. 1982). [↑](#footnote-ref-203)
203. 203 805 F.2d 528 (5th Cir. 1986). [↑](#footnote-ref-204)
204. 204 502 F. Supp. 472 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982). [↑](#footnote-ref-205)
205. 205 See Abrams, 805 F.2d at 528; Bryant, 502 F. Supp. at 472. In *Abrams,* a medical school asserted that it could not place Jewish doctors in its three-month rotation at the King Faisal Hospital in Riyadh because it could not secure them visas to Saudi Arabia. 805 F.2d at 531 & n.3. The Fifth Circuit disagreed with the school's claim that Saudi Arabia required discrimination, noting that Baylor's own witnesses testified that Jewish physicians *"had no difficulty getting visas."* Id. at 533 (emphasis in original). The employer also failed to establish foreign compulsion in *Bryant* because it could not show that the host country, Iran, required discriminatory employment practices. See 502 F. Supp. at 490. [↑](#footnote-ref-206)
206. 206 See EEOC Dec. No. 85-10, 2 Empl. Prac. Guide (CCH) P6851 (July 16, 1985). [↑](#footnote-ref-207)
207. 207 Id. at 7054. [↑](#footnote-ref-208)
208. 208 Id. [↑](#footnote-ref-209)
209. 209 Id. at 7055 (BFOQ defense did not apply in case because plaintiff's sex did not interfere with ability to do job). [↑](#footnote-ref-210)
210. 210 See id. [↑](#footnote-ref-211)
211. 211 See Restatement (Third), supra note 30, § 441 comment b. To illustrate the defense, the comment discusses a hypothetical conflict between Title VII and host country laws and states that "a showing that under the law of X, it would be a crime for United States nationals to conform to American standards in hiring practices would generally be a good defense to a charge of unlawful discrimination in employment in the United States." Id. The comment, however, never specifies whether the validity of the foreign compulsion defense in resolving conflicts between United States and foreign employment laws depends upon whether the employees are United States or foreign nationals. To the extent that the *Restatement (Third)* reporters contemplated a situation concerning the employment of United States nationals in a country requiring discrimination, this Note disagrees with their conclusion. However, the comment continues that "[t]he territorial preference is not as strong in situations where the activity being regulated has direct effects in both the territorial state and the state of nationality." Id. Since the employment of United States nationals by United States companies has substantial effects in the United States, see notes 52-53 and accompanying text supra, the foreign compulsion defense is inapplicable. [↑](#footnote-ref-212)
212. 212 See Restatement (Third), supra note 30, ch. 4 introductory note; id. § 441 comment e. [↑](#footnote-ref-213)
213. 213 Id. § 441. The *Restatement (Third)* expressly recognizes that the foreign compulsion defense, while generally available, does not always apply.

     (1) *In general,* a state may not require a person

     (a) 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; or

     (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.

     (2) *In general,* a state may require a person of foreign nationality

     (a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or

     (b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.

     Id. (emphasis added); see also id. comment a (state may in unusual circumstances require national to do abroad what state prohibits). [↑](#footnote-ref-214)
214. 214 Id. § 403(2)(a). For the text of the section, see text accompanying note 235 infra. [↑](#footnote-ref-215)
215. 215 Id. § 403(2)(b). For the text of the section, see text accompanying note 240 infra. [↑](#footnote-ref-216)
216. 216 Id. § 403(2)(c). For the text of the section, see text accompanying notes 246, 266 infra. [↑](#footnote-ref-217)
217. 217 Id. § 403(2)(d). [↑](#footnote-ref-218)
218. 218 Id. § 403(2)(e). For the text of the section, see text accompanying note 267 infra. [↑](#footnote-ref-219)
219. 219 Id. § 403(2)(f). For the text of the section, see text accompanying note 268 infra. [↑](#footnote-ref-220)
220. 220 Id. § 403(2)(g). [↑](#footnote-ref-221)
221. 221 Id. § 403(2)(h). The *Restatement (Third)* indicates that there is no priority or significance in the order in which these eight factors are listed. Id. comment b. In fact, not all considerations have the same importance in all situations; rather, the weight given any particular factor depends on the circumstances. Id. For example, factors (d) and (h) specifically address jurisdiction to prescribe and thus lose their relevance when resolving conflicts that arise when two states have a reasonable basis for exercising jurisdiction over an activity. See Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-49 (D.C. Cir. 1984). [↑](#footnote-ref-222)
222. 222 See Restatement (Third), supra note 30, § 403(2)(c),(e)-(f). [↑](#footnote-ref-223)
223. 223 Several courts relied on the balancing test found in the *Restatement (Second)* to test the validity of a foreign compulsion defense in contexts other than Title VII. See, e.g., In re Societe Nationale Industrielle Aerospatiale, 762 F.2d 120, 126-27 (8th Cir. 1986), aff'd, 107 S. Ct. 2542 (1987); Airline Pilots Ass'n v. TACA Int'l Airlines, 748 F.2d 965, 971 (5th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); In re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817, 827 (11th Cir. 1984); see also Note, Foreign Sovereign Compulsion, supra note 185, at 132-34. [↑](#footnote-ref-224)
224. 224 Restatement (Third), supra note 30, § 403(3) reporters' note 10; see note 83 supra. [↑](#footnote-ref-225)
225. 225 See notes 25, 28 supra. [↑](#footnote-ref-226)
226. 226 Cf. Restatement (Third), supra note 30, § 403 comment g (United States statutes are construed to avoid unreasonableness; if impossible, the statute is still valid). [↑](#footnote-ref-227)
227. 227 Courts will likely use the factors in § 403 in the same manner as they have used the factors in Restatement (Second), supra note 83, § 40 -- to resolve conflicts when both the United States and another nation have jurisdiction to prescribe laws. See, e.g., Airline Pilots Ass'n v. TACA Int'l Airlines, 748 F.2d 965, 971-72 (5th Cir. 1984) (section 40 factors resolved conflict between United States statute and Salvadoran law), cert. denied, 471 U.S. 1100 (1985); In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 997 (10th Cir. 1977) (section 40 factors resolved conflict between discovery order and Canadian regulation). [↑](#footnote-ref-228)
228. 228 Restatement (Third), supra note 30, § 403(3); see also Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 948 & n.145 (D.C. Cir. 1984).

     The *Restatement (Third)* therefore prescribes an approach to conflict of laws analogous to the interest analysis used in state courts that is "the dominant mode of analysis in modern choice of law theory." Silberman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U. L. Rev. 33, 80 n.259 (1978); cf. Richards v. United States, 369 U.S. 1, 11-13 & n.26-27 (1962) (noting trend toward balancing interests of states with significant contacts). [↑](#footnote-ref-229)
229. 229 Cf. Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 549-50 (1935) (conflict between laws of states of the United States). [↑](#footnote-ref-230)
230. 230 See text accompanying notes 211-21. [↑](#footnote-ref-231)
231. 231 See Restatement (Third), supra note 30, § 403(2)(a). [↑](#footnote-ref-232)
232. 232 See id. § 403(2)(b)-(c). [↑](#footnote-ref-233)
233. 233 See id. § 403(2)(g). [↑](#footnote-ref-234)
234. 234 See Id. § 403(2)(c),(e)-(f). [↑](#footnote-ref-235)
235. 235 Id. § 403(2)(a). [↑](#footnote-ref-236)
236. 236 See notes 51-53 supra. [↑](#footnote-ref-237)
237. 237 In analogous situations, in tort actions, a deference to territoriality has given way to a reasonableness inquiry. See Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.11 (1981); Silberman, supra note 224, at 80 n.259; see also United States v. Davis, 767 F.2d 1025, 1037 (2d Cir. 1985) (lawsuits in Cayman Islands seeking to bar production of bank documents sought in United States court had direct, substantial, and foreseeable effect on United States). [↑](#footnote-ref-238)
238. 238 See notes 51-53 and accompanying text supra. [↑](#footnote-ref-239)
239. 239 See notes 8-9, 26, 34-37 and accompanying text supra. [↑](#footnote-ref-240)
240. 240 Restatement (Third), supra note 30, § 403 (2)(b). The residence element may refer to and overlap with the territorial principle. [↑](#footnote-ref-241)
241. 241 Id. § 403(2)(c). [↑](#footnote-ref-242)
242. 242 See notes 32-36 and accompanying text supra. [↑](#footnote-ref-243)
243. 243 Id. [↑](#footnote-ref-244)
244. 244 See notes 32-36 and accompanying text supra; cf. United States v. Davis, 767 F.2d 1025, 1034 (2d Cir. 1985) (finding close United States links to defendants who are United States nationals). [↑](#footnote-ref-245)
245. 245 Restatement (Third), supra note 30, § 403(2)(b). [↑](#footnote-ref-246)
246. 246 Id. § 403(2)(c). [↑](#footnote-ref-247)
247. 247 Section 403(2)(c) overlaps with several others that examine consistency with international law or tradition. See id. § 403(2)(c), (e)-(f). Therefore, § 403(2)(c) will be addressed when §§ 403(2)(e)-(f) are examined. See notes 266-75 and accompanying text supra. [↑](#footnote-ref-248)
248. 248 See Davis, 767 F.2d at 1037. [↑](#footnote-ref-249)
249. 249 In re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817, 827 (11th Cir. 1984). [↑](#footnote-ref-250)
250. 250 In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 999 (10th Cir. 1977) (United States's interest in its discovery orders not as great as Canada's in enforcement of its law). [↑](#footnote-ref-251)
251. 251 Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 543 (1935) (California had legitimate public interest in controlling and regulating relationship between companies incorporated in California and their employees who performed jobs out of state). [↑](#footnote-ref-252)
252. 252 Airline Pilots Ass'n v. TACA Int'l Airlines, 748 F.2d 965, 971 (5th Cir. 1984), cert. denied, 471 U.S. 1100 (1985). TACA International Airlines, S.A. (TACA), a Salvadoran company controlled by Salvadorans, but with its pilots based in New Orleans, abrogated a contract with its pilots in violation of the Railway Labor Act, 45 U.S.C. §§ 152, 155-56 (1982), after El Salvador adopted a new constitutional requirement that all public service companies operating in El Salvador be based there. Although the employer was a host country national and the constitution of El Salvador signified great national interest on the part of the host country, the Fifth Circuit concluded that the United States's interest in the integrity of labor contracts and the fundamental principles of American labor policy must prevail. See 748 F.2d at 971. [↑](#footnote-ref-253)
253. 253 See House Report, supra note 9, 1964 U.S. Code Cong. & Admin. News at 2391. [↑](#footnote-ref-254)
254. 254 Restatement (Third), supra note 30, § 414 comment c; United States v. Vetco Inc., 644 F.2d 1324, 1331 (9th Cir. 1981). The *Restatement (Third)* provides that United States laws can be applied to subsidiaries' activities "related to international transactions, . . . but not *generally* over predominantly local activities," such as the labor relations of a foreign branch or subsidiary. Restatement (Third), supra note 30, § 414 comment c (emphasis added). However, foreign employment of United States citizens by United States companies generally is not a predominantly local activity. See note 52 and accompanying text supra. Such employees may have been hired in the United States or may return there to work for the United States parent company, and decisions and actions related to their employment should be characterized as United States activities or international transactions. To permit the foreign affiliates of United States corporations to discriminate simply because the final employment decision is made or announced abroad would invite corporations to conduct sham hiring processes in which individuals hired in the United States would undergo a formal application process with the foreign affiliate to create a paper trail suggesting the employment decision was made abroad. But cf. United States v. Bechtel Corp., 1979-1 Trade Cas. (CCH) P62,429 (N.D. Cal. 1979) (enjoining company from entering into or implementing provision in contract for boycott of any United States person as subcontractor in the United States but permitting company to enter such agreements outside United States if required by foreign laws), aff'd, 749 F.2d 660 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). [↑](#footnote-ref-255)
255. 255 See 50 U.S.C. app. § 2407(a)(1)(B) (1982) (prohibiting discrimination against any United States person in support of boycott against country friendly to United States). [↑](#footnote-ref-256)
256. 256 See notes 45-47 and accompanying text supra; see also Restatement (Third), supra note 30, § 403 reporters' note 6 ("[A] court may take into account declarations of United States interest in official statements or records of the Executive Branch."). [↑](#footnote-ref-257)
257. 257 President's Statement, supra note 41. [↑](#footnote-ref-258)
258. 258 Quoted in House Report, supra note 45, at 47, 1977 U.S. Code Cong. & Admin. News at 392. [↑](#footnote-ref-259)
259. 259 See, e.g., U.N. Dep't of Int'l & Social Affairs, Multinational Corporations in World Development at 44, U.N. Doc. ST/ESA/190, U.N. Sales No. E.73. II.A.11 (1973) ("[F]oreign control of key sectors by multinational corporations is regarded in many quarters as a serious infringement upon political independence, and even sovereignty itself."); see also Collins, supra note 106, at 12 (Saudi Arabia hires from Southeast Asia to protect society from Western influence). [↑](#footnote-ref-260)
260. 260 In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 994, 999 (10th Cir. 1977). [↑](#footnote-ref-261)
261. 261 Restatement (Third), supra note 30, § 403(3). [↑](#footnote-ref-262)
262. 262 See Airlines Pilots Ass'n v. TACA Int'l Airlines, 748 F.2d 965, 972 (5th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); note 252 supra. [↑](#footnote-ref-263)
263. 263 See, e.g., Collins, supra note 106, at 12. [↑](#footnote-ref-264)
264. 264 See id. [↑](#footnote-ref-265)
265. 265 See, e.g., Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 945-52 (D.C. Cir. 1984) (courts unable to neutrally balance competing resulting interests, causing detriment to international comity); In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (balancing "inherently unworkable" because judiciary has little expertise in economic and social policies of foreign nations). [↑](#footnote-ref-266)
266. 266 Restatement (Third), supra note 30, § 403(2)(c). [↑](#footnote-ref-267)
267. 267 Id. § 403(2)(e). [↑](#footnote-ref-268)
268. 268 Id. § 403(2)(f). [↑](#footnote-ref-269)
269. 269 See id. § 403 reporters' note 6 (when nation is signatory to international agreement, that agreement is indication of its interests); see also I. Brownlie, supra note 38, at 636 ("[O]fficial statements may have probative value as admissions of rights inconsistent with the claims of the declarant in a situation of competing interests."). [↑](#footnote-ref-270)
270. 270 See notes 63-74 and accompanying text supra. [↑](#footnote-ref-271)
271. 271 Transnational Corporations Code, supra note 66. [↑](#footnote-ref-272)
272. 272 Id. art. 12. [↑](#footnote-ref-273)
273. 273 Id. art. 13 ("Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion."). [↑](#footnote-ref-274)
274. 274 Restatement (Third), supra note 30, § 403(2)(c). [↑](#footnote-ref-275)
275. 275 Id. § 403(2)(f). [↑](#footnote-ref-276)
276. 276 See notes 89-174 and accompanying text supra. [↑](#footnote-ref-277)
277. 277 See notes 175-265 and accompanying text supra. [↑](#footnote-ref-278)
278. 278 Of course, a United States company may simply refuse to conduct business in the host country unless permitted to comply with Title VII. Since this situation raises issues similar to those raised when a company complies with Title VII while remaining in the host country -- commitment to equal employment oportunity at the risk of possible economic loss -- the situations will be discussed together. [↑](#footnote-ref-279)
279. 279 See, e.g., First Nat'l City Bank v. IRS, 271 F.2d 616, 620 (2d Cir. 1959) ("If the [employer] cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and [of the host country], perhaps it should surrender to one sovereign or the other the privileges received therefrom."), cert. denied, 361 U.S. 948 (1960). [↑](#footnote-ref-280)
280. 280 See, e.g., United States v. First Nat'l City Bank, 396 F.2d 897, 899 (2d Cir. 1968) (production of documents in American court proceeding might have subjected defendant to fines or jail up to six months under German bank-secrecy laws). In addition to penalties such as fines and jail, consequences may include loss of business if the company's actions offend government officials or citizens of the host country. See, e.g., Fernandez v. Wynn ***Oil*** Co., 20 Fair Empl. Prac. Cas. (BNA) 1162, 1163-64 (C.D. Cal. 1979), aff'd, 653 F.2d 1273 (9th Cir. 1981). [↑](#footnote-ref-281)
281. 281 See A. Lowe, supra note 32, at 79-275. [↑](#footnote-ref-282)
282. 282 For example, in direct response to antitrust litigation in American courts and court orders requiring document production, a number of countries enacted nondisclosure laws. See Kestenbaum, Antitrust's "Extraterritorial" Jurisdiction: A Progress Report on the Balancing of Interests Test, 18 Stan. J. Int'l L. 311, 315 (1982); Note, Foreign Nondisclosure Laws, supra note 185, at 612; Note, Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction, 98 Harv. L. Rev. 1310, 1310-14 (1985). [↑](#footnote-ref-283)
283. 283 When the United States sought to ensure that foreign subsidiaries of United States companies complied with American trade sanctions, several host countries threatened to nationalize the American subsidiaries operating within their borders. See, e.g., Judgment of May 22, 1965, Cour d'appel, Paris, [1968] D.S. Jur. 147 (when United States informed Freuhauf's United States parent that American law barred performance of contract with China, French court appointed judicial administrator to take control of company and permit compliance); Thompson, United States Jurisdiction over Foreign Subsidiaries: Corporate and International Law Aspects, 15 Law & Pol'y Int'l Bus. 319, 332 n.45 (1983) (Argentina threatened to nationalize United States subsidiary operating there if United States prevented it from trading with Cuba). [↑](#footnote-ref-284)
284. 284 There are numerous ways a country could retaliate, including refusing to grant visas to members of disfavored groups. Companies wishing to continue their discriminatory practices have on occasion exaggerated the likelihood of visa denials. See, e.g., Abrams v. Baylor College of Medicine, 805 F.2d 528, 533 (5th Cir. 1986). [↑](#footnote-ref-285)
285. 285 Companies that violated the League of Arab Nations' boycott of Israel initially were barred from operating in several Arab nations. See Boycott Rep., Jan. 1978, at 3. [↑](#footnote-ref-286)
286. 286 See, e.g., Briggs & Stratton Corp. v. Baldridge, 539 F. Supp. 1307, 1317 (E.D. Wis. 1982) (United States company did not answer questionnaire as required by Syria and in violation of League of Arab Nations mandate, but other Arab countries purchased company products and Syria soon thereafter lifted blacklisting), aff'd, 728 F.2d 915 (7th Cir.), cert. denied, 469 U.S. 826 (1984). [↑](#footnote-ref-287)
287. 287 See A. Lowenfeld, supra note 44, at 385-88; Boycott Rep., Jan. 1985, at 5-6. [↑](#footnote-ref-288)
288. 288 See Dehner, supra note 3, at 113-14 (citing letter from Roger B. Smith (General Motors Treasurer) to W. Dehner, Feb. 8, 1971). [↑](#footnote-ref-289)
289. 289 Export Administration Amendments of 1977, Pub. L. No. 95-52, §§ 201-205, 91 Stat. 235, 244-48 (expired 1979) (current version at 50 U.S.C. app. § 2407 (1982)). [↑](#footnote-ref-290)
290. 290 See A. Lowenfeld, supra note 44, at 313. [↑](#footnote-ref-291)
291. 291 Id. at 345; see also House Report, supra note 45, at 5, 1977 U.S. Code Cong. & Admin. News at 362-91; Boycott Rep., May 1978, at 1 (during congressional consideration of antiboycott measures, some American companies advertised that hundreds of thousands of jobs would be lost if law were passed). [↑](#footnote-ref-292)
292. 292 See, e.g., A. Lowenfeld, supra note 44, at 327 (rules not strictly applied to American companies); Boycott Rep., Sept. 1978, at 3 (Saudi Arabia no longer requires answers to standard boycott questions in seeking to register trademark); see also Telegram from American Embassy in Jedda, Saudia Arabia, to Secretary of State, March 12, 1980 (on file at New York University Law Review) (while Saudi Arabia once refused Jews visas as general policy, new policy is to handle visas applications on a case-by-case basis). [↑](#footnote-ref-293)
293. 293 See, e.g., Boycott Rep., Mar. 1985, at 3 (since onset of Iraq-Iran war, United States company officials deal with Iraqi boycott requirements by "simply requesting that they be rephrased or dropped entirely"). [↑](#footnote-ref-294)
294. 294 See, e.g., Boycott Rep., Apr. 1979, at 2 (Kuwait dropped requirement that bidders agree to comply with contract laws relating to boycott of Israel). [↑](#footnote-ref-295)
295. 295 One New York banker who earlier had expressed fear that "the Arabs were not going to budge" said in 1978 that "[w]e've seen a lot of modifications on the part of Arabs. . . . I have to admit I was completely wrong on this." Wiegold, U.S. Boycott Laws Seen Not Affecting Trade with Arabs, Am. Banker, Apr. 19, 1978, at 3. [↑](#footnote-ref-296)
296. 296 See, e.g., United States v. First Nat'l City Bank, 396 F.2d 897, 905 (2d Cir. 1968) (United States bank required to produce records for grand jury despite claims of possible economic retaliation). [↑](#footnote-ref-297)
297. 297 See House Report, supra note 55, at 10-11. For a discussion of the effectiveness of trade sanctions and other types of economic regulation for political ends, see note 61 supra. [↑](#footnote-ref-298)
298. 298 A. Lowenfeld, supra note 44, at 260-65. [↑](#footnote-ref-299)
299. 299 Id. at 277. [↑](#footnote-ref-300)
300. 300 Exec. Order No. 12,532, 31 C.F.R. 545 (1986). [↑](#footnote-ref-301)
301. 301 Pub. L. No. 95-213, 91 Stat. 1496 (codified as amended in scattered sections of 15 U.S.C.). [↑](#footnote-ref-302)
302. 302 See S. Rep. No. 114, 95th Cong., 1st Sess. 10, reprinted in 1977 U.S. Code Cong. & Admin. News 4098, 4108. [↑](#footnote-ref-303)
303. 303 See 42 U.S.C. § 2000e-5(q) (1982); see also B. Babcock, A. Freedman, E. Norton & S. Ross, Sex Discrimination and the Law: Causes and the Remedies 413-35 (1975); B. Schlei & P. Grossman, supra note 14, at 1395-1465. [↑](#footnote-ref-304)
304. 304 See 42 U.S.C. § 2000e-5(g) (1982). [↑](#footnote-ref-305)
305. 305 See id. [↑](#footnote-ref-306)
306. 306 See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). [↑](#footnote-ref-307)
307. 307 See, e.g., Dual v. Griffith, 446 F. Supp. 791, 800 (D.D.C. 1977) (transfer to former position and pay). [↑](#footnote-ref-308)
308. 308 See 42 U.S.C. § 2000e-5(g) (1982). [↑](#footnote-ref-309)
309. 309 See Chasteny v. Flynn & Emrich Co., 381 F. Supp. 1748 (D. Md. 1974), aff'd, 541 F.2d 1040 (4th Cir. 1976). [↑](#footnote-ref-310)
310. 310 Albermarle Paper Co. v. Moody, 422 U.S. 405, 415-17 (1975). [↑](#footnote-ref-311)
311. 311 See notes 287-95 and accompanying text supra. [↑](#footnote-ref-312)
312. 312 Cf. Bob Jones Univ. v. United States, 461 U.S. 574, 595-96 (1983) (racially discriminatory educational entities denied tax exempt status because they do not confer public benefit). [↑](#footnote-ref-313)
313. 313 26 U.S.C. § 908(a) (1982 & Supp. IV 1986). [↑](#footnote-ref-314)
314. 314 Id. § 162(c)(1) (1982); see also id. § 964(a) (no earnings offset allowed for illegal bribes and kickbacks). [↑](#footnote-ref-315)
315. 315 See note 14 supra. [↑](#footnote-ref-316)
316. 316 Exec. Order 11,246, § 201, 3 C.F.R. 339 (1987), reprinted in 42 U.S.C. § 2000e note. [↑](#footnote-ref-317)
317. 317 See Dehner, supra note 3, at 83; see also Broadman & Dunkerley, The Drilling Gap in Non-OPEC Developing Countries, 25 Nat. Resources J. 415 (1985) (***oil*** producers contracts require corporations to hire and train host country nationals). [↑](#footnote-ref-318)
318. 318 See J. LaPolombara & S. Blank, supra note 52, at 159 (Brazilians more satisfied than Malaysians or Nigerians with managerial training of locals by multinational corporations). [↑](#footnote-ref-319)