Vanderbilt Journal of Transnational Law

Volume 27
Issue 4 *Issue 4 - November 1994*

Article 4

1994

Extraterritorial Application of Title VII: The Foreign Compulsion Defense and Principles of International Comity

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NOTES

Extraterritorial Application of Title VII: The Foreign Compulsion Defense and Principles of International Comity

ABSTRACT

With an increasing number of United States corporations locating and affiliating overseas and United States citizens seeking employment with multinational corporations, the debate over the extraterritorial application of United States discrimination laws has attracted greater international attention. The 1991 amendment to Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, religion, sex, or national origin, specifically provides for extraterritorial application of Title VII. The foreign compulsion defense, however, limits the scope of Title VII's application abroad and raises the issue of whether U.S. corporations can claim this defense when foreign governments informally compel violations of the Act. This Note addresses the issues surrounding extraterritorial application of Title VII and the statutory and practical limitations imposed by the foreign compulsion defense. It analyzes proposed standards for determining whether United States multinational corporations are liable for violations of Title VII that are committed to avoid sanctions for breaching informal policies of host nations. This Note concludes that principles of international comity should shield companies subject to informal governmental compulsion from liability for Title VII violations.

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I. INTRODUCTION

United States employment discrimination laws[1] presumptively apply only to suits arising within national borders.[2] However, the increasing number of U.S. corporations locating and affiliating overseas, coupled with the growing number of U.S. citizens seeking employment with multinational corporations, has sparked debate over whether the employment discrimination laws of the United States apply extraterritorially.[3] Specifically, this Note discusses the extraterritorial application of Title VII, which prohibits discrimination in employment on the basis of race, religion, sex, or national origin.[4]

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1. Title VII of the Civil Rights Act of 1964 represents one of the broadest anti-discrimination provisions of United States law. 42 U.S.C. § 2000e (1988 & Supp. III 1991), *as amended by* 42 U.S.C. §§ 12111, 12112, 12209 (Supp. III 1991). Other employment discrimination laws include: Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (Supp. II 1990); Rehabilitation Act of 1973, 87 Stat. 355 (1973) (current version at 29 U.S.C. § 701 et seq. (1988)); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988); and Age Discrimination in Employment Act of 1967, 81 Stat. 602 (1967) (current version at 29 U.S.C. § 621 et seq. (1988)).

2. EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) [hereinafter *Aramco*] ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (holding that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States") (citing Blackmen v. United States, 284 U.S. 421, 437 (1932)).

3. *See* Debra L.W. Cohn, Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. REV. 1288 & n.5 (1987); *see, e.g.*, Daniel J. McConville, *Relocation Firms Look Abroad to Jump-Start Stalled Business*, CRAIN'S N.Y. BUS., Mar. 29-Apr. 4, 1993, (Magazine), at 29. United States-based relocation companies have experienced substantial growth in the volume of international relocations. *Id.* In the past five years, the largest relocation consultant company watched its international volume increase from 20% to 30% of its business. *Id.* Likewise, international sales for the London division of one international relocation company increased 53% in one year. *Id.* The growth in international relocations stems from regional trade pacts, such as the Treaties of the European Union and the North American Free Trade Agreement, which have caused companies to reassess their manufacturing and distribution tactics. *Id.*; Elisa Tinsley, *More U.S. Citizens Relocating Abroad*, U.S.A. TODAY (Int'l Ed.; Weekend), Oct. 16, 1993, at 7A. The top ten countries to which U.S. executives relocate most often are: England, Belgium, Australia, France, Mexico, Singapore, Canada, Germany, the Netherlands, and Hungary. *Id.*

4. 42 U.S.C. § 2000e-2(a) makes it unlawful 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

In *EEOC v. Arabian American Oil Co. (Aramco)*,[5] the United States Supreme Court rejected the extraterritorial application of Title VII of the Civil Rights Act of 1964 (1964 Act)[6] because the statute lacked a clear statement of congressional intent to apply the Act abroad.[7] However, the Court invited Congress to amend Title VII to apply extraterritorially.[8] Congress accepted the Court's invitation by enacting the Civil Rights Act of 1991 (1991 Act).[9]

The plain language of the 1991 Act provides that the anti-discrimination provisions of Title VII apply extraterritorially.[10] The scope of Title VII's extraterritorial application is tempered, however, by the Act's "foreign compulsion defense,"[11] which shields an employer from Title VII liability when compliance with the Act would violate the laws of the employer's host nation. Case law limits this statutory defense to cases of "actual" foreign compulsion—conduct mandated by the positive law of the host nation.[12] Informal compulsion by the host foreign nation is not a defense to a Title VII violation.[13] Nevertheless, breach of informal governmental policies, understandings, or agreements can result in sanctions or otherwise harm relations between the host government and both the employer and the United States.[14] Consequently, informal compulsion by foreign governments may undermine compliance with Title VII overseas. In such cases, extraterritorial application of Title VII should be restricted by principles of international comity.[15]

Part II of this Note traces the debate surrounding the extraterritorial application of Title VII, including the traditional inference of extraterritorial intent, the *Aramco* decision, and the clear statement of extraterritorial intent in the 1991 Act. Part III explores the statutory and practical limitations on the scope of extraterritoriality imposed by the "foreign compulsion defense"

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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.

5. *Aramco*, 499 U.S. at 244.

6. 78 Stat. 241 (1964) (codified as amended at 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-d, 2000a-h-6).

7. *Aramco*, 499 U.S. at 259.

8. *Id.*

9. 105 Stat. 1071 (1991) (codified as amended at 2 U.S.C. §§ 601, 1201-24; 16 U.S.C. § 1a-5; 29 U.S.C. § 626; 42 U.S.C. § 1981 et seq.).

10. *See infra* notes 91-92 and accompanying text.

11. *See infra* notes 95-96 and accompanying text.

12. *See infra* text accompanying note 112.

13. *See infra* notes 151-53 and accompanying text.

14. *See infra* part III.A.2.b.

15. *See infra* part III.B.2.

and principles of international comity. This Note concludes that principles of international comity should shield U.S. corporations from liability when the informal policies of the host nation effectively compel a Title VII violation.

II. BACKGROUND

A. *Jurisdiction to Prescribe*

The application of United States law abroad depends upon congressional exercise of its prescriptive jurisdiction.[16] The Restatement (Third) of Foreign Relations Law of the United States defines "jurisdiction to prescribe" as "the authority of a state to make its law applicable to persons or activities."[17] The Restatement identifies two bases for exercising prescriptive jurisdiction relevant to extraterritorial application of United States law: first, the "effects principle," which recognizes prescriptive jurisdiction when conduct abroad has a substantial domestic effect;[18] and second, the "nationality principle," which recognizes prescriptive jurisdiction over activities, interests, status, or relations of nationals outside of U.S. territory.[19] Based upon these two principles, the Supreme Court has upheld *extraterritorial* prescriptive jurisdiction over activities that occur outside the territorial bounds of the United States.[20]

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16. "There is . . . a type of 'jurisdiction' relevant to determining the extraterritorial reach of a statute; it is known as 'legislative jurisdiction,' or 'jurisdiction to prescribe.'" Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2918 (1993) (Scalia, J., concurring in part, dissenting in part) (citing *Aramco*, 499 U.S. at 253; RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 6 (1934); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986)). *Id.*

17. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986) [hereinafter RESTATEMENT (THIRD)].

18. Restatement (Third) § 402(1)(c) provides that a state has jurisdiction to prescribe a law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory." The comments to § 402 explain that "a state may exercise jurisdiction based on effects in the state when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403." RESTATEMENT (THIRD) § 402 cmt. d. *See infra* notes 173-79 and accompanying text for a discussion of reasonableness under § 403 of the Restatement (Third).

19. Restatement (Third) § 402(2) provides that a state has jurisdiction to prescribe law with respect to "the activities, interests, status, or relations of its nationals outside as well as within its territory." RESTATEMENT (THIRD) § 402(2).

20. *Hartford*, 113 S. Ct. at 2909 ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.") (citations omitted);

Title VII violations against United States citizens abroad have a substantial effect on U.S. interests because discriminatory activity and its consequences are not limited to a corporation's overseas operations. For example, overseas discrimination may actually begin in the United States when recruitment for overseas positions occurs domestically[21] or advancement within a multinational corporation depends upon foreign service.[22] Such activities, although seemingly limited to a corporation's foreign operations, affect domestic interests by promoting discriminatory conduct in the United States.[23] Accordingly, Congress may exercise its prescriptive jurisdiction to prohibit foreign employment discrimination because the U.S. interest in equality is substantially affected by foreign conduct.[24] Thus, extraterritorial application of Title VII depends upon whether Congress chooses to exercise its prescriptive jurisdiction.

To determine whether and to what extent Congress has exercised extraterritorial prescriptive jurisdiction,[25] courts use two canons of statutory interpretation. The first canon, the presumption against extraterritoriality, provides that legislation presumptively applies only within the territorial jurisdiction of the United States "unless a contrary [congressional] intent appears."[26] If a court determines that the presumption against

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Blackmer v. United States, 284 U.S. 421 (1932); Ford v. United States, 273 U.S. 593, 620 (1927) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm . . . .") (citation omitted); Bryant v. International Sch. Servs., 502 F. Supp. 472, 482 (D. N.J. 1980) ("[I]t is well settled that Congress has the power to extend the reach of its laws to American citizens outside the geographical boundaries of the United States.") (citing Foley Bros. v. Filardo, 336 U.S. 281 (1949)). *But see* American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

21. *See* Cohn, *supra* note 3, at 1296 n.51 (citing Abrams v. Baylor College of Medicine, 805 F.2d 528, 530-31 (5th Cir. 1986) (U.S. medical school recruited doctors in Houston to work in Saudi Arabia); EEOC Dec. No. 85-10, 2 Empl. Prac. Guide (CCH) ¶ 6851 (July 16, 1985) (radar air traffic controller position in foreign state advertised in U.S. professional publication, and company conducted orientation program, interviews, and selection in the United States).

22. Cohn, *supra* note 3, at 1296 & nn.52-53 (citing Watkins v. Scott Paper Co., 530 F.2d 1159, 1192-93 (5th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976) (discriminatory practices can prevent employees from gaining experience that employer deems necessary to become a supervisor)).

23. *See supra* notes 20-21.

24. EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1280 (1982) (stating that the government has a compelling interest in "assuring equal employment opportunities"); *see supra* note 18 and accompanying text.

25. *Hartford*, 113 S. Ct. at 2919 (Scalia, J., dissenting).

26. *Id.* (quoting *Aramco*, 111 S. Ct. at 1230 (quoting Foley Bros. v. Filardo, 336 U.S. 285 (1949))).

extraterritoriality has been rebutted, the second canon—the *Charming Betsy* principle—governs the scope of overseas application: "[A]n act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains."[27]

Thus, the first inquiry into extraterritorial application of Title VII is whether the presumption against extraterritoriality has been overcome. The presumption against extraterritoriality in Title VII cases has sparked debate among administrative agencies, the courts, and Congress.

B. *The Debate Over Extraterritorial Application of Title VII*

Extraterritorial application of Title VII hinges on whether Congress exercises its prescriptive jurisdiction. Prior to the Supreme Court's decision in *Aramco,* courts inferred congressional intent to exercise prescriptive jurisdiction from the statute and applied Title VII overseas.[28] In 1991, in *Aramco,* the Supreme Court held that prescriptive jurisdiction requires a clear statement of congressional intent and denied extraterritorial application of Title VII.[29] That same year, Congress responded to the *Aramco* decision by amending the Civil Rights Act to include a clear statement of prescriptive intent.[30]

1. The Traditional Approach: Inferred Congressional Intent

Prior to the Supreme Court's ruling in *Aramco,*[31] the EEOC,[32] the Department of Justice,[33] and lower courts considering the

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27. *Hartford,* 113 S. Ct. at 2919 (quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)).

28. *See, e.g.,* Bryant v. International Sch. Servs., 502 F. Supp. 472 (D. N.J. 1980); *see also infra* notes 33-34 and accompanying text.

29. *Aramco,* 499 U.S. 244, 259 (1991).

30. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (1991).

31. 499 U.S. 244 (1991).

32. *See, e.g.,* EEOC Decision No. 85-10, 2 Empl. Prac. Guide (CCH) ¶ 6851, July 16, 1985.

33. During a debate to prohibit religious discrimination by U.S. employers participating in an Arab boycott, Justice Scalia, then Assistant Attorney General, stated that Title VII applied abroad to prohibit employment discrimination. *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) (statement of Antonin Scalia, Assistant Attorney General), *cited in* Cohn, *supra* note 3, at 1291 n.25. *See also Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong.,

extraterritorial application of Title VII held that Congress intended the Act to apply abroad.[34] These entities generally inferred extraterritorial intent from three sources: first, the 1964 Act's "alien exemption" clause; second, the 1964 Act's broad definitions of employer, state, and commerce; and finally, courts' deference to the interpretation of the Act by the Department of Justice and the EEOC.

Congressional intent to exercise prescriptive jurisdiction was most often inferred from Title VII's "alien exemption" clause.[35] The alien exemption clause provides that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State."[36] The issue then becomes the meaning of "state." The statute broadly defines "state"[37] to include any state of the United States, the District of Columbia, and specified territories.[38] Therefore, the express exemption of aliens employed by domestic corporations outside "any state" implies that Title VII applies to citizens of the United States employed by domestic corporations outside any state.[39] The alien exemption thus allows an inference that Congress intended Title VII to apply abroad because providing an exemption for aliens employed abroad would be unnecessary if the statute had no extraterritorial application.[40]

Second, the Department of Justice, the EEOC, and lower courts also inferred extraterritorial intent from the 1964 Act's definitions of "employer," "commerce," and "state." Title VII

1st Sess. 165 (1975) (statement of Antonin Scalia, Assistant Attorney General), *cited in Aramco*, 499 U.S. at 276 (Marshall, J., dissenting).

34. *See, e.g.*, Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986); Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981); Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983); Bryant v. International Sch. Servs., 502 F. Supp. 472, 483 (D. N.J. 1980) (concluding that Title VII has extraterritorial effect).

35. 42 U.S.C. § 2000e-1. *See* Seville v. Martin Marietta Corp., 638 F. Supp. 590, 592 (D. Md. 1986); Bryant v. International Sch. Servs., 502 F. Supp. 472, 482 (D. N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) ("By negative implication, since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to non-aliens, *i.e.* American citizens . . . ."); Love v. Pullman Co., 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) ("Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state."); EEOC Decision, *supra* note 32 (interpreting the "alien exemption" as congressional intent of extraterritorial application).

36. 42 U.S.C. § 2000e-1.

37. The statute provides that "[t]he term 'state' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act." 42 U.S.C. § 2000e(i).

38. *Id.*

39. *See supra* note 35.

40. 42 U.S.C. § 2000e-1.

applies only to employers "engaged in an industry affecting commerce,"[41] or "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce . . . ."[42] The Act defines "commerce" as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and *any place outside thereof.*"[43] As previously noted, "state" is defined to include any state in the United States, the District of Columbia, and specified territories.[44] Therefore, the clause "between a State and any place outside thereof" arguably manifests congressional intent to apply Title VII to employers engaged in commerce outside of the United States.[45]

Finally, courts have also deferred to administrative agencies, which have inferred that Congress intended Title VII to apply extraterritorially. The EEOC and the Department of Justice, the two federal agencies primarily responsible for enforcing Title VII,[46] both support extraterritorial application.[47] The Supreme Court has afforded considerable deference to these agency interpretations,[48] thereby bolstering claims for protection from discriminatory employment practices abroad. Thus, under the traditional approach, the presumption against extraterritoriality was rebutted by congressional intent inferred from the statute and agency interpretations.

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41. *Id.* § 2000e(b).

42. *Id.* § 2000e(h).

43. *Id.* § 2000e(g) (emphasis added).

44. *See supra* note 37.

45. Faith I. Michell, Note, *The Multinational Corporation and Employment Discrimination: A Strategy for Litigation*, 16 U.S.F. L. REV. 491, 503-04 (1982).

46. *Aramco*, 499 U.S. 244, 256 (1991) (referring to the EEOC as one of the two agencies responsible for enforcing Title VII); Cohn, *supra* note 3, at 1291 n.25.

47. *See supra* notes 32-33.

48. *See, e.g.*, Chevron v. NRDC, 467 U.S. 837, 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding"); EEOC v. Commercial Office Products Co., 486 U.S. 107, 115 (1988) ("[T]he EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one . . . . Rather, [it] need only be reasonable to be entitled to deference.").

2. The Clear Statement Rule: *Aramco*

The Supreme Court departed from the traditional approach of inferring extraterritorial intent, however, in *Aramco*.[49] In *Aramco*, the Court declined to apply Title VII to employment discrimination against United States citizens employed abroad by U.S. corporations.[50] The Court imported the clear statement rule[51] into the traditional presumption against extraterritorial application,[52] holding that inferences of congressional intent are insufficient to mandate compliance with Title VII abroad.[53]

In *Aramco*, Ali Boureslan, a naturalized United States citizen born in Lebanon, initiated suit in the United States District Court for the Southern District of Texas against Aramco, his former employer.[54] The complaint alleged discrimination based on race, religion, and national origin in violation of Title VII of the Civil Rights Act of 1964.[55] The district court dismissed the suit for lack of subject matter jurisdiction, finding that the language and legislative history of the Act did not manifest congressional intent to apply the Act extraterritorially.[56] The Fifth Circuit Court of Appeals affirmed.[57] On writ of certiorari, the United States Supreme Court held that Title VII did not apply to discrimination against U.S. citizens employed in foreign operations of U.S. corporations.[58]

The majority considered only one issue: whether evidence of congressional intent to apply the Act extraterritorially could

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49. 499 U.S. 244 (1991).

50. *Id.* at 259.

51. The clear statement rule is a strict standard of statutory interpretation requiring congressional intent to be plainly expressed in the statute, and disavowing reliance on legislative history, administrative interpretations, and inferences from statutory language. Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. Rev. 1095, 1102 (1993). Prior to the *Aramco* decision, the clear statement rule was used only "to interpret statutes that implicated the structure of our government as delineated by the constitution." *The Supreme Court—Leading Cases: Civil Rights Law*, 105 HARV. L. REV. 369, 374-76 (1991). The Supreme Court departed from precedent by expanding the application of the rule, which threatened to undermine congressional intent and to cause statutory amendment. *Id.*

52. *Aramco*, 499 U.S. at 248.

53. *Id.* at 258-59.

54. *Id.* at 247-48.

55. *Id.* at 248. Plaintiff, Ali Boureslan, was employed by Aramco Services Company as an engineer in El Paso, Texas. Plaintiff was transferred to work for Aramco in Saudi Arabia, where his supervisor allegedly harassed him about his national origin, religion, and race. Plaintiff's performance deteriorated, and his employment was terminated. Plaintiff then initiated a Title VII action against his employer. Boureslan v. Aramco, 653 F. Supp. 629 (S.D. Tex. 1987).

56. *Id.*

57. *Id.*

58. *Id.* at 259.

overcome the traditional presumption against extraterritoriality.[59] The Court strictly construed the presumption, holding that it is rebutted only when a contrary intent is "clearly expressed."[60] The Court then rejected inferences of congressional intent, stating that "[i]f we were to permit possible, or even plausible interpretations of [statutory] language . . . to override the presumption against extraterritorial application, there would be little left of the presumption."[61]

The Court explicitly rejected the EEOC's claim that Title VII applied extraterritorially.[62] The EEOC advanced the traditional arguments[63] for inferring congressional intent: first, that the statutory definitions of "employer" and "commerce" manifested the requisite congressional intent, and second, that the Court itself found the agency's reading "plausible."[64] While the Court also found Aramco's contrary reading "plausible," it declined to choose between the competing interpretations.[65] The Court reasoned that the language relied upon by the EEOC was "ambiguous" and "deduced by inference from boilerplate language,"[66] thus falling short of the "affirmative showing" of contrary intent required for extraterritorial application.[67]

The Court explicitly rejected the "alien exemption" language as evidence of congressional intent.[68] The EEOC maintained that "Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to foreclose *all* potential extraterritorial applications of the statute."[69] Aramco, on the other hand, offered two alternative readings of the exemption provision: either the phrase "outside any state" refers only to U.S. possessions,[70] or the alien exemption provision

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59. In a 6-3 opinion, Justices White, O'Connor, Kennedy, and Souter joined Chief Justice Rehnquist writing for the Court. Justice Scalia concurred in the judgment. *Id.* at 244.

60. *Id.* at 248.

61. *Id.* at 254.

62. *Id.* at 249.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 250-51.

67. *Id.* at 250. According to the *Aramco* decision, the "affirmative showing" of contrary congressional intent may not be inferred from statutory language or agency interpretation, but rather requires a "clear statement" that a statute applies overseas. *Id.* at 258. At least one later decision by a circuit court of appeals questions the "clear statement" requirement. *See infra* note 94.

68. *Aramco*, 499 U.S. at 255.

69. *Id.* at 253 (emphasis in original).

70. Aramco argued that the "outside any state" clause "means outside any state, but within the control of the United States." *Aramco*, 499 U.S. at 253.

merely confirms that aliens employed within the United States are protected by the statute.[71] Again, the Supreme Court declined to endorse either interpretation, but noted that using the alien exemption provision to apply the statute overseas would subject not only U.S. corporations, but also foreign employers, to Title VII.[72] For example, according to the Court, under this analysis Title VII would apply not only to a U.S. employer of U.S. citizens in France, but also to a French employer of U.S. citizens in France.[73] Because subjecting foreign employers to Title VII would invite conflict with foreign laws, the Court declined to apply the statute extraterritorially "[w]ithout clearer evidence of congressional intent . . . than is contained in the alien-exemption clause . . . ."[74]

Furthermore, the court in *Aramco* noted that Title VII lacks the elements that ordinarily suggest extraterritorial application. Specifically, the majority found that Title VII fails to address conflicts with foreign laws and procedures.[75] Thus, the absence of language addressing such conflicts indicates that Congress did not intend the Act to interfere with the sovereignty of any other state.[76] Therefore, according to the Court, Title VII has a "purely domestic focus."[77]

Finally, the Court declined to defer to administrative interpretation of the statute. The Court found the EEOC interpretation of the statute neither contemporaneous with the statute's enactment[78] nor consistent with earlier EEOC pronouncements on the issue,[79] and therefore unworthy of

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71. *Id.* at 254.
72. *Id.*
73. *Id.*
74. *Id.* at 255.
75. *Id.*
76. *Id.* The Court cites 42 U.S.C. §§ 2000e-5(d), 2000e-7, and 2000h-4 as examples of the statute's provisions protecting state sovereignty. *Aramco*, 499 U.S. at 255. Each section generally provides that Title VII shall not be construed to invalidate state law, or exclude or affect the application of state or local law unless inconsistent with the purposes of Title VII or otherwise unlawful under Title VII. 42 U.S.C. §§ 2000e-5(d), 2000e-5(d), 2000e-7, 2000h-4 (1988 & Supp. V 1993).
77. *Aramco*, 499 U.S. at 255.
78. *Id.* at 257. The Court noted that the EEOC interpretation of the statute was "not expressly reflected in its policy guidelines until some 24 years after the passage of the statute." *Id.*
79. *Id.* The Court cited 29 C.F.R. § 1606.1(c) (1971) ("Title VII . . . protects all individuals, both citizens and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin") as evidence that the EEOC interpretation of the statute was inconsistent with its earlier pronouncements. The dissent took issue with this claim. *See infra* notes 88-90 and accompanying text.

deference.[80] The Court concluded that Title VII did not apply extraterritorially because Congress is well aware of "the need to make a clear statement that a statute applies overseas,"[81] and yet failed to do so. The Court invited Congress to amend the statute to apply extraterritorially.[82]

In a concurrence, Justice Scalia disagreed with the majority's holding regarding deference to agency interpretations. Scalia maintained that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."[83] Nevertheless, Justice Scalia would not have deferred to the EEOC in this case because it is unreasonable to allow inferences from vague statutory language to overcome the presumption against extraterritoriality.[84] Justice Scalia advocated limited judicial deference to agency interpretations, stating that "deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."[85] Because the court normally employs a presumption against extraterritoriality and *Aramco* requires a clear statement of congressional intent to overcome this presumption, Justice Scalia maintained that the EEOC interpretation was not reasonable.[86] Therefore, he declined to defer to the EEOC interpretation.

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80. General Electric Co. v. Gilbert, 429 U.S. 125, 140-46 (1976) (addressing the proper deference afforded EEOC guidelines). According to standards set forth in that case, "the level of deference afforded 'will depend upon the thoroughness evident in [the Agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Aramco*, 499 U.S. at 257 (quoting *Gilbert*, 429 U.S. at 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

81. 499 U.S. at 257. The Court found evidence that Congress was aware of the need to make a clear statement of extraterritorial intent in the numerous statutes that contain such a clear statement. The Court cites the Exportation Administration Act of 1979, 50 U.S.C. App. § 2515(2); Coast Guard Act, 14 U.S.C. § 89(a); Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001(5)(A); and Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (quotations omitted). *Id.* at 258.

82. *Id.* at 259.

83. *Id.* (Scalia, J., concurring) (quoting EEOC v. Commercial Office Products, 486 U.S. 107, 115 (1988)). Justice Scalia stated that the majority's reliance on General Electric v. Gilbert, 429 U.S. 125 (1976) is misplaced. The holding in *Gilbert* refers only to EEOC *guidelines*, which are afforded limited deference because the agency lacks explicit rulemaking power. Deference to EEOC interpretations is governed by Chevron v. NRDC, 467 U.S. 837 (1984) (requiring only that the interpretation be reasonable to be afforded deference). *Aramco*, 499 U.S. at 259-60 (Scalia, J. concurring).

84. *Aramco*, 499 U.S. at 260 (Scalia, J., concurring).

85. *Id.*

86. *Id.*

Justice Marshall, joined by Justices Blackmun and Stevens, dissented. Stating that the majority improperly transformed the presumption against extraterritoriality into a "clear statement" rule,[87] the dissent relied on traditional rules of statutory interpretation to reach the conclusion that Congress intended Title VII to apply overseas.[88] Based on the statutory language and legislative history, the dissent concluded that the alien exemption provision sufficiently rebuts the presumption against extraterritorial application.[89] The dissent further reasoned that the EEOC interpretation of the statute was consistent with its earlier pronouncements on the issue, and therefore should be afforded deference.[90]

The *Aramco* decision temporarily settled the debate over extraterritorial application of Title VII. However, Congress accepted the Supreme Court's invitation to amend the statute by adding a "clear statement" of extraterritorial intent in the Civil Rights Act of 1991.

3. Making a Clear Statement of Extraterritorial Intent: The Civil Rights Act of 1991

The Civil Rights Act of 1991[91] expands the scope of Title VII protection to include U.S. citizens employed by U.S. corporations operating abroad. These amendments to Title VII effectively overruled the Supreme Court's decision in *Aramco*, which barred the extraterritorial application of Title VII for lack of a clear statement of congressional intent.[92]

Section 109(a) of the 1991 Act amends the definition of "employee" to read: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."[93] This broader definition of employee satisfies the

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87. *See supra* note 51.

88. *Aramco*, 499 U.S. at 261 (Marshall, J., dissenting).

89. *Id.* at 266-70. The dissenters first noted that the statutory definitions of the terms "employer" and "commerce" were not limited to the territory of the United States. *Id.* at 266. They then reasoned that the existence of an alien exemption provision is proof that Congress contemplated extraterritorial application of Title VII. *Id.* Finally, the dissent noted that reference was made to extraterritorial application before a Senate subcommittee working on an early version of the bill. *Id.* at 269.

90. *Id.* at 274-78. "Since 1975, the EEOC has been on record as construing Title VII to apply to United States companies employing United States citizens abroad." *Id.* at 275.

91. Pub. L. No. 102-166, 105 Stat. 1071 (1991) [hereinafter 1991 Act].

92. David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, C779 ALI-ABA 639, 677 (Dec. 3, 1992).

93. 1991 Act, § 109(a), 105 Stat. 1071, 1077 (1991).

clear statement required by the Supreme Court in *Aramco*.[94] The expanded protection for U.S. citizens abroad is limited, however, by the "foreign compulsion defense."[95] This defense protects U.S. employers from Title VII liability when compliance with the statute would require the employer "to violate the law of the foreign country in which such workplace is located."[96] The foreign compulsion defense bars Title VII liability if a U.S. employer can prove that the positive law of the host country mandates the alleged discriminatory activity.[97] The statute fails to distinguish between customs and laws for purposes of the defense,[98] and does not provide any guidance for federal courts attempting to differentiate between them.[99] Statutory silence with regard to this distinction has resulted in debate over the scope of the foreign compulsion defense.

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94. Notwithstanding the *Aramco* decision, at least one circuit court of appeals has held that extraterritorial application of a statute does not require a clear statement of congressional intent. In Kollias v. DAG Marine Maintenance, 29 F.3d 67 (2d Cir. 1994), the Second Circuit Court of Appeals held that the *Aramco* decision did not require a clear statement of extraterritorial intent, but rather "sufficiently clear indicia of congressional intent." The court held that a true "clear statement" rule would preclude consideration of legislative history, administrative interpretations, and other extrinsic indicia of congressional intent. The court reasoned that because the *Aramco* decision considered all of these factors, the Court could not have intended to require a clear statement to overcome the presumption against extraterritoriality. *Id.* at 73.

The Second Circuit then considered statutory language, congressional purpose in enacting the statute, legislative history, and administrative interpretation to conclude that Congress intended the Longshore and Harbor Workers' Compensation Act (LHWCA) to apply abroad. *Id.* at 73-75. This decision casts doubt on the clear statement rule that seems to be imposed by the Supreme Court in *Aramco*. *See also* Sale v. Haitian Centers Council, 113 S. Ct. 2549, 2562 (1993) (cited in *Kollias* as holding that "all available evidence" may be considered in determining extraterritorial intent). *But see* Gushi Bros. Co. v. Bank of Guam, 28 F.3d 1535 (9th Cir. 1994) (holding that the *Aramco* methodology is conclusive and denying extraterritorial application in the absence of an express statement of congressional intent beyond a statute's "boiler plate" and generic language).

95. 1991 Act, §§ 109(b)(1)(b), 109(b)(2)(b).

96. 1991 Act, § 109(b). Section 109(b) provides:

> It shall not be unlawful under section 703 or 704 [of the Civil Rights Act of 1964] for an employer (or a corporation controlled by an employer) . . . to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation) . . . to violate the law of the foreign country in which such workplace is located.

Id.

97. *Id.*; *see also* part III.A.2.a. (discussing the need to show "actual" foreign compulsion by the positive law of the host nation).

98. Cathcart & Snyderman, *supra* note 92, at 677.

99. *Id.*

III. SCOPE OF EXTRATERRITORIAL APPLICATION OF TITLE VII

The general presumption against extraterritorial application is rebutted for Title VII by the 1991 Act's inclusion of a clear statement of congressional intent to apply the statute to U.S. corporations operating abroad. Once the presumption against extraterritoriality has been rebutted, the *Charming Betsy* principle applies to limit the scope of extraterritorial application of U.S. law.[100] This principle provides that "an act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains."[101] Title VII avoids violating the law of nations by restricting the scope of its extraterritorial reach with the statutory foreign compulsion defense.[102] This statutory defense is limited, however, and leaves open the possibility that compliance with Title VII will conflict with the laws of foreign states. Therefore, the scope of the Act must be further limited by principles of international comity.

A. *Statutory Limitations on the Scope of Extraterritoriality: the Foreign Compulsion Defense*

The Act itself limits the extraterritorial application of Title VII through the foreign compulsion defense.[103] This defense exempts U.S. employers from liability under the Act when foreign law compels the allegedly discriminatory conduct.[104] The foreign compulsion principle arose as a theoretical defense to antitrust liability,[105] and an examination of antitrust case law reveals the narrow construction of the defense.

1. The Foreign Compulsion Defense in Antitrust Cases

In *Interamerican Refining Corp. v. Texas Maracaibo,*[106] the defendant successfully invoked the foreign compulsion defense against a claim under the Sherman Antitrust Act.[107] In *Maracaibo,* the plaintiff alleged that defendants violated the Sherman Act by refusing to supply them with low-cost

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100. *See supra* note 27 and accompanying text.

101. *Hartford,* 113 S. Ct. at 2919 (quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)).

102. *See supra* note 96.

103. *Id.*

104. *Id.*

105. Michael A. Warner, Jr., Comment, *Strangers In a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law,* 11 NW. J. INT'L L. & BUS. 371, 374 (1990).

106. 307 F. Supp. 1291 (D. Del. 1970).

107. 26 Stat. 209 (1890), *codified as amended,* 15 U.S.C.A. §§ 1-7 (1987).

Venezuelan crude oil.[108] The defendants argued that although they had violated the Sherman Act, they should escape liability because the violation was compelled by the Venezuelan government.[109] The district court found the claim of foreign compulsion supported by undisputed facts,[110] and held that such compulsion functioned as a complete defense to liability under the Sherman Act.[111] The court limited the defense, however, to cases of "actual" governmental compulsion, stating that "knowledge, acquiescence, approval, or even encouragement of the illegal activity by the host government does not excuse an anti-trust violation."[112] The court failed to articulate standards for determining what constitutes "actual" foreign compulsion.[113]

2. The Foreign Compulsion Defense in Employment Discrimination Cases

Employment discrimination cases have similarly limited the foreign compulsion defense. In *Abrams v. Baylor College of Medicine*,[114] a medical school barred two doctors from participating in the school's program in Saudi Arabia because they were Jewish.[115] In an action under Title VII, the defendant medical school argued that the Saudi Arabian government compelled them to discriminate against the doctors on the basis of their religion.[116] The court recognized the foreign compulsion defense, but declined to apply it because the court found no evidence of actual compulsion.[117] The school officials could not claim that their discriminatory conduct was compelled by foreign law because they took no affirmative steps to ascertain the official position of the Saudi government.[118] This case illustrates that a

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108. 307 F. Supp. at 1294.

109. *Id.*

110. *Id.* at 1296 ("The [c]ourt concludes . . . that the undisputed facts demonstrate that defendants were compelled by regulatory authorities in Venezuela to boycott plaintiff.").

111. *Id.* (stating that "compulsion is a complete defense").

112. Warner, *supra* note 105, at 375.

113. *Id.*

114. 805 F.2d 528 (5th Cir. 1986).

115. *Id.* at 531 n.3.

116. *Id.* at 533.

117. *Id.* at 535.

118. *Id.* In dicta, the *Baylor* court indicates a slightly less stringent standard than the one articulated in the antitrust cases. The court indicated that Baylor need only "prove that the official position of the Saudi government forbade *or discouraged*" non-discriminatory participation in the program, and "[t]hat would have meant that Baylor would have to obtain an *authoritative statement* of the position of the Saudis." *Id.* at 533 (emphasis added). The defense, as

vague understanding about the policies and laws of the host government cannot sustain the foreign compulsion defense, regardless of the reasonableness of that understanding.[119] A defendant corporation must take steps to ascertain the foreign government's positive law in order to establish that the discriminatory conduct was compelled by that law.[120]

In addition, the foreign compulsion defense in employment law requires the conflicting foreign law to be "basic and fundamental to the [discriminatory conduct] and more than merely peripheral to the overall illegal course of conduct."[121] In *Bryant v. International Schools System (ISS)*,[122] plaintiffs claimed that the hiring policies of ISS, a U.S. corporation operating in Iran, violated Title VII because a disproportionate number of married women were hired for lower paying jobs.[123] The defendant corporation claimed that Iranian law prohibited payment of certain benefits to spouses of Iranian employees who already received those benefits,[124] and that this Iranian

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developed in the antitrust cases, does not recognize mere discouragement as "actual" compulsion, nor does it accept statements by foreign governments as proof of compulsion. The *Baylor* court was speaking in the context of a "bona fide occupational qualification" (BFOQ), an approach that has been rejected by the EEOC and the amendments to Title VII in favor of the foreign compulsion defense. *See, e.g.*, EEOC Decision, 2 Empl. Prac. Guide (CCH) ¶ 6850, at 7055 n.2 [hereinafter EEOC Decision] (expressing the EEOC's preference for a foreign compulsion analysis rather than a BFOQ analysis), *cited in* Warner, *supra* note 105, at 392 n.132. Therefore, the less stringent standard articulated by the *Baylor* decision in the BFOQ context is not likely to control foreign compulsion defenses under the 1991 Act.

119. *See* EEOC Decision, *supra* note 118, at 7055 ("The extent to which an employer must go to substantiate its belief that the person would not be allowed to work in the foreign country will vary depending upon the facts . . . . However, it is the Commission's view that the employer cannot rely upon mere conjecture about the policies of the foreign country or upon stereotypical views of the individual's class.").

120. *Abrams*, 805 F.2d at 534-35.

121. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979).

122. 502 F. Supp. 472 (D. N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982).

123. The Iranian government mandated that spouses working in Iran could not receive certain benefits if their spouse already received them. ISS based its hiring policy on whether a married woman was in Iran primarily to teach at the school, or whether she was there for some independent purpose. *Bryant*, 502 F. Supp. at 478-79. If an American woman was in Iran for an independent purpose, the school assumed that she was accompanying a working spouse and offered her a lower paying employment contract. *Id.* at 487. ISS failed to advise its potential employees of this policy, thereby eliminating a woman's opportunity to establish that she was not in Iran accompanying a working spouse. *Id.* The court held that this "failure to inform" constituted a violation of Title VII because it created a disparate impact on female workers. *Id.* at 490.

124. *Id.*

restriction "lies at the heart of plaintiff's claims."[125] The court recognized the foreign compulsion defense, and held that ISS was compelled to offer fewer benefits to women whose husbands already received such benefits.[126] However, the court found that the failure to advise employees of the Iranian law, rather than the law itself, created the disparate impact on female employees because they could have received the benefits by demonstrating that they did not have spouses receiving benefits.[127] Therefore, the Iranian law compelling discriminatory conduct was peripheral to the Title VII violation and did not constitute foreign compulsion to discriminate.[128] The court stated that "nothing in Iranian law . . . compelled ISS to conceal its policies,"[129] and therefore the foreign compulsion defense failed.

The EEOC has interpreted the foreign compulsion defense somewhat more expansively. For example, an EEOC decision declined to impose Title VII liability on a U.S. company for refusing to hire a woman as an air traffic controller in a foreign state.[130] In so holding, the EEOC considered both the laws and the social and religious customs of the host country.[131] In contrast to the prevailing federal court cases,[132] the EEOC accepted a letter from a "responsible official" as evidence that "the customs and laws [of the host country] prohibit the employment of females in all but a few categories,"[133] and that "private companies will not be permitted to disregard the laws against the commingling of the sexes."[134] By considering not only positive law, but also social and religious customs supported solely by an official letter, the EEOC decision sparks debate about the role of "informal," as distinguished from "actual," foreign governmental compulsion and the appropriate method of dealing with such compulsion under the 1991 Act.

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125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 490-91.
129. *Id.*
130. The EEOC does not identify the parties "in order to maintain the confidentiality of the parties to the charge, as well as the identity of the host country." EEOC Decision, *supra* note 118, at 7055 n.6.
131. *Id.* at 7053.
132. *See infra* part III.A.2.a.
133. EEOC Decision, *supra* note 118, at 7053.
134. *Id.* at 7054.

a. "Actual" Foreign Compulsion

Federal courts in antitrust cases have narrowly construed the requirement of "actual" foreign compulsion. For example, the court in *Mannington Mills, Inc. v. Congoleum Corp.*[135] refused to recognize foreign compulsion as a defense to antitrust liability when "the governmental action rises no higher than mere approval."[136] In *Mannington Mills*, the plaintiff, a U.S. manufacturer of flooring, brought an antitrust action against another U.S. manufacturer, alleging fraud in securing patents with foreign governments.[137] The defendant corporation argued that foreign patents could be granted only by affirmative government action. Therefore, fraud in securing the patents was immune from antitrust liability under the foreign compulsion defense.[133] The court interpreted the defense narrowly, stating that "[o]ne asserting the defense must establish that the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct."[139] The court further held that "[i]t is necessary that *foreign law must have coerced the defendant* into violating [U.S.] antitrust law."[140] The "defense is not available if the defendant could have legally refused to accede to the foreign power's wishes."[141] Thus, an official government decree alone is insufficient to support the foreign compulsion defense.[142] The foreign law must be coercive as well as basic to the alleged misconduct.[143]

In *Hartford Fire Insurance v. California*,[144] the Supreme Court similarly restricted the definition of foreign compulsion. The Court determined that British law did not compel the corporation to violate the Sherman Act when the defendant could comply with the directives of both the United States and Great Britain. Although the Court did not directly address the foreign compulsion defense, it considered whether foreign law compelled the alleged antitrust behavior and found that it did not.[145] In *Hartford*, the plaintiffs alleged various conspiracies in violation of the Sherman Act against both domestic and foreign

135. 595 F.2d 1287 (3d Cir. 1979).
136. *Id.* at 1293.
137. *Id.* at 1290.
138. *Id.* at 1293.
139. *Id.*
140. *Id.* (emphasis added).
141. *Id.*
142. *Id.* at 1294-95.
143. *Id.*
144. 113 S. Ct. 2891 (1993).
145. *Id.* at 2911.

defendants.[146] The defendants argued that principles of international comity militated against extraterritorial application of the Sherman Act in order to avoid a conflict with British law.[147] The defendants maintained that their conduct was perfectly consistent with British law, and argued that finding their conduct unlawful under the Sherman Act would create a conflict.[148] In support of this contention, the British government appeared before the Court as amicus curiae and asserted that the conduct at issue was perfectly legal under Parliament's comprehensive regulatory regime.[149] The Court held that a foreign state's strong policy to permit or encourage conduct does not bar the application of United States law prohibiting the conduct. "No conflict exists . . . 'where a person subject to regulation by two states can comply with the laws of both.'"[150]

Thus, under both *Hartford* and *Mannington Mills*, mere approval or even encouragement of conduct—even when supported by explicit statements by the host government[151]—fails the "actual" compulsion requirement of the foreign compulsion defense. Therefore, the defense applies only when positive foreign law, central to the otherwise illegal conduct, requires U.S. corporations to violate U.S. law.

b. Informal Foreign Compulsion

Courts generally do not recognize "informal" foreign governmental compulsion as sufficient to establish the foreign compulsion defense,[152] even though it often significantly influences a corporation's conduct abroad.[153] Many foreign governments "operate under a system of close informal

146. *Id.* at 2895.
147. *Id.*
148. *Id.* at 2910.
149. *Id.*
150. *Id.* (quoting RESTATEMENT (THIRD) § 403 cmt. e).
151. For several examples of courts rejecting explicit statements by host governments to shield defendant corporations from liability, see Warner, *supra* note 105, at 375-76 n.23 (citing *In Re* Japanese Product Antitrust Litigation, 723 F.2d 238, 315 (3d Cir. 1983) (ruling that a note from the Japanese government supporting the claim of foreign compulsion was insufficient to establish the defense); *In Re* Uranium Antitrust Litigation, 617 F.2d 1248, 1254 (7th Cir. 1980) (rejecting an amicus brief from the Canadian government as insufficient to establish the foreign compulsion defense)). *See also* Stephen J. Hawes, Comment, *The Sovereign Compulsion Defense in Antitrust Actions and the Role of Statements by Foreign Governments*, 62 WASH. L. REV. 129 (1987).
152. Warner, *supra* note 105, at 384.
153. *Id.* at 385.

cooperation between business and government."[154] In such systems, even though governmental regulation may not rise to the level of binding law, it is no less compelling. Often a multinational corporation can expect sanctions for breach of informal understandings with the host government, the same as for breaking formal law.[155] Notwithstanding these sanctions, courts refuse to recognize these informal understandings as "actual" compulsion under the foreign compulsion defense.

B. *Informal Governmental Compulsion as a Shield to Title VII Liability*

Informal governmental compulsion could operate as a shield to Title VII liability in two ways. First, courts could apply a "good faith" standard to recognize informal customs and practices as foreign compulsion. Second, courts could recognize informal compulsion under principles of international comity.

1. The "Good Faith" Standard

In one decision, the EEOC applied a "good faith" standard to determine whether the host government compelled the defendant's conduct.[156] The EEOC declined to impose Title VII liability on an employer who had a good faith belief that the otherwise prohibited conduct was compelled by the host country.[157] In order to establish such a good faith belief, "the employer must have a current, authoritative, and factual basis for its belief [that the laws or customs of the host country compel the conduct], and it must rely upon that belief in good faith."[158] This language implies a substantially less stringent standard than the traditional foreign compulsion defense.[159] Under the EEOC decision, mere custom of the host nation, established only by

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154. *Id.* at 385 (citing Griffine, *A Primer on Extraterritoriality*, 13 INT'L BUS. L. 23, 25 (Nov. 1985)).

155. *Id.* at 384-85.

156. EEOC Decision, *supra* note 118, at 7054.

157. *Id.*

158. *Id.*

159. The EEOC did not invoke the foreign compulsion defense explicitly, ruling instead that the defendant corporation did not violate Title VII because the discriminatory conduct was a unilateral act by the host government. *Id.* at 7054-55. The analysis is quite similar to traditional foreign compulsion cases with one significant difference—in this EEOC decision, the Commission considered the defendant corporation's "good faith" in order to determine whether the foreign compulsion argument was a pretext for discrimination. Although traditional foreign compulsion cases do not consider pretext separately, pretext is melded into the understanding of compulsion. Therefore, the EEOC's language is significant in this inquiry.

letter from a foreign government official and relied upon in good faith by the defendant corporation, conceivably could immunize the defendant from Title VII liability.[160]

At least one commentator[161] has suggested that this loose interpretation of the foreign compulsion defense opens the door to third-party preferences as a legitimate defense to liability.[162] Specifically, the concern is that under a good faith analysis, the fact that competitors' businesses have discriminatory hiring practices may form the requisite "factual basis" for the belief that the practice is compelled by social or religious custom of the foreign state.[163] The EEOC decision provides some protection from this haphazard determination of what the host country mandates by requiring an "authoritative" basis for the belief.[164] The third-party preference standard conflicts with the common approach to Title VII liability. Generally, a corporation cannot point to third-party preferences to excuse discrimination as either a business necessity[165] or a "bona fide occupational qualification" (BFOQ).[166] Furthermore, mere approval or encouragement of discriminatory conduct by foreign governments is inconsistent with the notion of "compulsion" developed in federal case law.[167]

The EEOC decision to allow a corporation to assert a good faith belief that it would be sanctioned for failing to discriminate in violation of Title VII arguably solves the dilemma about informal foreign compulsion. This standard explicitly considers social and religious customs, and credits statements by the host government describing its national policies.[168] Nevertheless, this standard is not without its drawbacks. The good faith standard may overstep the statutory defense by opening up the possibility of a third-party preference defense.[169] Expanding the foreign compulsion defense to incorporate informal government

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160. *Id.*

161. Warner, *supra* note 105, at 391 n.124.

162. Proponents of Title VII would likely hesitate to rest the statute's application on such limited protection from pretext. *Id.*

163. *Id.* at 391-93.

164. EEOC Decision, *supra* note 118, at 7054.

165. *See, e.g.*, Fernandez v. Wynn Oil, 653 F.2d 1273, 1276 (9th Cir. 1981) (holding that gender is not a business necessity when customers in a foreign nation prefer to deal with men, stating that "customer preference should not be bootstrapped to the level of business necessity.").

166. *See id.* at 1277 ("The need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid BFOQ exception."); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (being female was not a BFOQ for job of flight attendant).

167. *See supra* part III.A.2.a.

168. *See, e.g.*, EEOC Decision, *supra* note 118, at 7053-54.

169. *See supra* notes 161-67 and accompanying text.

compulsion may impermissibly expand its scope beyond that intended by Congress.

2. Principles of International Comity

Principles of international comity may warrant restricting the extraterritorial reach of a statute even when Congress has exercised its prescriptive jurisdiction.[170] Under the doctrine of international comity, "a court faced with the prospect of a United States law punishing what another country requires, encourages, or permits should analyze the contacts and interests of the two countries and by neutral criteria select the law that is more reasonable to apply—the law of the state whose 'interest is clearly greater.'"[171] Thus, international comity can be used to limit the application of Title VII in cases of informal compulsion by foreign nations. According to the strictures of international comity, Title VII would apply abroad only when extraterritorial application is reasonable.[172]

a. The Reasonableness Standard: A Balancing Test

The most common approach for determining whether extraterritorial application of a statute would be "reasonable" is to engage in a balancing test. The Restatement (Third) of Foreign Relations Law requires the evaluation of "all relevant factors,"[173] and identifies some of the factors to be considered in the balance:

> the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory [of the regulating state];[174] [the] connections . . . between the regulating state and the person principally responsible for the activity [or] those whom the regulation is designed to protect;[175] [the] character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such activities . . . and the desirability of such regulation;[176] [the] importance of the regulation to the international . . . system;[177] [and the] extent to which another state may have an interest in regulating the activity.[178]

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170. Hartford Fire Ins. v. California, 113 S. Ct. 2891, 2919-20 (1993).

171. Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1801-02 (1992).

172. *Id.* at 1802 & n.13.

173. RESTATEMENT (THIRD) § 403(2).

174. *Id.* § 403(2)(a).

175. *Id.* § 403(2)(b).

176. *Id.* § 403(2)(c).

177. *Id.* § 403(2)(e).

178. *Id.* § 403(2)(g).

After balancing the states' competing interests, the Restatement provides that "a state should defer to the other state if that state's interest is clearly greater."[179]

Several cases involving the extraterritorial application of U.S. laws have employed the balancing approach outlined by the Restatement. In *Timberlane Lumber Co. v. Bank of America*,[180] for example, the court recognized the extraterritorial reach of U.S. antitrust laws, but limited the scope of extraterritorial application with principles of international comity.[181] The court stated that simply because "American law covers some conduct beyond this nation's borders does not mean that it embraces all [conduct] . . . . [A]t some point the interests of the United States are too weak and the foreign harmony incentives for restraint too strong to justify an extraterritorial assertion of jurisdiction."[182] The court then used a balancing approach to determine the point at which courts should defer to the foreign interest.[183] The court identified three factors to consider in the balance: first, whether there is some effect, actual or intended, on United States interests; second, whether the effect is sufficiently substantial to present a cognizable injury to the plaintiffs; and third, whether United States interests are sufficiently strong in comparison to interests of other nations to justify the assertion of extraterritorial authority.[184]

The court in *Mannington Mills* endorsed the *Timberlane* balancing approach to determine whether extraterritorial prescriptive jurisdiction should be exercised.[185] The court enumerated a ten-factor balancing test[186] and remanded the case

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179. *Id.* § 403(3).
180. 549 F.2d 597 (9th Cir. 1976).
181. *Id.* at 609.
182. *Id.*
183. *Id.* at 613.
184. *Id.*
185. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979).
186. *Id.* The factors identified by the court for consideration are:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

with instructions to balance United States interests against the divergent interests of the twenty-six host nations involved in the dispute.[187] Thus, principles of international comity arguably solve the dilemma regarding informal governmental compulsion by using a balancing test to determine when enforcement of Title VII is appropriate. However, cases and commentators have identified problems with the balancing approach.

b. Limitations on the Comity Analysis: Arguments Against the Balancing Approach

Mannington Mills highlights several arguments against using a balancing test to limit the scope of Title VII's extraterritorial application. First, the ten factors considered in the balance raise "highly complex issues"[188] which some courts and commentators argue are beyond the ability and role of the court to resolve.[189] Second, because the interests of each state are distinct,[190] a balancing approach may yield different results for different states. This lack of predictability leaves U.S. businesses without clear guidelines upon which to base their business decisions, and "present[s] powerful incentives for increased litigation on the jurisdictional issue itself."[191]

Similarly, in 1984 the court in *Laker Airways v. Sabena, Belgian World Airlines*[192] rejected the balancing approach. The Court enumerated two reasons for its decision. First, "there are substantial limitations on the court's ability to conduct a neutral balancing of the competing interests."[193] Second, interest balancing is "unlikely to achieve its goal of promoting

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7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

Id. at 1297-98 (footnotes omitted).

187. *Id.* at 1298 (stating that "the interests and policies of each of the foreign nations differ and must be balanced against our nation's legitimate interest in regulating [the conduct]").

188. *Id.* at 1298.

189. Weintraub, *supra* note 171, at 1817; Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 588-95 (1983).

190. Mannington Mills, 595 F.2d at 1298.

191. Weintraub, *supra* note 171, at 1817 (quoting Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 n.2 (D.C. Cir. 1987)).

192. 731 F.2d 909 (D.C. Cir. 1984).

193. *Id.* at 948.

international comity."[194] The court expressed doubt that the judiciary "could adequately chart the competing problems and priorities that inevitably define the scope of any nation's interest in a legislated remedy."[195] Further, because courts find neutral balancing of competing interests difficult, "[w]hen there is any doubt, national interests will tend to be favored."[196]

Commentators often agree with the *Laker* court. One commentator contends that courts are an inappropriate forum for interest balancing because their decisions are necessarily unilateral and need not consider the importance of future negotiations and dealings with foreign governments.[197] Therefore, courts can—and often do—favor domestic law or custom and discount the interest of the foreign nation.[198] Similarly, through the application of principles of international comity, "[o]ur bargaining chips will have been given away before the political branches could use them."[199] These limitations on the usefulness of the comity approach have led to arguments both in favor of a presumption of jurisdiction[200] and against United States interference.[201]

3. Tipping the Scales in Favor of Domestic Law

One commentator argues for a presumption in favor of extraterritorial jurisdiction whenever the effect of the conduct on United States interests is "direct, substantial, and reasonably foreseeable."[202] This commentator contends that comity will retard rather than advance international accommodation and bargaining between governments, and therefore a presumption in favor of jurisdiction is appropriate.[203]

Another approach favors no interference by the United States, and refuses to engage in a comity analysis when foreign interests are repugnant to domestic public policy.[204] This approach rejects the presumption of jurisdiction on the basis of comity. Once United States law applies abroad, the inevitable

194. *Id.*
195. *Id.* at 950.
196. *Id.* at 951.
197. Maier, *supra* note 189, at 591-95.
198. *Id.*
199. Weintraub, *supra* note 171, at 1817.
200. *Id.*
201. Maier, *supra* note 189, at 596.
202. Weintraub, *supra* note 171, at 1816 (quoting the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1988)).
203. *Id.* at 1817.
204. *Id.* at 1804.

protests of foreign governments "must be dealt with at the governmental level by changes in United States or foreign law and by intergovernmental agreement."[205] While acknowledging that interest balancing should be left to the diplomatic forum, this commentator argues that "in those instances where [exercise of United States prescriptive jurisdiction] will inevitably lead to requiring acts contrary to the legitimate wishes of a foreign sovereign in its own territory, United States courts should indulge the strong presumption that international law . . . does not permit such interference."[206]

A less radical approach, adopted by the *Laker* court, calls for tipping the scale toward applying United States law.[207] In *Laker*, the court rejected the comity analysis when enforcing foreign interests would undermine strong public policy concerns of the United States.[208] The court stated that this principle "flows from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws."[209] Under the *Laker* analysis, a court would not consider principles of international comity when informal foreign compulsion results in violations of Title VII. Such compulsion would be "unjust and prejudicial" in light of the strong public policy behind the Act.[210] At least one commentator has argued that equal employment opportunity is an "international human rights goal"[211] and, therefore, should trump concerns for international comity. The *Laker* court maintained, however, that "[n]othing is more inconsistent with harmonious international cooperation than insistence upon national viewpoints under the pretense of their being international."[212]

IV. CONCLUSION

The Civil Rights Act of 1991 contains a clear statement of legislative intent to exercise prescriptive jurisdiction over U.S.

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205. *Id.*

206. Maier, *supra* note 189, at 596.

207. Laker Airways v. Sabena, Belgium World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

208. *Id.* at 937 (stating that "the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.").

209. *Id.* at 937 n.104 (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 30, 32-33 (Arno Press 1972) (1834)).

210. *Id.* at 937.

211. Cohn, *supra* note 3, at 1292.

212. Maier, *supra* note 189, at 595 (quoting Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189, 200 (1942)).

corporations operating abroad. The extraterritorial reach of Title VII is limited, however, by the foreign compulsion defense, which bars Title VII liability for discriminatory acts compelled by foreign law. Courts have further limited the foreign compulsion defense to cases of *actual* foreign compulsion; mere knowledge, approval, or encouragement of illegal activities by the host government cannot establish the defense. To prove actual compulsion, a corporation must actively seek to ascertain the foreign government's positive law. In addition, that law must be coercive and fundamental, rather than merely peripheral, to the discriminatory conduct at issue.

The statutory defense does not recognize informal foreign governmental compulsion, notwithstanding the profound impact that informal policies can have on corporate behavior. To avoid violating the laws of nations, courts should not only apply the limitations imposed by the statute itself, but also the limitations suggested by principles of international comity.

None of the three extreme viewpoints previously discussed—a presumption in favor of jurisdiction, abdication of jurisdiction in cases of conflict with foreign interests, and refusing to engage in a comity analysis when the foreign law is contrary to strong United States public policy—is appropriate in cases of informal foreign compulsion to violate Title VII. Reducing the question of extraterritorial application of Title VII to a rigid formula ignores the complexity of the issues. The *Mannington Mills* decision correctly recognized that "the policy of each nation is not likely to be the same,"[213] and therefore the results of disputes over extraterritorial application are not likely to be the same. In some instances, a foreign government's preferences do not rise to the level of outright compulsion. In other cases, however, violation of even informal policies and customs can result in sanctions or deportation. Consequently, principles of international comity provide the best vehicle for determining foreign application of Title VII because they require the balancing of a number of interests designed to take into account the particular circumstances.

A U.S. corporation arranging its affairs abroad will invariably maintain that a comity analysis in cases of informal foreign compulsion offers no certainty upon which to base its conduct. Corporations must be mindful, however, that comity supports only reasonable extraterritorial application of Title VII; "when there is any doubt, national interests will tend to be favored over

213. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1289 (3d Cir. 1979).

foreign interests."[214] Thus, in any reasonableness inquiry the scales are tipped in favor of national interests.[215] For example, the corporation's conduct in the EEOC Decision indicated no desire to violate Title VII. The corporation accepted the employment application of a woman, warned her of the possibility that the host nation would not accept her for the position, but proceeded to process her application as it did any other.[216] The EEOC found no discrimination on the part of the corporation, and held that the host nation committed the discrimination.[217] In contrast, in *Abrams v. Baylor College of Medicine*, the Baylor officials made no attempt to ascertain the Saudi policy concerning Jewish students participating in the exchange program.[218] The court properly held that Baylor violated Title VII unilaterally by failing to ascertain the policy of the host nation, regardless of the actual policy of the host nation.

A United States corporation operating abroad, therefore, need only make a concerted and genuine effort to comply with the directives of Title VII. When the policies of a foreign state prevent them from doing so, principles of international comity should shield them from liability.

Mary Claire St. John

214. Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 951 (D.C. Cir. 1984).

215. Lairold M. Street, *Application of U.S. Fair Employment Laws to Transnational Employers In the United States and Abroad*, 19 N.Y.U. J. INT'L L. & POL. 357 (1987) (stating that "the balance should be tipped in favor of the national policy, enhanced by a global awareness of the right to be free from employment discrimination in the domestic or international workplace.").

216. EEOC Decision, *supra* note 118, at 7053-54.

217. *Id.*

218. Abrams v. Baylor College of Medicine, 805 F.2d 528, 535 (5th Cir. 1986).