# **NOTE: THE BIASES OF CUSTOMERS IN A HOST COUNTRY AS A BONA FIDE OCCUPATIONAL QUALIFICATION: *FERNANDEZ V. WYNN OIL CO.***

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**Text**

**[\*335]** The United States Court of Appeals for the Ninth Circuit stated in *Fernandez v. Wynn* ***Oil*** *Co.* [[1]](#footnote-2)1 that under Title VII of the Civil Rights Act of 1964, [[2]](#footnote-3)2 the preferences of customers in a foreign country to deal with male business representatives do not justify a domestic corporation's refusal to hire women for those positions. [[3]](#footnote-4)3 Before that statement, no federal court had ever addressed the issue of whether the prejudices of clients in a host, foreign country could legally bar a woman employed by a United States company from obtaining a position with the company in that country. [[4]](#footnote-5)4 The resolution of this issue is the next logical **[\*336]** step in the development of the law of the bona fide occupational qualification (BFOQ) defense [[5]](#footnote-6)5 under Title VII.

Unfortunately, the court's remarks concerning gender as a BFOQ were dicta. [[6]](#footnote-7)6 While the *Fernandez* discussion of the issue is an important step in the right direction, the underlying problem remains. Over 4500 American companies control foreign business enterprises. [[7]](#footnote-8)7 Yet **[\*337]** neither a legislative nor a judicial mandate prohibits American companies from refusing to hire persons for overseas positions on the basis of certain characteristics to placate clients in foreign countries.

This Note argues that there is a foundation in current case law on Title VII as applied to purely domestic employment practices to hold that preferences of customers in a host country cannot dictate American hiring practices. This Note describes the current status of the BFOQ issue and criticizes it as deficient in protecting United States citizens' rights to fair employment in overseas posts. [[8]](#footnote-9)8 This Note then **[\*338]** proposes judicial, legislative, and treaty solutions to the problem posed, but left unanswered, by *Fernandez.*

I. CURRENT CASE LAW INTERPRETING THE BFOQ PROVISION

A. *FERNANDEZ V. WYNN* ***OIL*** *COMPANY*

In 1976, Delia Fernandez asked her employer of seven years, Wynn ***Oil*** Company, to promote her to a managerial position over its international operations. [[9]](#footnote-10)9 The company refused, and cited among its reasons for refusal the reticence of its Latin American customers to deal with a female business representative. [[10]](#footnote-11)10 Another employee, a male, was given the job instead. Wynn eventually terminated Fernandez. [[11]](#footnote-12)11

Fernandez brought suit alleging that the failure to promote her to the international position constituted unlawful sex discrimination under Title VII. [[12]](#footnote-13)12 Following a bench trial, the district court found against Fernandez on two grounds. First, the court found that Wynn refused to promote Fernandez, not on the basis of her sex, but because she was unqualified for the position. [[13]](#footnote-14)13

Second, the district court agreed with Wynn and found that even if Fernandez had been qualified, Wynn's refusal was justified because "maleness" was a bona fide occupational qualification for the job. [[14]](#footnote-15)14 **[\*339]** Wynn prevailed on the argument that the hostile reaction a female executive might receive from Wynn's Latin American clients might damage the company's business. [[15]](#footnote-16)15

Fernandez appealed, and the case became one of first impression [[16]](#footnote-17)16 in the federal appellate courts on the issue of whether a domestic corporation could bar a female employee from a position in a foreign country because of the preferences and biases of customers in that country. Fernandez argued that Latin American biases were irrelevant to American employment practice because:

If . . . the court herein upholds the [trial court's] interpretation of Title VII that an American company doing business overseas is permitted to acquiesce in the prejudices and biases of a foreign country by refusing to hire and/or promote a female because the employer's customers in the host country would object to such a practice, [then] an American company doing business with customers in South Africa would be permitted to discriminate against Blacks . . . . [[17]](#footnote-18)17

Similarly, under this reasoning, American firms operating in Arab countries would be permitted to discriminate against Jews. [[18]](#footnote-19)18 Several amici curiae also argued this point before the Court of Appeals. [[19]](#footnote-20)19

The Court of Appeals, in an opinion by Judge Ferguson, agreed with the district court's conclusion that Fernandez was not qualified for the job, and was therefore not refused promotion because of her sex. [[20]](#footnote-21)20 **[\*340]** More importantly, the appellate court turned a deaf ear to Wynn's plea not to reach the BFOQ issue. [[21]](#footnote-22)21 The Ninth Circuit repudiated the lower court's ruling that customer preferences could control domestic hiring in this international situation. The appellate court refused to hold that a BFOQ of "maleness" existed in this case. In particular, the court refused to adopt the argument that biases of customers in a host country could dictate hiring practices, and repudiated the lower court's statement that "customer preferences rise to the dignity of a bona fide occupational qualification if 'no customer will do business with a member of one sex either because it would destroy the essence of the business or would create serious safety and efficacy problems.'" [[22]](#footnote-23)22 The appellate court thereby acknowledged the narrow applicability of the BFOQ defense, and hinted at the great burden a defendant employer would have to overcome in order to equate customer preferences and the BFOQ justification.

B. BONA FIDE OCCUPATIONAL QUALIFICATION TEST

A brief overview of the development of the current BFOQ defense as it relates to customer preference clarifies the significance of the *Fernandez* ruling, and in particular why the right to overseas fair employment for persons protected by Title VII was left open by the court's dicta.

1. *Limitations on Applicability of the Defense*

The BFOQ defense is statutory. [[23]](#footnote-24)23 It is limited in its applicability. The statute specifically omits race as a BFOQ, [[24]](#footnote-25)24 thus on its face barring a claim by a defendant that race is a BFOQ. Therefore, only sex, religion, and national origin may lawfully be used, under certain prescribed circumstances, to bar a person from employment. [[25]](#footnote-26)25

The defense is further limited by the judicially created tenet that the BFOQ defense be narrowly construed in its application. [[26]](#footnote-27)26 This tenet is apparently derived from the legislative history of the BFOQ **[\*341]** defense. [[27]](#footnote-28)27 The Equal Employment Opportunity Commission (EEOC) has also called for the narrow interpretation of the BFOQ as applied to sex. [[28]](#footnote-29)28 Courts give great weight to these administrative guidelines. [[29]](#footnote-30)29

The BFOQ defense is closely related to the "business necessity" defense, [[30]](#footnote-31)30 a judicially created defense to a sex discrimination claim. [[31]](#footnote-32)31 The two defenses are distinct in theory, although not necessarily in practice. The business necessity defense is used if the case involves a neutral employment-related policy that results in disparate impact among the protected and unprotected classes. [[32]](#footnote-33)32 But if an employment policy or requirement treats groups differently on its face, the BFOQ defense is appropriate. [[33]](#footnote-34)33 Both defenses require a clear demonstration of compelling business need to justify different treatment of a member **[\*342]** of a protected class. [[34]](#footnote-35)34

The BFOQ defense will be unsuccessful when the employer justifies the exclusion of a person from a paricular job based on genderrelated, stereotypical assumptions about ability to perform the job. [[35]](#footnote-36)35 In accord with this reasoning, the EEOC has promulgated guidelines prohibiting such sterotyping. [[36]](#footnote-37)36

Thus, the BFOQ defense applies only to employment practices or policies which facially discriminate on the basis of sex, religion, or national origin. The defendant must show that the BFOQ was reasonably necessary to normal operation of the business in order to successfully defend a discrimination claim. It is not clear, however, which exclusions of people from employment are "reasonably necessary" to a business, because the term is vague. This Note now turns to some of the tests developed by the courts in applying the BFOQ defense.

2. *Tests Developed by Courts to Determine the Applicability of the BFOQ Provision*

The question of whether a discriminatory practice is "reasonably necessary" [[37]](#footnote-38)37 to a business's normal operation has been problematic. Difficulties arise when courts attempt to balance the employer's needs with the nondiscriminatory spirit of Title VII. [[38]](#footnote-39)38 The courts have developed primarily three tests to determine whether a discriminatory practice is reasonably necessary. [[39]](#footnote-40)39

**[\*343]** a. *"All or Substantially All":* In *Weeks v. Southern Bell Telephone and Telegraph Co.,* [[40]](#footnote-41)40 the plaintiff was denied a job as a switchman because she was a woman. [[41]](#footnote-42)41 The job required lifting thirty or more pounds on an occasional basis. [[42]](#footnote-43)42 The court determined that Southern Bell failed to show that "maleness" was a BFOQ for the position and set forth its often-quoted "all or substantially all" rule:

[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that *all or substantially all women* would be unable to perform safely and efficiently the duties of the job involved. [[43]](#footnote-44)43

The *Weeks* test would be largely inapplicable to the *Fernandez* facts. The skill required there was the ability to negotiate with clients, Latin American ones in particular. [[44]](#footnote-45)44 There would be no "factual basis" for thinking that "all or substantially all" women would not be able to perform such negotiations.

b. *Stereotypical assumptions:* Another test, announced in *Rosenfeld v. Southern Pacific Co.,* [[45]](#footnote-46)45 prohibits exclusion of one sex or the other from a job based upon assumptions about the sexual characteristics of that gender. [[46]](#footnote-47)46 In *Rosenfeld,* the female plaintiff sought a position that required heavy physical labor and occasional nightwork. [[47]](#footnote-48)47 The company justified the plaintiff's exclusion from the position by using the BFOQ defense. The court rejected "the company['s] attempts to raise a commonly accepted characterization of women as the 'weaker sex' to the level of a BFOQ." [[48]](#footnote-49)48

The *Rosenfeld* test, like the *Weeks* test, is difficult to apply to the facts of *Fernandez.* [[49]](#footnote-50)49 That test requires some characteristic peculiar to one sex or the other about which a stereotypical assumption may be **[\*344]** made. In *Rosenfeld,* one such characteristic was that women lack strength to perform physical labor. But in *Fernandez,* there was no such single characteristic intrinsic to Fernandez as a woman. The damaging assumption was that the clients would refuse to deal with her solely because she was a woman. [[50]](#footnote-51)50

c. *"Essence" of the operation:* The courts generally emphasize that the discriminatory practice must be *necessary* to the operation of the business in order to be legally justified as a BFOQ. In *Diaz v. Pan American World Airways, Inc.,* [[51]](#footnote-52)51 males challenged Pan American's practice of hiring only women as flight attendants. [[52]](#footnote-53)52 The court held that "femaleness" was not a BFOQ for the position, stating that the word "necessary" in the statute "requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." [[53]](#footnote-54)53

Where the previous two tests fail in their applicability to the *Fernandez* case, this test may be applied to such a case. This is not to say, however, that an employer will necessarily prevail on such a standard. Unlike the other two, this test does not depend upon the existence of a certain characteristic, such as physical strength. It requires only that the discriminatory choice go to the essence of the operation. A decision to hire a person of one gender over the other, as was the case in *Fernandez,* theoretically may involve performance factors going to the operation's essence. [[54]](#footnote-55)54

These three main tests are currently used to determine whether a discriminatory practice is justifiable as a BFOQ. The next section analyzes current case law on the discriminatory practice of hiring a person **[\*345]** of one gender over the other for certain positions to satisfy customer preferences, and the use of gender as a BFOQ.

3. *Satisfying Customer Preference as a BFOQ*

a. *Relationship to BFOQ:* As was the case in *Fernandez,* an employer may try to justify the exclusion of one sex from a position on the basis that the employer's clientele prefer not to deal with a person of that sex. The employer argues that client preferences make a discriminatory practice reasonably necessary to the normal operation of the business and that client partiality toward the "preferred characteristic" therefore constitutes a BFOQ. [[55]](#footnote-56)55

The Senate Interpretative Memorandum on the BFOQ provision used the preferences of customers as examples of a legal basis for discrimination. The Memorandum posited the following examples of "legitimate discrimination" under the BFOQ provision: "the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion." [[56]](#footnote-57)56

b. *Customer preference decisions:* Virtually all holdings, however, reject an employer's reliance on customer preference as the justification for discrimination, when both the application for, and denial of, employment concerned a position within the United States. [[57]](#footnote-58)57

**[\*346]** The seminal case on customer preference and Title VII is *Diaz v. Pan American World Airways, Inc.* [[58]](#footnote-59)58 In *Diaz,* males brought a class action alleging discriminatory refusal to hire them as flight attendants. Pan Am defended by asserting that its customers clearly preferred female flight attendants. [[59]](#footnote-60)59 Pan Am argued that such preferences constituted a BFOQ of "femaleness" under Title VII. [[60]](#footnote-61)60

The Fifth Circuit reversed the trial court's holding that "femaleness" was a BFOQ for the positions, stating that "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." [[61]](#footnote-62)61 The Fifth Circuit's holding has been widely followed. [[62]](#footnote-63)62

EEOC guidelines also prohibit the use of customer preference as a justification for sex discrimination. The guidelines instruct the Commission to find that "[t]he refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers" does not warrant the application of a BFOQ, [[63]](#footnote-64)63 except when needed for "authenticity or genuineness." [[64]](#footnote-65)64 The EEOC has followed its guidelines in its decisions. In one decision, for example, a female employee claimed she was unlawfully denied promotion to the position of branch manager because she was a woman. [[65]](#footnote-66)65 The employer justified the denial on the basis that the position would require the employee to entertain male customers at sporting events, dinners, and hunting trips. The employer argued that his customers would enjoy these events accompanied by female managers only if the women were "built like Raquel Welch." [[66]](#footnote-67)66 The argument failed before the EEOC.

This example is analogous to the fact situation in *Fernandez.* The essential difference is that the example above involves prejudices of domestic rather than foreign clients. Fernandez argued that she was denied promotion for similar reasons, including the employer's concern for the preferences of its male customers. [[67]](#footnote-68)67

**[\*347]** Many subissues arise under the guise of a "customer's" preference. Often the real preference is the employer's, loosely based upon its *assumption* that customers will not deal with the prospective employee because she is a woman. In *Fernandez,* for example, Wynn may have assumed that the Latin American cultural attitudes prohibited customers from dealing comfortably with a female business executive. [[68]](#footnote-69)68 It is also conceivable that customers in the past may have demonstrated a reluctance or refusal to deal with one particular woman. From this experience the employer may have inferred a general preference to deal with men, an inference that does not necessarily follow from the facts.

The EEOC guidelines make it clear that the preferences of customers, employers, and even coworkers, are not a lawful basis for employment discrimination on the basis of sex, or for the establishment of a BFOQ. [[69]](#footnote-70)69 Until *Fernandez,* the federal case law, which is in accord with the EEOC guidelines, dealt with the preferences of only *domestic* customers. [[70]](#footnote-71)70 The next section examines the additional factors that must be considered when Title VII claims involve preferences of *foreign* parties.

II. TITLE VII AND FOREIGN EMPLOYMENT: CRITIQUE OF EXISTING LAW

A. FOREIGN CUSTOMERS' PREFERENCES

Title VII case law and administrative decisions clearly indicate that within the United States a customer's preference regarding an employee's gender does not justify the employer's exclusion of a member of the other sex from a job. Although current law protects against employment discrimination based on *domestic* customers' preferences, the case law fails to protect citizens' employment rights that are affected by *foreign* customers' preferences or prejudices.

Some authority exists for the proposition that neither religious nor racial biases of foreign countries can legitimate discriminatory employment decisions. Under these decisions, the preference of foreign citizens for a member of a particular race or religion does not form the **[\*348]** basis of a BFOQ. In *American Jewish Congress v. Carter,* [[71]](#footnote-72)71 the New York State court had to decide whether an ***oil*** company, incorporated in New York, could lawfully refuse to send a Jewish engineer to Saudi Arabia because the Saudis prohibited the employment of Jews in their country. [[72]](#footnote-73)72 In applying New York antidiscrimination law, which predated Title VII but included a similar BFOQ provision, the court held that the host country's preference for a non-Jewish employee was not a BFOQ. The court stated, "An engineer who is Jewish is no less an engineer by being so -- and no cavalier attempt to classify him as not having a 'bona fide qualification' because he is Jewish will be countenanced by this court." [[73]](#footnote-74)73

The EEOC has considered the issue of whether a domestic employer may cater to the preferences of the citizens of a host country by assigning a nonblack employee to a post in the country. The Commission decided that a domestic employer may not rely upon the host country's racial biases to deny an employee of the unfavored race an overseas assignment. [[74]](#footnote-75)74

Both *Carter* and the EEOC decision on racial bias arguably deal as much with a country's political prejudices against members of certain classes as they do with the prejudices of potential individual customers in the country. The court in *Fernandez,* on the other hand, had no evidence before it of any particular South American *country's* political bias against women. Instead, the defendant emphasized the alleged biases of individual Latin American *customers.* [[75]](#footnote-76)75 Religion and race are arguably characteristics that more readily evoke minority status than does being female. Virtually every country has a roughly numerically-equal population of men and women, if one assumes that the same number of males and females are born. Thus, the oppression of women as a class may stem more from the cultural biases of particular *citizens* than from the political bias of a *nation* toward its minority citizens. This cultural-political distinction may explain the relative lack of support in the case law for the protection of the rights of women as **[\*349]** compared to the rights of races or religions in overseas employment. [[76]](#footnote-77)76

B. THE INTERNATIONAL EFFECT OF TITLE VII

Current law also fails to protect domestic employees abroad, to the extent that a court declines to adjudicate issues with potential foreign policy ramifications. In particular, courts avoid questions of politics and foreign policy [[77]](#footnote-78)77 which are tangential to the issue of whether a company must ignore the biases of its foreign customers in hiring or promotion. These political and foreign policy questions are especially relevant when treaties are involved. [[78]](#footnote-79)78 Wynn ***Oil*** argued on appeal that for policy reasons the court should neither foist American social attitudes on host countries, nor force American businesses to suffer when the host country repudiates our fair employment practices. [[79]](#footnote-80)79 Thus, at least two issues complicate the problem: first, whether domestic courts may apply Title VII to cases of discrimination overseas, and second, whether Title VII applies when a contrary treaty provision exists.

1. *Extraterritorial Application of Title VII by Courts*

Nothing in the language or legislative history of Title VII distinguishes between domestic and foreign employers in the statute's antidiscrimination mandate. [[80]](#footnote-81)80 Confusion exists as to whether Title VII applies to practices outside of the United States even when suit is brought by a United States citizen working in the overseas office of a **[\*350]** United States employer. For example, if Fernandez had been refused promotion after having worked in an entry level job in the South American office rather than the California office, it is unclear whether she, as an American citizen, would have been able to successfully sue her employer under Title VII.

Case law on the issue is sparse. In *EEOC v. Institute of Gas Technology,* [[81]](#footnote-82)81 the plaintiff alleged that he was unlawfully terminated from his position in Algeria due to his race. [[82]](#footnote-83)82 The EEOC had brought an action to enforce a subpoena duces tecum against the Institute of Gas Technology. [[83]](#footnote-84)83 The Institute claimed that because the event occurred outside United States territorial limits, the EEOC had no jurisdictional power to investigate the incident. [[84]](#footnote-85)84 The district court found that it did not have the power to inquire into EEOC jurisdiction during a proceeding to enforce a subpoena, and thus, "as intriguing as is the issue of whether Title VII applies extraterritorially, an issue which has never been decided by a court of the United States, the court may not determine the merits of that issue in this proceeding." [[85]](#footnote-86)85

In a similar case, *Bryant v. International Schools Services, Inc.,* [[86]](#footnote-87)86 two female teachers sued their employer, an American corporation operating in Iran, under Title VII for sex discrimination in compensation and benefits. [[87]](#footnote-88)87 Despite the employer's argument that Title VII did not apply to conduct in a foreign country, the district court concluded that the Act did apply to conduct overseas. [[88]](#footnote-89)88 The court based this determination of extraterritorial reach on the power of Congress to extend United States law to Americans living outside of United States territory. [[89]](#footnote-90)89

**[\*351]** The Third Circuit reversed the lower court's finding of sex discrimination, holding that the plaintiffs had failed to establish a prima facie case. [[90]](#footnote-91)90 In so doing, the appellate court expressly left open the issue of the extraterritorial effect of Title VII: "Our holding in no way answers the questions raised by appellee's jurisdictional challenge. No court has decided the extraterritorial applicability of Title VII and we find it unnecessary to do so to decide this case." [[91]](#footnote-92)91 Because the court declined to decide the extraterritoriality issue, the question of whether Title VII prohibits discriminatory employment practices outside the United States is unresolved. This determination is analytically important to the *Fernandez* question, namely, whether Title VII bars discriminatory decisions made in the United States concerning overseas employment.

These cases differ from *Fernandez* in one major respect. In both *International Schools* and *Institute of Gas Technology* the allegedly discriminatory conduct by the American company occurred overseas. *Fernandez* is thus the easiest case, because the alleged discrimination occurred within the United States. Yet a comprehensive solution to the problem of whether Title VII prohibits foreign customers' prejudices from dictating hiring practices requires resolution of such extraterritoriality issues.

The question of whether customers' preferences may legally bar employment of a certain person overseas may also conceivably arise when a treaty between the United States and the host country has placed that at issue. This Note now turns to that issue.

2. *Effect of Treaties on Title VII Actions*

Commercial trade between the United States and other nations presents particularly fertile situations for employment discrimination. As long ago as 1977, over five and one-half million persons were employed in foreign companies controlled by United States firms. [[92]](#footnote-93)92 Commercial treaties, primarily treaties of Friendship, Commerce and **[\*352]** Navigation, [[93]](#footnote-94)93 control and encourage foreign investment between the United States and approximately twenty-five foreign nations. [[94]](#footnote-95)94 These treaties may provide the foreign employer the option to employ whom it wishes in the host country. [[95]](#footnote-96)95 The protection given such employers to select workers under these treaties may be "better-than-national," [[96]](#footnote-97)96 that is, better than they would have in their native countries. For these reasons, and because the stated purpose of such treaties is to encourage international investment, [[97]](#footnote-98)97 the likelihood of employment discrimination is strong, especially in a *Fernandez* situation in which cultural attitudes differ. [[98]](#footnote-99)98

The basic problem in adjudicating claims of discrimination arising from prejudices of clients in a foreign country is whether Title VII even applies when a treaty is in effect. This issue arose in a military treaty context in *Rossi v. Brown.* [[99]](#footnote-100)99 In that case American citizens working on a United States naval base in the Phillipines were terminated by the military and replaced with Phillipine nationals. [[100]](#footnote-101)100 A military base employment treaty between the two countries permitted such discrimination. At issue was whether the treaty or Title VII controlled the case. The court held that the treaty controlled and declined to reach the issue of whether Title VII covers discrimination based on citizenship and national origin. [[101]](#footnote-102)101

The United States Supreme Court recently decided a case involving facts almost the inverse of those addressed in *Fernandez.* In *Sumitomo Shoji America, Inc. v. Avigliano,* [[102]](#footnote-103)102 the United States-based, **[\*353]** wholly-owned subsidiary [[103]](#footnote-104)103 of a Japanese corporation allegedly employed Japanese males, who would be acceptable to overseas clients. [[104]](#footnote-105)104 Several Americans [[105]](#footnote-106)105 working in the New York subsidiary brought suit under Title VII, alleging that Sumitomo discriminated on the basis of sex and national origin by bringing male Japanese nationals to American for management jobs, instead of promoting the Americans. [[106]](#footnote-107)106 Sumitomo claimed that the 1953 Treaty of Friendship, Commerce and Navigation between Japan and the United States [[107]](#footnote-108)107 exempted Japanese wholly-owned subsidiaries from the application of Title VII. [[108]](#footnote-109)108

The Second Circuit ruled that both the Treaty and Title VII governed the company. [[109]](#footnote-110)109 Further, the court held that Japanese companies could assert Japanese nationality as a BFOQ, stating, "Title VII, construed in the light of the Treaty, would not preclude the company from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business." [[110]](#footnote-111)110

The Supreme Court reversed the Second Circuit's holding that the subsidiary could invoke the Treaty's employment provisions if done consistently with a broad construction of Title VII. [[111]](#footnote-112)111 The Supreme Court held that because the subsidiary, Sumitomo, was an independent entity, it could not invoke the protection of the Treaty's employee provision and that the Treaty was thus no defense to a Title VII suit. [[112]](#footnote-113)112

The Supreme Court left open, however, the important question of **[\*354]** whether a BFOQ defense based on national citizenship or sex was available to the corporation. The Court stated in a footnote:

We express no view as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions at Sumitomo or as to whether a business necessity defense may be available. There can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country. . . . [T]he Court of Appeals [did not] discuss the bona fide occupational qualification exception in relation to respondents' sex discrimination claim or the possibility of a business necessity defense. Whether Sumitomo can support its assertion of a bona fide occupational qualification or a business necessity defense is not before us. [[113]](#footnote-114)113

Thus, whether the preferences of customers of a subsidiary wholly-owned by a foreign parent may lawfully dictate employment practices of the subsidiary is still unclear.

The Supreme Court's decision leaves the question unanswered not only in terms of the treaty at issue, but also in terms of fundamental cultural differences between Japanese employees and customers on the one hand, and American employees on the other. By refusing to negate or otherwise address the Second Circuit's statement that customers' preferences might be a legitimate factor in hiring, [[114]](#footnote-115)114 the court implicitly recognized something special about the international trade relationship which might warrant deference to customer bias in hiring practices. [[115]](#footnote-116)115

Like the situation in *Avigliano,* the *Fernandez* facts also dealt with international trade and differing cultures. The danger exists that a court, presented with the same issues as those in *Fernandez* and finding no precedent that directly refutes the use of customer preference in foreign circumstances, will also accede to the customer preference for dealing with a man. This would leave a female plaintiff lawfully barred from employment and unprotected by Title VII.

**[\*355]** III. PROPOSALS

A. JUDICIAL SOLUTION

The court's statement in *Fernandez* that the preferences of customers in a foreign country for male business representatives do not constitute a BFOQ under Title VII does not have the strength of a holding. [[116]](#footnote-117)116 Had the statement possessed the strength of a holding, it would have been the first judicial interpretation of Title VII holding that customer preference law applies to international situations. This could have settled the issue of whether women (or men) are protected from sex-based discrimination by foreign-based American corporations. Further, the application of domestic BFOQ law to an international situation would have eliminated the uncertainty left by the Supreme Court in the *Avigliano* decision. [[117]](#footnote-118)117

The framework for a judicial resolution of these issues was laid in the *Fernandez* dicta, which rested on domestic precedent. A state court had already ruled that an employer may not take religion into account when considering whether to send an engineer overseas. [[118]](#footnote-119)118 The EEOC had similarly ruled that race may not be considered in such a decision. [[119]](#footnote-120)119

The *Diaz* [[120]](#footnote-121)120 case is particularly instructive on the standards a court should apply if presented again with a *Fernandez* situation. The logical extension of the *Diaz* holding is that customer preference for a certain gender may be considered by an employer only when the exclusion of the other sex is *essential* to the normal operation of the business. [[121]](#footnote-122)121 The standard, as a matter of both logic and policy, should be equally applicable to both foreign and domestic customers.

Revisionists argue that liberal application of Title VII impinges on business efficiency and imposes higher costs on society. [[122]](#footnote-123)122 Economists argue that elimination of discrimination from the employment marketplace **[\*356]** might result in a loss of efficiency and higher transaction costs. [[123]](#footnote-124)123 These arguments have not yet persuaded courts that discrimination within domestic employment is "reasonably necessary"; this standard is difficult to meet. [[124]](#footnote-125)124 Further, these arguments do not, as a matter of logic, make discrimination any more "reasonably necessary" in the foreign situation than in a domestic situation.

An employer may be required to undergo some expense to avoid discriminatory selection of workers. The EEOC has ruled, for example, that an employer can be required to provide equal housing facilities for women and men, rejecting the employer's claim that the extra "financial expense should constitute a 'business necessity' defense." [[125]](#footnote-126)125 In a business necessity defense context, the courts have issued orders to alleviate discrimination, despite the employer's loss of efficiency and increased costs incurred through implementation of such orders. [[126]](#footnote-127)126

An employment decision based on customer preference in the United States would be rejected by a court under the *Diaz* holding because it is unlikely that the expense to the employer in lost sales could ever reach a level high enough to justify discrimination. This analysis should be no less applicable in a foreign situation such as *Fernandez.*

A viable solution to the *Fernandez* problem may also be achieved through congressional action. This Note now turns to such a legislative solution.

B. A PROPOSED LEGISLATIVE SOLUTION

In constructing a legislative solution to the *Fernandez* problem, it is important to note that sex was included among the classifications to be prohibited by the Civil Rights Act only as an afterthought, [[127]](#footnote-128)127 and even then as an attempt to defeat the entire bill. [[128]](#footnote-129)128 Because of its shaky legislative beginnings, a solution to sex discrimination in foreign employment **[\*357]** could best be obtained by amending Title VII to explicitly prohibit it.

Congress has acted in the past to amend Title VII to remedy what it considered to be an errant judicial holding. It should not, therefore, find it problematic to remedy a problem as yet unresolved by the courts. In the Pregnancy Discrimination Act of 1978, [[129]](#footnote-130)129 Congress amended Title VII to prevent discrimination against women on the basis of pregnancy. Congress passed the pregnancy amendment to nullify the holding in *General Electric Co. v. Gilbert* [[130]](#footnote-131)130 that a company's provision of general physical disability benefits with no disability coverage for pregnancy did not violate Title VII. [[131]](#footnote-132)131 At the time of that decision, twenty-five federal courts, including seven courts of appeal, had already prohibited employment discrimination on the basis of pregnancy. [[132]](#footnote-133)132 The fact that *Gilbert* reached a contrary conclusion did not deter Congress from amending Title VII to reflect the lower courts' holdings. Similarly, if any case law existed supporting the proposition that the biases of customers in a foreign country do constitute a BFOQ, this should not bar Congress from amending Title VII to exclude customer preference as a basis for a BFOQ. [[133]](#footnote-134)133

In enacting the Pregnancy Discrimination Act, the House stated that its intent was to "clarify" the point that employment discrimination on the basis of pregnancy is sex discrimination. [[134]](#footnote-135)134 An amendment to invalidate the use of customers' preferences to justify employment discrimination overseas would effect a similar "clarification."

This proposed amendment could be inserted in the BFOQ provision of Title VII, [[135]](#footnote-136)135 and provide the following words after "reasonably necessary to the normal operation of that particular business or enterprise":

*Provided,* That it shall be an unlawful employment practice to hire and employ employees on the basis of the prejudices, biases, or preferences of customers, co-workers, the employer, or other parties, either in the United States or in other countries, notwithstanding the **[\*358]** operation of any treaty or agreement provision between the United States and other nations to the contrary, and that said practice shall in no event constitute a bona fide occupational qualification under the meaning of this section.

Congress should not be deterred by the fact that legislating a solution to the *Fernandez* problem involves legislating the operation of business in a foreign country. Congress already regulates how American companies do business abroad. By implication, then, it also regulates how those foreign businesses trade with American business abroad. The Foreign Corrupt Practices Act [[136]](#footnote-137)136 is an example of this regulation. It prevents corporate attempts to influence foreign officials in a host country by offering bribes.

These two Acts, the Foreign Corrupt Practices Act and Title VII of the 1964 Civil Rights Act, are analogous. In *Fernandez,* Wynn sought to protect profits in a foreign country by promoting a man instead of a woman, thereby adopting allegedly common South American business practices. Similarly, the Foreign Corrupt Practices Act was meant to prevent American firms from protecting their profits in foreign countries by giving gratuities to officials, thereby adopting an assertedly common business practice. [[137]](#footnote-138)137

The legislative history of the Foreign Corrupt Practices Act refers to the destructiveness of bribery to American prestige abroad and competition at home. [[138]](#footnote-139)138 Similar evils may result from the preference of one gender over the other in defiance of domestic antidiscrimination laws.

Finally, a legislative solution to the *Fernandez* issue requires a clear expression of congressional intent to give Title VII an extraterritorial effect. This issue has been left open by the courts. [[139]](#footnote-140)139 Even though *Fernandez,* unlike *Bryant v. International Schools Service, Inc.,* [[140]](#footnote-141)140 did not involve alleged discrimination occurring outside the United States, such a case could easily arise. The proposed amendment to Title VII must therefore apply extraterritorially to protect both employees in the United States and abroad.

**[\*359]** C. PROPOSED TREATY PROVISIONS

The problem in *Avigliano* [[141]](#footnote-142)141 stemmed from a provision in the treaty between the United States and Japan providing that nationals or companies in either country could hire accountants and other specialists of their choice. [[142]](#footnote-143)142 If the principles against employment discrimination are to be preserved in international situations, then terms must be added to new commercial treaties specifying that any provisions on employment decisions may not violate the discrimination laws of either country. The terms should apply whether the company involved is either a wholly-owned subsidiary or a branch office. [[143]](#footnote-144)143 The Supreme Court in *Avigliano* wrestled with this distinction and concluded that wholly-owned subsidiaries incorporated in the host country are not immune to Title VII employment discrimination suits under the "of-choice" provisions of the Treaty. [[144]](#footnote-145)144

Existing treaties with "of-choice" provisions would have those provisions changed by the proposed amendment to Title VII. [[145]](#footnote-146)145 A treaty provision may be rendered void or changed by the express will of Congress. [[146]](#footnote-147)146 Thus, the legislative solution proposed would serve two purposes. First, it would clearly provide in a *Fernandez* situation that biases of foreign customers may not legally bar employment overseas. Second, it would nullify contrary treaty provisions on this point.

CONCLUSION

The court in *Fernandez v. Wynn* ***Oil*** *Company* asserted in dicta that the biases of customers in a foreign country against dealing with female business representatives do not legitimate a domestic employer's decision to discriminate in a foreign country. Case law in similar domestic situations provides that client prejudices do not justify the exclusion of **[\*360]** women from employment. For reasons of policy, logic, and equity, the Title VII holdings on the role of client preferences and BFOQ's in domestic employment should apply to employment for overseas positions in American corporations.

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1. 1 653 F.2d 1273 (9th Cir. 1981). [↑](#footnote-ref-2)
2. 2 42 U.S.C. §§ 2000e-2000e(17) (1976 & Supp. V 1981). [↑](#footnote-ref-3)
3. 3 653 F.2d at 1276-77. [↑](#footnote-ref-4)
4. 4 *See infra* notes 16-18 and accompanying text.

   A federal lower court recently decided an issue analogous to that in *Fernandez.* In ***Kern*** v. Dynalectron Corp., No. 4-79-346-K (N.D. Tex. Oct. 18, 1983), *appeal docketed,* No. 83-1791 (5th Cir. Nov. 1, 1983), the issue was whether the employer, Dynalectron Corp., could require its employee, Wade ***Kern***, to convert to the Moslem religion in order to fly helicopters for the company into Mecca, Saudi Arabia. ***Kern*** v. Dynalectron Corp., No. 4-79-346-K, slip op. at 2. Dynalectron asserted that conversion was necessary to the job of flying into this area, because, the company argued, non-Moslems would be beheaded upon landing in Mecca under Moslem law. *Id.* at 9.

   The district court held that ***Kern*** had established a prima facie case of religious discrimination under Title VII. *Id.* at 4. The court, however, accepted Dynalectron's bona fide occupational qualification (BFOQ) defense, *see infra* note 5, and held that being Moslem was a BFOQ for this job. *Id.* at 9. The court applied two of the main BFOQ standards, that of Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), *see infra* notes 40-44 and accompanying text, and the standard of Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971), *see infra* notes 51-54 and accompanying text. The district court held, "Dynalectron has proven a factual basis for believing that *all* non-Moslems would be unable to perform this job safely. Specifically, non-Moslems flying into Mecca are, if caught, beheaded." ***Kern*** v. Dynalectron Corp., No. 4-79-346-K, slip op. at 9 (emphasis in original). The court further held that "the essence of Dynalectron's business would be undermined by the beheading of all the non-Moslem pilots based in Jeddah." *Id.* ***Kern*** has appealed this ruling.

   Analytically, ***Kern*** is not a pure customer preference case. *Id.* at 11. It is not Dynalectron's customers who insist that the pilots be Moslem. It is Moslem law as applied in Saudi Arabia that requires persons in the holy area of Mecca to be of the Moslem religion. In this sense, it is the application of Moslem law that supposedly mandates the discriminatory treatment, and not the preferences of customers in that country. The former situation is largely beyond the scope of this Note. *See infra* notes 80-91 and accompanying text. For a topical discussion of employment of Americans in the Middle East, see generally Day, *Job Bias: U.S. Firms Skirt the Laws,* L.A. Times, Nov. 20, 1983, § 1, at 1, col. 1.

   On appeal, it appears that the Fifth Circuit should scrutinize the application of the BFOQ provision by the lower court. An interpretation of the district court's BFOQ holding is that being Moslem is reasonably necessary to flying a helicopter. Clearly this is not so.

   The appellate court should also scrutinize the lower court's treatment of *Fernandez.* The trial court in ***Kern*** avoided the *Fernandez* court's admonition that "[n]o foreign nation can compel the non-enforcement of Title VII here." Fernandez, 653 F.2d at 1277. The district court reasoned that Moslem law is not prohibiting enforcement of Title VII. Title VII, according to the court, is being enforced to the fullest in this case because the BFOQ provision is an integral part of the statute. ***Kern*** v. Dynalectron Corp., No. 4-79-346-K, slip op. at 13. This reasoning appears illusory. In practical effect, the only reason the BFOQ provision was fulfilled was *because* of Moslem law as applied in Saudi Arabia. [↑](#footnote-ref-5)
5. 5 The BFOQ provision of Title VII is the statutory defense to claims of discrimination. It provides in part:

   Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

   42 U.S.C. § 2000e-2(e) (1976). [↑](#footnote-ref-6)
6. 6 In *Fernandez,* the Court of Appeals found that the plaintiff had not established a prima facie case of discrimination under Title VII, because she was not qualified for the job. 653 F.2d at 1275. A prima facie case of employment discrimination under Title VII is established when plaintiff shows that he or she belongs to a class protected by Title VII, applied for and was *qualified for* the job, but was nonetheless rejected, and that the employer continued seeking candidates with plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

   If a prima facie case of discrimination is not established, then a court's inquiry into the existence of a BFOQ is irrelevant; assertion of the defense presumes the existence of a prima facie case. *See* Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252, 262 (N.D. Ind. 1977) (when plaintiff with a sex discrimination claim establishes a prima facie case, burden shifts to defendant to justify its actions). *See also* Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification,* 55 TEX. L. REV. 1025, 1026 (1977) ("Before the BFOQ provision becomes relevant, a party must first prove sex discrimination by an employer."). For commentaries on *Fernandez v. Wynn* ***Oil*** *Co.,* see *1981-1982 Annual Survey of Labor Relations and Employment Discrimination Law,* 24 B.C.L. REV. 47, 256-66 (1982), and Note, *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-7)
7. 7 2 AMERICAN ENCYCLOPEDIA OF INTERNATIONAL INFORMATION, DIRECTORY OF AMERICAN FIRMS OPERATING IN FOREIGN COUNTRIES 1 (J. Angel comp. 8th ed. 1975). *See also* Tumulty, *Nations Turn Tables on Companies,* L.A. Times, Sept. 26, 1982, § 1, at 1, col. 1 (citing 1977 U.S. Commerce Department survey showing that 3540 U.S. firms do business with 24,666 affiliates around the world). [↑](#footnote-ref-8)
8. 8 The focus of this Note is for the most part limited to situations in which the domestic company operates a branch overseas office, as opposed to a wholly-owned subsidiary. Wynn ***Oil*** Company in fact maintained wholly-owned subsidiaries in several countries. Brief of Appellee at 3, Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273 (9th Cir. 1981). There is, however, no indication that it maintained "branches." *Id.* at 2-13. Nonetheless, this Note discusses this issue because of the possibility that such a factual situation may arise wherein the plaintiff has been refused employment in a branch office overseas. *See infra* this note.

   Branches and wholly-owned subsidiaries are the business organization forms commonly found in overseas operations of United States companies. "The two broad alternative modes of direct investment are operation through a branch qualified to do business in the foreign country and the creation of a subsidiary company organized under the laws of the foreign country . . . ." Friedmann & Pugh, *Comparative Analysis,* in LEGAL ASPECTS OF FOREIGN INVESTMENT 734, 735 (W. Friedmann & R. Pugh eds. 1959).

   The form of the overseas business organization has potential ramifications for a plaintiff's sex discrimination suit. The subsidiary, as a legal entity entirely separate from its parent, is not associated with the acts of its parent. *See, e.g.,* C. ROHRLICH, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES § 10.02, at 10-7 (5th ed. rev. 1983) ("[T]he incorporation of an whollyowned subsidiary [sic] serves to create a separate legal entity for all purposes."). *Cf.* Lucas v. Mobil ***Oil*** Corp., 331 F. Supp. 957, 959 (N.D. Tex. 1971) ("mere fact" that parent owned all of subsidiary's stock not sufficient to make parent and subsidiary one legal entity for tort liability purposes). A "branch" or a "division," on the other hand, is not a legal entity separate from the main corporation. C. ROHRLICH, *supra,* § 10.01, at 10-1. Foreign countries, in fact, treat subsidiaries as separate entities, and branches as mere extensions of the main corporation. *See, e.g., The Formation and Operation of Foreign Subsidiaries and Branches, Including the Extent to Which Foreign Subsidiaries are Entitled to Special Treatment Under the Law of Their Incorporation or Under International Law,* 16 BUS. LAW. 403, 444-45 (1961) (discussing the relative tax advantages under Canadian law of branches and subsidiaries); id. at 451-52 (under the law of the United Kingdom, foreign subsidiaries are generally treated the same as foreign branches but a branch does not have the advantage of being a separate legal entity).

   If a foreign subsidiary of a domestic corporation decides not to hire a particular person based on customer preferences in the foreign country, then the plaintiff may have difficulty asserting jurisdiction over the subsidiary in court. Courts will disregard the corporate entity to reach the parent corporation generally only where the subsidiary was incorporated to avoid the imposition of legal liability on the parent. *See* C. ROHRLICH, *supra,* § 10.03, at 10-16 to -17 (courts will disregard corporate entity when incorporation used to avoid antitrust, bankruptcy, labor, criminal, consumer protection, and unfair competition laws).

   United States laws, including Title VII, do not have extraterritorial effect unless a contrary legislative intent appears. Steele v. Bulova Watch Co., 344 U.S. 280, 285 (1952); Reyes v. Secretary of HEW, 476 F.2d 910, 915 n.10 (D.C. Cir. 1973). Absent evidence that the subsidiary is a sham, the courts maintain the subsidiary-parent distinction when applying Title VII. *Cf.* Hassell v. Harmon Foods, Inc., 336 F. Supp. 432, 433 (W.D. Tenn. 1971) (nothing in the legislative history of Title VII allows a parent-subsidiary separate relationship to be ignored for purposes of obtaining jurisdiction). By implication, therefore, a Title VII plaintiff could more easily succeed if a branch office, rather than a subsidiary, were the situs of an allegedly discriminatory employment decision.

   For a discussion of the importance of the subsidiary-branch distinction in the context of civil rights and treaties, see Sumitomo Shoji America, Inc. v. Avigliano, 457 U.S. 176 (1982), and *infra* notes 141-44 and accompanying text. [↑](#footnote-ref-9)
9. 9 653 F.2d at 1274. The Director of International Operations position, to which Fernandez requested promotion, supervised the operation of all wholly-owned subsidiaries, and the activities of Regional Sales Managers, who themselves would be involved in international trade. Brief of Appellee at 4-5, *Fernandez.* [↑](#footnote-ref-10)
10. 10 653 F.2d at 1274, 1276. [↑](#footnote-ref-11)
11. 11 Id. at 1274. [↑](#footnote-ref-12)
12. 12 Title VII provides, in pertinent part, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(1) (1976). Ironically, the section does not use the neuter gender form, "his or her," even when discussing sex discrimination. [↑](#footnote-ref-13)
13. 13 653 F.2d at 1275. [↑](#footnote-ref-14)
14. 14 Id. at 1276. [↑](#footnote-ref-15)
15. 15 *See* id. at 1276 (district court based its conclusion "on testimony that Wynn's South American clients would refuse to deal with a female" executive). [↑](#footnote-ref-16)
16. 16No federal court has determined whether, under Title VII, an employer may consider the social customs and mores of another country in selecting employees where that consideration would result in exclusion of a protected group, e.g. women or minorities." Brief for Appellee at 36, *Fernandez. See also* Appellant's Opening Brief at 10, Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273 (9th Cir. 1981) ("the case herein presents an issue of first impression"). [↑](#footnote-ref-17)
17. 17 Appellant's Opening Brief at 15-16, *Fernandez.* [↑](#footnote-ref-18)
18. 18 *Id.* at 15.

    For examples of cultural attitudes in various countries to women in the job market, see Ajami, *The Multinational Firm and Host Arab Society: Areas of Conflict and Convergence,* MGMT. INT'L REV., no. 1, 1980, at 16; Moskoff, *Women and Work in Israel and the Islamic Middle East,* Q. REV. ECON. BUS., Winter 1982, at 89.

    The political climate clearly affects how host countries receive members of certain classes as employees of United States companies. During the Arab boycott of Israel, for example, "[i]n misguided and misinformed attempts to curry favor with potential Arab clients, some American businessmen have refrained from employing Jews or dealing with Jewish businessmen." N. VANDER CLUTE, *The Arab Boycott of Israel,* in LEGAL ASPECTS OF THE ARAB BOYCOTT 9, 22 (N. Vander Clute chair 1977). [↑](#footnote-ref-19)
19. 19 Amicus curiae briefs were filed by American Jewish Congress, Equal Employment Opportunity Commission, Mexican American Legal Defense and Educational Fund, Inc., and Women's Equal Rights Legal Defense and Education Fund. Fernandez, 653 F.2d at 1275. [↑](#footnote-ref-20)
20. 20 *Id.* [↑](#footnote-ref-21)
21. 21 Brief of Appellee at 31-35, *Fernandez.* [↑](#footnote-ref-22)
22. 22 Fernandez, 653 F.2d at 1276. [↑](#footnote-ref-23)
23. 23 *See supra* note 5. [↑](#footnote-ref-24)
24. 24 *Id. See also* Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982) (race or color not a BFOQ); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 370 n.13 (4th Cir. 1980) (BFOQ defense inapplicable in race discrimination case). [↑](#footnote-ref-25)
25. 25 42 U.S.C. § 2000e-2(e) (1976). [↑](#footnote-ref-26)
26. 26 *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (BFOQ exception meant to be an extremely narrow exception to general prohibition of sex discrimination). [↑](#footnote-ref-27)
27. 27 An "Interpretative Memorandum" offered to the Senate by Senators Case and Clark characterized the provision as a "limited right to discriminate" under Title VII. 110 CONG. REC. 7213 (1964). *But see* Sirota, *supra* note 6, at 1026 ("The meager legislative history of the BFOQ provision indicates that Congress intended it to have broad application in the area of sex discrimination."). *Cf.* J. BAER, THE CHAINS OF PROTECTION 137 (1978) (broad judicial interpretation of the BFOQ provision could potentially nullify antidiscrimination purpose of Title VII). [↑](#footnote-ref-28)
28. 28 29 C.F.R. § 1604.2(a) (1982). The EEOC would allow sex as a BFOQ only in very limited circumstances where authenticity or genuineness are needed, as in the case of actors or actresses. *Id.* at § 1604.2(a)(2). At least one proposal would limit discrimination by sex to the very narrow case in which "intrinsic attributes of one sex or the other are a necessary qualification for the job." *Developments in the Law -- Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1179 (1971) [hereinafter cited as *Developments in the Law].* [↑](#footnote-ref-29)
29. 29 *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 334 n.19 (1977) (EEOC construction of BFOQ given great weight); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (EEOC administrative guidelines entitled to great deference by courts). [↑](#footnote-ref-30)
30. 30 The Supreme Court recognized the business necessity defense in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), but the defense as applied since has developed into a balancing test. According to a widely cited articulation of the defense, the employer must show: (1) that the business purpose "compelling[ly]" outweighs the discriminatory effect; (2) that the challenged practice effectively advances the asserted interest; and (3) that no less discriminatory alternative exists. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971). For criticism of the *Lorillard* test, see Note, *Title VII and Business Necessity -- Individuality or Convenience?,* 22 ARIZ. L. REV. 79, 85-87 (1980). [↑](#footnote-ref-31)
31. 31 H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 575 (2d ed. 1981); Annot., 36 A.L.R. FED. 9, 23 n.7 (1978). [↑](#footnote-ref-32)
32. 32 B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 359 (2d ed. 1983). *See also* Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 653 (5th Cir. 1980) (business necessity defense applies to racial discrimination, but is apparently limited to facially neutral, operationally discriminatory practices). [↑](#footnote-ref-33)
33. 33 B. SCHLEI & P. GROSSMAN, *supra* note 32, at 358-59. Many courts, however, do not distinguish the defenses. *Id.* at 358; *see, e.g.,* Swint v. Pullman-Standard, 624 F.2d 525, 534 (5th Cir. 1980) (court in race discrimination evaluated both BFOQ and business necessity defenses), *rev'd on other grounds,* 456 U.S. 273 (1982). *See generally* H. KAY, *supra* note 31, at 576-81 (discussing courts' inconsistent application of the defenses in sex discrimination cases); Note, *Sex Discrimination: Theories and Defenses under Title VII and* Burwell v. Eastern Air Lines, Inc., 83 W. VA. L. REV. 605, 618-19 (1981) (discussing differences in defenses). [↑](#footnote-ref-34)
34. 34 *See* Note, *A Woman's Place: Diminishing Justifications for Sex Discrimination in Employment,* 42 S. CAL. L. REV. 183, 200 (1969) (arguing for strict necessity test for BFOQ). [↑](#footnote-ref-35)
35. 35 City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 (1978); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1223-25 (9th Cir. 1971). *See also infra* notes 45-48 and accompanying text. [↑](#footnote-ref-36)
36. 36 The EEOC has promulgated the following guideline: "The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." 29 C.F.R. § 1604.2(a)(1)(ii) (1982). [↑](#footnote-ref-37)
37. 37 42 U.S.C. § 2000e-2(e) (1976). [↑](#footnote-ref-38)
38. 38 A standard initially proposed in congressional debates over a BFOQ provision would have permitted discrimination when the employer believed, "on the basis of substantial evidence," that hiring an individual of one gender over the other "[would] be more beneficial to the normal operations of . . . [the] business or to its good will." 110 CONG. REC. 13,825 (1964) (proposed amendment by Senator McClellan). This standard, more lenient than the "reasonably necessary" test, was defeated. *Id.* at 13,826. Senator Case, who had co-offered the Senate Interpretative Memorandum, *see supra* note 27, argued that the McClellan amendment would destroy the civil rights bill. 110 CONG. REC. 13,826 (1964). [↑](#footnote-ref-39)
39. 39 *See generally* Sirota, *supra* note 6, at 1042-47 (discussing the general tests and the narrowness of the BFOQ provision). [↑](#footnote-ref-40)
40. 40 408 F.2d 228 (5th Cir. 1969). [↑](#footnote-ref-41)
41. 41 Id. at 230. [↑](#footnote-ref-42)
42. 42 Id. at 233. [↑](#footnote-ref-43)
43. 43 Id. at 235 (emphasis added). For a discussion of the safety and efficiency rationale in a business necessity context, see Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249-50 (10th Cir. 1970). For examples of reliance on *Weeks* by other courts, see, *e.g.,* Hardin v. Stynchcomb, 691 F.2d 1364, 1370 (11th Cir. 1982); Tuohy v. Ford Motor Co., 675 F.2d 842, 844 (6th Cir. 1982). [↑](#footnote-ref-44)
44. 44 Fernandez, 653 F.2d at 1274. [↑](#footnote-ref-45)
45. 45 444 F.2d 1219 (9th Cir. 1971). [↑](#footnote-ref-46)
46. 46 Id. at 1224-25. *See supra* notes 35-36 and accompanying text. [↑](#footnote-ref-47)
47. 47 Rosenfeld, 444 F.2d at 1223. [↑](#footnote-ref-48)
48. 48 Id. at 1224. [↑](#footnote-ref-49)
49. 49 *See supra* notes 40-44 and accompanying text. [↑](#footnote-ref-50)
50. 50 Fernandez, 653 F.2d at 1274. Furthermore, the Ninth Circuit intimated that there must be a *factual* basis for believing that a woman in this position would undermine its operations in the other country. Id. at 1276. This also militates against application of the *Rosenfeld* test to a *Fernandez* situation, if the court is correct, because *Rosenfeld* involved stereotyped characteristics. [↑](#footnote-ref-51)
51. 51 442 F.2d 385 (5th Cir. 1971). [↑](#footnote-ref-52)
52. 52 *Id.* at 86. [↑](#footnote-ref-53)
53. 53 *Id.* at 388 (emphasis in original). At least one commentator has broken the *Diaz* standard into two standards: the essence of a particular job, and the essence of a business as a whole. Sirota, *supra* note 6, at 1043-44. [↑](#footnote-ref-54)
54. 54 For a discussion of the extent to which an employer's operations must suffer in order to accommodate a nondiscriminatory choice of employee, see *infra* notes 122-25 and accompanying text. [↑](#footnote-ref-55)
55. 55 *Cf.* Rucker v. Higher Educ. Aids Bd., 669 F.2d at 1180-81 (employer cited black community preference as justification for hiring a black counselor). [↑](#footnote-ref-56)
56. 56 110 CONG. REC. 7213 (1964). Representative Goodell proposed the amendment to the Act that would add "sex" to the list of characteristics subject to BFOQ claims. *Id.* at 2718. He stated that sex discrimination should be acceptable when, for example, an elderly female patient preferred a female nurse. *Id.* This type of preference was rejected by the EEOC when a male nurse sued because he was denied a position in a nursing home in which three-quarters of the patients were female. EEOC Dec. No. 71-2410 (1971), EEOC Dec. (CCH) P6282 (1973). *But cf.* Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1354 (D. Del. 1978) (denial of male nurse's application does not violate Title VII when privacy interests of predominantly female patients form the basis of a BFOQ), *aff'd mem.,* 591 F.2d 1334 (3d Cir. 1979). [↑](#footnote-ref-57)
57. 57 *See, e.g.,* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971) (preferences of passengers for unmarried airline stewardesses do not form basis for single marital status as a BFOQ): Wigginess Inc. v. Fruchtman, 482 F. Supp. 681, 692 (S.D.N.Y. 1979) (preferences of male customers for "female massagists" does not justify injunction against enforcement of zoning ordinance prohibiting massage by member of opposite sex), *aff'd mem.,* 628 F.2d 1346 (2d Cir. 1980). *But cf.* Ward v. Westland Plastics, Inc., 651 F.2d 1266, 1268-69 (9th Cir. 1980) (exclusion of female employee from business lunch in which client wished to be only woman in attendance does not violate Title VII). [↑](#footnote-ref-58)
58. 58 442 F.2d 385 (5th Cir. 1971). [↑](#footnote-ref-59)
59. 59 Id. at 387. [↑](#footnote-ref-60)
60. 60 Id. at 386. [↑](#footnote-ref-61)
61. 61 Id. at 389. [↑](#footnote-ref-62)
62. 62 *See, e.g.,* Rucker v. Higher Educ. Aids Bd., 669 F.2d at 1181 (customer preference rejected as a justification for discrimination against black woman); EEOC v. St. Anne's Hosp., 664 F.2d 128, 133 (7th Cir. 1981) (race discrimination not justified by customer preference). [↑](#footnote-ref-63)
63. 63 29 C.F.R. § 1604.2(a)(1)(iii) (1982). [↑](#footnote-ref-64)
64. 64 *Id.* at § 1604.2(a)(2). [↑](#footnote-ref-65)
65. 65 EEOC Dec. No. 71-2338 (1971), EEOC Dec. (CCH) P6247 (1973). [↑](#footnote-ref-66)
66. 66 *Id.* at 4438. [↑](#footnote-ref-67)
67. 67 *See* Appellant's Opening Brief at 11, *Fernandez* (Wynn official testified "an American company would be ill advised to have female representatives conducting business in Latin America"). [↑](#footnote-ref-68)
68. 68 *See id.* (testimony on cultural attitudes based on company official's "knowledge"); Fernandez, 653 F.2d at 1276 (district court's conclusion that Wynn's foreign clients would refuse to deal with a woman erroneous in that no factual basis existed linking sex with job performance). [↑](#footnote-ref-69)
69. 69 *See supra* text accompanying note 63. [↑](#footnote-ref-70)
70. 70 *See supra* notes 57-64 and accompanying text. [↑](#footnote-ref-71)
71. 71 19 Misc. 2d 205, 190 N.Y.S.2d 218 (N.Y. Sup. Ct. 1959), *modified,* 10 A.D.2d 833, 199 N.Y.S.2d 157 (1960), *aff'd,* 9 N.Y.2d 223, 173 N.E.2d 778, 213 N.Y.S.2d 60 (1961). [↑](#footnote-ref-72)
72. 72 190 N.Y.S.2d at 221 (cited material appears in unofficial reporter only). [↑](#footnote-ref-73)
73. 73 Id. at 223 (emphasis omitted) (cited material appears in unofficial reporter only). [↑](#footnote-ref-74)
74. 74 EEOC Dec. No. 72-0697 (1971), EEOC Dec. (CCH) P6317 (1973) (employer's policy of accommodating racially discriminatory requirements of host countries is within ambit of Title VII). [↑](#footnote-ref-75)
75. 75 *See* Appellant's Opening Brief at 10-11, *Fernandez* (summarizing testimony of Wynn officials on their perceived bias of Latin American customers). [↑](#footnote-ref-76)
76. 76 One commentary opines that the *Fernandez* situation may evoke lawful discrimination. The authors conclude,

    Sex may also be a bfoq for positions whose occupants face cultural bias outside the effective reach of the statute [Title VII]. For example, men only could be hired for a position that called primarily for business dealings with a foreign culture in which women are totally unacceptable in a business context.

    *Developments in the Law, supra* note 28, at 1186. [↑](#footnote-ref-77)
77. 77 *See, e.g.,* Romero v. International Terminal Operating Co., 358 U.S. 354, 383 (1959) (adjudication of issues entangled in international relations requires that the Court be circumspect); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (foreign relations, entrusted to the political government branches, largely immune from judicial interference); Holmes v. Laird, 459 F.2d 1211, 1215 (D.C. Cir.) (foreign policy entrusted to other nonjudicial branches of government, especially when treaty involved), *cert. denied,* 409 U.S. 869 (1972); Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.) (courts not designed to deal with issues of foreign policy), *cert. denied,* 298 U.S. 965 (1970). [↑](#footnote-ref-78)
78. 78 *See infra* notes 92-115 and accompanying text. [↑](#footnote-ref-79)
79. 79 Brief for Appellee at 38, *Fernandez.* [↑](#footnote-ref-80)
80. 80 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 *passim* (1968) [hereinafter cited as LEGISLATIVE HISTORY]; Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 STAN. L. REV. 947, 956-57 (1979). [↑](#footnote-ref-81)
81. 81 23 Fair Empl. Prac. Cas. (BNA) 825 (N.D. Ill. 1980). [↑](#footnote-ref-82)
82. 82 Id. at 826. [↑](#footnote-ref-83)
83. 83 *Id.* [↑](#footnote-ref-84)
84. 84 *Id.* [↑](#footnote-ref-85)
85. 85 Id. at 827. [↑](#footnote-ref-86)
86. 86 502 F. Supp. 472 (D.N.J. 1980), *rev'd,* 675 F.2d 562 (3d Cir. 1982). [↑](#footnote-ref-87)
87. 87 Id. at 474. [↑](#footnote-ref-88)
88. 88 Id. at 482-83. [↑](#footnote-ref-89)
89. 89 Id. at 482.

    United States statutes "apply only to conduct occurring within, or having effect within, the territory of the United States, *unless the contrary is clearly indicated by the statute."* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1962) (emphasis added). This maxim has been followed by the courts. *See, e.g.,* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (legislation intended to apply domestically unless contrary congressional intent appears); Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1357 (D.C. Cir. 1981) (Congress must direct an agency to consider extraterritorial effects of an action before it may lawfully have jurisdiction to do so); FTC v. Compagnie de Saint-Gobain-Pot-A-Mousson, 636 F.2d 1300, 1322-23 (D.C. Cir. 1980) (in order for U.S. agency to be able to investigate extraterritorial effects of action, Congress must explicitly mandate that it have the power to do so). The legislative history of Title VII is silent on its intended extraterritorial effects. LEGISLATIVE HISTORY, *supra* note 80, *passim.* [↑](#footnote-ref-90)
90. 90 Bryant v. International Schools Servs., Inc., 675 F.2d 562, 576-77 (3d Cir. 1982). For the elements of a prima facie case under Title VII, see *supra* note 6. [↑](#footnote-ref-91)
91. 91 675 F.2d at 577 n.23. [↑](#footnote-ref-92)
92. 92 Tumulty, *supra* note 7, § 1, at 14, col. 2. Not all of these employees, of course, will be United States citizens. [↑](#footnote-ref-93)
93. 93 For a discussion of treaties of friendship, commerce, and navigation, see generally Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805 (1958). [↑](#footnote-ref-94)
94. 94 For a partial list of such treaties, see 1 INTERNATIONAL LEGAL MATERIALS 92-93 (1962). [↑](#footnote-ref-95)
95. 95 Note, *supra* note 80, at 950. [↑](#footnote-ref-96)
96. 96 *Id. See* Costantino, Goldstein & Kehoe, *Title VII: The Current Conflict with International Treaty Law,* N.Y.L.J., NOV. 30, 1981, at 1, col. 3 (treaties grant foreign businesses better treatment than domestic firms) [hereinafter cited as Costantino]; Note, *State Regulation of Foreign Investment,* 9 CORNELL INT'L L.J. 82, 92 (1975) ("The investment freedom [of companies] is almost complete."). [↑](#footnote-ref-97)
97. 97 Costantino, *supra* note 96, at 1, col. 3. [↑](#footnote-ref-98)
98. 98 There was no treaty issue in *Fernandez;* however, policies of multinationals doing business in different countries inevitably clash. *Cf.* Ajami, *supra* note 18, at 16 (presence of foreignowned operations in host country results in clashes of ideology and culture); Tumulty, *supra* note 7, § 1, at 15, col. 1 (contrasting the American and German attitudes toward corporate bribery). [↑](#footnote-ref-99)
99. 99 467 F. Supp. 960 (D.D.C. 1979), *aff'd mem.,* sub nom. Rossi v. Weinberger, 684 F.2d 1033 (D.C. Cir. 1982). [↑](#footnote-ref-100)
100. 100 Id. at 961. [↑](#footnote-ref-101)
101. 101 Id. at 968. *See also* Evans, *Judicial Decisions,* 74 AM. J. INT'L L. 184, 200-02 (1980) (summarizing the parties' arguments and court's reasoning in *Rossi v. Brown*). [↑](#footnote-ref-102)
102. 102 457 U.S. 176 (1982). [↑](#footnote-ref-103)
103. 103 For a discussion of the import of "subsidiary" status, see *supra* note 8. [↑](#footnote-ref-104)
104. 104 457 U.S. at 178. [↑](#footnote-ref-105)
105. 105 Plaintiffs also included one Japanese citizen living in the United States. *Id.* [↑](#footnote-ref-106)
106. 106 *Id.* [↑](#footnote-ref-107)
107. 107 Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Treaty]. [↑](#footnote-ref-108)
108. 108 *Id.* at 179. [↑](#footnote-ref-109)
109. 109 Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552, 559 (2d Cir. 1981). The court of appeals strained to reach the Title VII issue, stating that although the district court judge had not decided the reach of Title VII on the issue, "it would be a waste of judicial resources to remand without reaching the substantive question which Sumitomo's motion to dismiss inevitably poses." Id. at 558 n.6. [↑](#footnote-ref-110)
110. 110 Id. at 559. The court diverged from the established case law on domestic customer preferences, *see supra* notes 55-70 and accompanying text, by listing among the legitimate factors for hiring "the acceptability [of employees] to those persons with whom the company or branch does business." Id. at 559. *See also Foreign Corporations: Applicability of United States Civil Rights Statutes,* 22 HARV. INT'L L.J. 418, 421-22 (if a court considers acceptability of employees to those with whom company does business, this will be departure from traditional domestic BFOQ law). [↑](#footnote-ref-111)
111. 111 *See supra* note 8. [↑](#footnote-ref-112)
112. 112 457 U.S. at 182-83. [↑](#footnote-ref-113)
113. 113 Id. at 189 n.19. [↑](#footnote-ref-114)
114. 114 638 F.2d at 559. [↑](#footnote-ref-115)
115. 115 One commentator has suggested that

     the foreign employers might distinguish [domestic] precedents by arguing that previous interpretations of the BFOQ exception involving third-party attitudes have concerned American, rather than foreign, attitudes . . . . Expanding the BFOQ exception, the employers might argue, is appropriate to suit their *special* needs arising out of the *international character* of their business.

     Note, *supra* note 80, at 969 (footnotes omitted) (emphasis added). [↑](#footnote-ref-116)
116. 116 *See supra* note 6 and accompanying text. [↑](#footnote-ref-117)
117. 117 *See supra* notes 113-15 and accompanying text. [↑](#footnote-ref-118)
118. 118 For a discussion of American Jewish Congress v. Carter, see *supra* notes 71-73 and accompanying text. [↑](#footnote-ref-119)
119. 119 EEOC Dec. No. 72-0697 (1971), EEOC Dec. (CCH) P6317 (1973). *See also supra* text accompanying note 74. [↑](#footnote-ref-120)
120. 120 *See supra* notes 58-62 and accompanying text. [↑](#footnote-ref-121)
121. 121 442 F.2d 385, 389 (5th Cir. 1971). [↑](#footnote-ref-122)
122. 122 *See* Freed & Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment,* 1981 AM. B. FOUND. RESEARCH J. 583, 615 ("[R]ejection of efficient uses of race or sex as criteria for hiring decisions entails the imposition of costs on employers and society."). [↑](#footnote-ref-123)
123. 123 R. POSNER, ECONOMIC ANALYSIS OF LAW 525 (2d ed. 1977). [↑](#footnote-ref-124)
124. 124 *See supra* notes 51-56 and accompanying text. [↑](#footnote-ref-125)
125. 125 EEOC Dec. No. 1292 (1972), EEOC Dec. (CCH) P6356, at 4642 (1973). [↑](#footnote-ref-126)
126. 126 *Cf., e.g.,* Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.) (repudiating employer's efficiency and economy arguments for discriminatory job selections), *cert. denied,* 404 U.S. 1006 (1971). [↑](#footnote-ref-127)
127. 127 The amendment offered by Rep. Smith added sex as a prohibited category upon which to discriminate. 110 CONG. REC. 2577 (1964). [↑](#footnote-ref-128)
128. 128 *See* J. BAER, *supra* note 27, at 136 (sex classification remained in bill only because female Representatives joined liberals in refusing to vote it down); Sirota, *supra* note 6, at 1027 (amendment made to make entire bill unacceptable to legislators). [↑](#footnote-ref-129)
129. 129 42 U.S.C. § 2000e-(k) (Supp. V 1981). [↑](#footnote-ref-130)
130. 130 429 U.S. 125, 145-46 (1976). [↑](#footnote-ref-131)
131. 131 H. KAY, *supra* note 31, at 494. *See also* 123 CONG. REC. 29,385 (1977) (remarks of Sen. Williams) (Act would close hole left by *General Electric Co. v. Gilbert*). [↑](#footnote-ref-132)
132. 132 H.R. REP. NO. 948, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4750. [↑](#footnote-ref-133)
133. 133 Similarly, the EEOC guidelines should promote a legislative solution on the use of customer preference to warrant the application of a BFOQ. 29 C.F.R. § 1604.2(a)(1)(iii) (1982). [↑](#footnote-ref-134)
134. 134 *Id.* [↑](#footnote-ref-135)
135. 135 42 U.S.C. § 2000e-2(e)(1) (1976). [↑](#footnote-ref-136)
136. 136 15 U.S.C. §§ 78dd-1 & 78dd-2 (Supp. V 1981). [↑](#footnote-ref-137)
137. 137 *See* Tumulty, *supra* note 7, § 1, at 15, col. 1 (bribes are "an accepted and necessary part of doing business in certain parts of the world"). [↑](#footnote-ref-138)
138. 138 S. REP. NO. 114, 95th Cong., 1st Sess. 4, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4098, 4101. [↑](#footnote-ref-139)
139. 139 *See supra* notes 81-91 and accompanying text. [↑](#footnote-ref-140)
140. 140 675 F.2d 562 (3d Cir. 1982). [↑](#footnote-ref-141)
141. 141 *See supra* notes 102-15 and accompanying text. [↑](#footnote-ref-142)
142. 142 Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863. [↑](#footnote-ref-143)
143. 143 For a discussion of the distinction between branches and wholly-owned subsidiaries, see *supra* note 8. Most of the discussion in this Note has been limited to branches. If a treaty term regarding nondiscriminatory choice of employees is negotiated, however, there is no logical reason not to extend its applicability to both subsidiaries and branches. [↑](#footnote-ref-144)
144. 144 457 U.S. 176, 182-83 (1982). [↑](#footnote-ref-145)
145. 145 *See supra* notes 129-35 and accompanying text. [↑](#footnote-ref-146)
146. 146 *See, e.g.,* The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870) (act of Congress can supersede a prior Native-American treaty); Akins v. United States, 551 F.2d 1222, 1229 (C.C.P.A. 1977) (later congressional act supersedes prior treaty provision); Itzcovitz v. Selective Serv. Local Bd. No. 6, 301 F. Supp. 168, 181 (S.D.N.Y. 1969) (Friendship, Commerce and Navigation Treaty with Argentina can be abrogated or modified if Congress clearly expresses this intent). [↑](#footnote-ref-147)