Northwestern Journal of International Law & Business

Volume 11
Issue 2 *Fall*

Fall 1990

Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law

Michael A. Jr. Warner

COMMENTS

Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law

I. INTRODUCTION

The increasingly interdependent nature of the world economy has made commonplace the overseas employment of United States citizens by United States multinational corporations.[1] When an American company employs a United States citizen in a foreign country questions arise as to what extent the United States may regulate employment activity taking place outside of United States territorial boundaries.[2]

Historically, principles of territoriality and nationality have constrained the ability of a sovereign state to prescribe conduct occurring outside of its boundaries.[3] Under traditional principles of jurisdiction,

---

[1] In 1970 some 680,000 United States citizens worked overseas in private employment (excluding merchant marines). Social And Economic Statistics Admin., Bureau of the Census, United States Dept. of Commerce, Americans Living Abroad (1973). Currently, about 2,000 U.S. Companies operate 21,000 foreign units in 121 countries. *Were Civil Rights Meant to Travel?* Bus. Week, Jan. 21, 1991 at 36. As of November 1990 over 40,000 U.S. citizens were employed in Saudi Arabia alone. *Saudi Arabia's 'Guest Workers' Disenfranchised, Discontented*, Chicago Trib., Nov. 25, 1990, § 1, at 5, col. 3.

[2] *See EEOC: Policy Statement on the Application of Title VII To American Companies Overseas and to Foreign Companies*, 401 Fair Empl. Prac. Rep. (BNA) 6063 (1988)[hereinafter Policy Statement].

[3] Jurisdiction to prescribe consists of a sovereign's authority to "apply its law, whether by statute, agency regulation, executive act, or judgment of a court, whether in general or in particular cases." FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1315 (D.C. Cir. 1980).

In the past the jurisdiction of a state to make its law applicable in a transnational context was determined by formal criteria derived from concepts of state sovereignty and power. In princi-

employee relations fell predominantly under the control of the local authorities where the person or persons in question were employed.[4] Jurisdictional principles, however, have come to reflect the increasing complexity of international business relations. Today, principles of reasonableness and fairness supplement rigid concepts of territoriality.[5]

In some instances, the United States has expanded its jurisdiction beyond traditional boundaries in order to protect the interests of its citizens working overseas[6] and to further domestic labor relations policies.[7] As a result of these expansions, overlapping assertions of jurisdiction have become common.[8]

Under modern principles of jurisdiction, valid assertions of jurisdiction by more than one nation may occasionally result in situations where the law of one sovereign compels an employer to violate the law of another.[9] Such conflict has arisen where the United States claims jurisdiction to prescribe overseas employment conduct, and another foreign nation mandates discriminatory hiring practices,[10] interferes with a collective bargaining agreement,[11] or orders an employer to dismiss an employee without valid justification[12].

United States courts have long recognized the reasonableness of protecting a party from being caught between the law of the United States and the law of foreign countries where the party does business.[13] The defense of foreign sovereign compulsion has evolved from this principle.

---

ple, it was accepted that a state had jurisdiction to exercise authority within its territory and with respect to its nationals abroad.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402 Introductory Note at 235 (1987) [hereinafter RESTATEMENT].

4 United States v. Vetco, 644 F.2d 1324, 1331 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981). The RESTATEMENT provides that United States Laws may be applied to activities "related to international transactions . . . but not generally over predominantly local activities such as labor relations of a foreign branch or subsidiary." RESTATEMENT, *supra* note 3, § 414 comment c at 271. *See generally infra* notes 102-104 and accompanying text.

5 RESTATEMENT, *supra* note 3, § 402 Introductory Note at 236.

6 *See* Bryant v. International School Services, Inc., 502 F. Supp. 472, 481-483 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3rd Cir. 1982) (Title VII of Civil Rights Act interpreted to apply extraterritorially); Older Americans Act Amendments of 1984 § 802(b)1,·29 U.S.C.A. § 623 (f)(1) (West 1985),(Age Discrimination in Employment Act amended to apply extraterritorially).

7 *See* Airline Pilots Association v.TACA International Airlines, 748 F.2d 965, 968 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) (Collective bargaining agreement enforceable against corporation moving from United States to El Salvador because,"collective bargaining agreements are central to American labor law and are the essential threads of its fabric.")

8 RESTATEMENT, *supra* note 3, § 441 Introductory Note at 340.

9 *Id.*

10 *See* Bryant, 502 F. Supp. at 487; *infra* notes 116-138 and accompanying text.

11 *See* TACA, 748 F.2d at 971; *infra* notes 139-155 and accompanying text.

12 *See* McGhee, 871 F.2d at 1412; *infra* notes 156-168 and accompanying text.

13 *See* United States v. General Electric, 115 F. Supp. 835, 878 (D. N.J. 1953).

Under this defense, a defendant may escape liability under United States law if it shows that its actions, although in violation of United States law, complied with the directives of a foreign government.[14]

An employer may invoke the foreign compulsion defense in cases where a foreign government forces the employer to treat its employees in ways which violate United States law.[15] This comment develops a foreign compulsion doctrine applicable to employment disputes that ensures fair treatment for both employers and employees subject to foreign laws. In Part II, the comment focuses on the past application of the foreign compulsion defense in United States courts, particularly in the area of international antitrust law. This section analyzes the underlying nature and rationale of the defense, concluding that the principle purpose of the rule rests on an issue of fairness to the party subject to the conflicting laws. Proper application of these fairness principles involves a two-step process where the court must (1) determine whether the activity in question was in fact compelled and (2) determine which nation's law has primacy by invoking established principles of territoriality.

Part III applies principles developed in Part II in the context of employment law disputes, recognizing that the interdependent nature of an employer-employee relationship requires that the court consider the effect of the compelled activity on both the employer and employee. The application of these principles allows a defendant to escape liability only when evidence shows that good faith compliance with the host country's laws leaves no option but to violate United States law. This standard limits the adverse effects of foreign government orders on American employees and employers by creating a rule of law which allows an employer to ex-ante limit its exposure to liability under United States law.

II. THE FOREIGN COMPULSION DEFENSE: GENERAL CONCEPTS

The doctrine of foreign sovereign compulsion has evolved as a principle under international law to reduce the hardship placed on parties caught between the conflicting demands of more than one nation.[16] Es-

---

[14] RESTATEMENT, *supra* note 3, § 441 at 234; Interamerican Refining Corp. v. Texas Maracaibo, Inc., 307 F.Supp. 1291, 1297 (D. Del. 1970).

[15] Several courts have acknowledged the theoretical applicability of the defense in an employment law context. *See* TACA, 748 F.2d at 971; Bryant, 502 F. Supp. at 481-483; *but cf.* McGhee, 871 F.2d at 1419 ("Purposes of foreign compulsion doctrine normally are not implicated in cases involving international contract disputes). The Equal Employment Opportunity Commission (EEOC) has invoked the substance of the defense in one case. EEOC Decision No. 85-10, 2 Emp. Prac. Guide (CCH) ¶ 6851, 7052 (1985) [hereinafter EEOC Decision]. The RESTATEMENT has also recognized the potential applicability of the foreign compulsion defense to employment discrimination law. *See* RESTATEMENT, *supra* note 3, § 441 comment b at 234.

[16] RESTATEMENT, *supra* note 3, § 441 Introductory Note at 234. Section 441 reads:

sentially, a party invoking the defense claims, "I did it, but I'm not guilty because the government made me do it."[17]

The foreign compulsion principle originally arose as a defense against the extraterritorial reach of United States anti-trust law.[18] Courts have accepted foreign compulsion as a theoretical defense to anti-trust liability, and a defendant has successfully invoked the defense in one reported case.[19] More often, courts have acknowledged the defense in dicta, stating that if a foreign government compelled the defendant's conduct, the court could not impose liability.[20] Provisions incorporating the substance of the defense have also appeared in consent decrees. These decrees exempt activity undertaken in a foreign country under the compulsion of foreign law, which would otherwise violate provisions of the

---

Foreign State Compulsion

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

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

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

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

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

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

17 Panel Discussion, *The Sovereign Compulsion Defense in Antitrust Litigation: New Life for the Act of State Doctrine*, 72 AM. SOC. INT'L. L. PROC., 97, 98 (1978)(Statement of Milo G. Coerper).

18 Maracaibo, 307 F.Supp. at 1297-98.

19 *Id.* Foreign compulsion has also been invoked as a defense against discovery orders and sanctions which conflict with foreign nondisclosure laws. *See* Societe Internationale v. Rogers, 357 U.S. 197 (1958). However, foreign compulsion as a defense to United States substantive law is conceptually distinct from application in a procedural context. Foreign non-disclosure statutes are often specifically aimed at affecting litigation in United States courts and are usually not geared to advancing any affirmative policy of the foreign nation. Waller, *Redefining Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW & POL. INT'L BUS. 747, 781 (1982). Accordingly, somewhat less deference to the law of the foreign state may be called for. RESTATEMENT, *supra* note 3, § 442 comment e. The RESTATEMENT, recognizing this distinction, provides a separate rule for application of the defense in a procedural context. Section 441 concerns conflicts in substantive law where both states have jurisdiction to prescribe the conduct in question. Section 442 deals with the litigation process in situations where the forum state by definition has jurisdiction over the parties and the proceedings and foreign substantive law would not ordinarily be involved. *See id.* § 442 comment e. Although such a problem may arise in employment law litigation, the problem of foreign compulsion in this procedural context is beyond the scope of this comment.

20 *See* In Re Japanese Products Litigation, 723 F.2d 238, 315 (3rd Cir. 1983); In Re Uranium Antitrust Litigation, 617 F.2d 1248, 1254-55 (7th Cir. 1980); Mannington Mills v. Congoleum, 595 F.2d 1287 (3rd. Cir. 1979); Timberlane v. Bank of America, N.T. & S.A., 549 F.2d 597, 607 (9th Cir. 1976), *cert. denied*, 472 U.S. 1032 (1985); Linseman v. World Hockey Association, 439 F.Supp. 1315, 1324 (D. Conn. 1977); United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified* 1965 Trade Cas. (CCH) ¶ 70,352 (S.D.N.Y. 1965).

decree.[21]

A. Application of the Foreign Compulsion Defense

No clear guidelines exist which establish when foreign government activity exempts a defendant from liability. At a minimum, established precedents demonstrate that in order to successfully invoke a foreign compulsion defense a defendant must show that (1) a foreign law truly compelled the activity in question, and (2) the foreign nation's interest in compelling that activity overrides any competing United States interest. As explained below, courts have not agreed as to what constitutes either a case of true compulsion or a sufficient foreign interest.

1. The Requirement of Actual Compulsion

For a defendant to escape judgment in the United States it must show that a foreign sovereign actually compelled the conduct giving rise to liability under United States law. In the context of antitrust law courts have held that knowledge, acquiescence, approval, or even encouragement of the illegal activity by the host government does not excuse an antitrust violation.[22]

Courts have continuously recognized the theoretical validity of the foreign compulsion defense, but have construed the requirement of actual compulsion quite narrowly.[23] Courts have addressed the foreign compul-

---

[21] *See* United States v. Bechtel, 1979-1 Trade Cas. (CCH) ¶ 62,429, *aff'd* 749 F.2d 660 (9th Cir.1979), *cert. denied* 454 U.S. 1083 (1981); United States v. United Fruit Co., 1978-1 Trade Cas. (CCH) ¶ 62,458 (D.D.C. 1978). For a discussion of the role of foreign compulsion in consent decrees *see*, Waller, *supra* note 19, at 783. In addition the Antitrust Division of the United States Department of Justice has recognized the validity of the defense. *See U.S. Dept. of Justice, Antitrust Guide for International Operations* (1988), *reprinted in* 55 Antitrust & Trade Reg. Rep. (BNA) at S-23 (Spl. Supp. Nov. 17, 1988) [hereinafter *Antitrust Guide*].

[22] Maracaibo, Inc., 307 F.Supp. at 1296-1299. In *Maracaibo*, the plaintiff, an oil refiner, alleged that the defendants, exporters of low cost Venezuelan crude oil, refused to supply them with oil in violation of the Sherman Act. The defendant claimed that the Venezuelan government had ordered them not to sell oil extracted from its territory to the plaintiff. Finding nothing in the evidence which indicated that defendants either procured the Venezuelan order or acted voluntarily pursuant to a delegation of authority to control the oil industry, the court concluded that the undisputed facts demonstrated that defendants were compelled by regulatory authorities in Venezuela to boycott plaintiff, and held that such compulsion acted as a complete defense against liability under United States antitrust law. *Id.* at 1296. No other court has explicitly invoked foreign compulsion as a defense to antitrust liability. *But see* O.N.E. Shipping v. Flota Mercante Grancolombiana, 830 F.2d 449 (2d. Cir. 1987) *cert. denied* 485 U.S. 486 (1988) (Court invoked combination act of state doctrine and foreign compulsion). *See supra* note 34 (Discussion of the merger of act of state and foreign compulsion).

[23] For example, in Mannington Mills, 595 F.2d at 1293-1294, the mere issuance of patents by a foreign government did not force the defendant to exclude the plaintiff from foreign markets, and therefore did not represent "actual" compulsion. Moreover, in Linseman v. World Hockey Association, 439 F.Supp at 1324, a preference of the Canadian government that the professional hockey

sion defense on a case by case basis resulting in the absence of a clear rule of law delineating what constitutes "actual" compulsion sufficient to exempt a defendant from liability under United States law.[24]

According to the Restatement (Third) of the Foreign Relations Law of the United States, a court may find compulsion whether the requirement or prohibition is backed by criminal or civil liability, or both.[25] Generally, a defendant may only invoke the defense when the foreign state embodies the requirement in binding laws or regulations subject to penalty or other severe sanctions and not when the foreign state gives the orders in the form of "guidance," or informal communications.[26] However, if informal communications create a justifiable fear of sanctions, the communications may prove adequate to create compulsion.[27] The threat of termination of valuable business arrangements may give rise to the foreign compulsion defense, but denial of opportunity for new arrangements probably would not.[28] For the defense to succeed it is not enough to show that the foreign government licensed or tolerated the activity at issue,[29] gave an exclusive franchise to the corporation,[30] or even that a foreign-owned entity participated[31].

The scope of inquiry used to determine whether the activity in question actually constitutes compulsion is very narrow. As a general rule, a United States court may not consider the validity of the foreign government order under the foreign law.[32] The act of state doctrine precludes an American court from inquiring into the validity of a foreign sover-

---

draft not apply to amateurs under the age of twenty did not compel an agreement among the league teams not to draft players under the age of twenty, and therefore did not exempt that agreement from antitrust laws. Finally, a claim made by a foreign government before the court that the act under adjudication was compelled by that government will not exempt a defendant from liability. *See* In Re Japanese Products Antitrust Litigation, 723 F.2d at 315 (Note from Japanese ministry indicating that alleged restraints were required by law insufficient to prove compulsion); In Re Uranium Antitrust Litigation, 617 F.2d at 1254 (Amicus brief from Canadian Government alleging that it compelled private restraint in American Uranium trade held insufficient).

24 Waller, *supra* note 19, at 786.

25 RESTATEMENT, *supra* note 3, § 441 comment c at 342.

26 *Id.* For a discussion of the role of foreign government statements *see* Comment, *The Sovereign Compulsion Defense in Antitrust Actions and The Role of Statements by Foreign Governments*, 62 WASH. L. REV. 129 (1987).

27 See, *e.g.*, Maracaibo, 307 F.Supp. at 1296-1299. In *Maracaibo* compulsion was found by the court based on statements made by a Venezuelan Official.

28 RESTATEMENT § 441 COMMENT c AT 340.

29 *Id. See also* In Re Uranium Antitrust Litigation, 617 F.2d at 1254.

30 Mannington Mills, 595 F.2d at 1293-1294.

31 RESTATEMENT, *supra* note 3, § 441 comment c at 342; Mannington Mills, 595 F.2d at 1294. *See also supra* note 23.

32 The court in *Maracaibo* refused to consider the affidavit of a Venezuelan attorney that the order which led to the compelled activity was issued without authority under Venezuelan law on the grounds that such an inquiry was beyond the scope of its powers. 307 F.Supp. at 1301.

eign's actions. Under the act of state doctrine, United States courts must reject private claims that are based on the contention that the act of another nation violates either American or international law.[33] The act of state doctrine relates to the foreign compulsion defense to the extent that when a nation compels a private firm to engage in a certain activity, "[a]cts of business become effectively acts of the sovereign."[34] The interplay between the act of state doctrine and the foreign compulsion defense limits the factual inquiry in a potential case of foreign compulsion to the existence of the foreign order. Once a defendant shows governmental action, further examination into the nature of that action is neither necessary nor proper.[35]

A finding that the activity in question was actually compelled means that the defendant could not obey United States law without breaking the law of a foreign sovereign. In such an instance the court must determine which law prevails. This comment now turns to a discussion of the factors a court should consider when deciding whether the law of the foreign sovereign will take precedence over United States law.

2. Foreign Interest and the Principle of Territoriality

A court forced to resolve a case of foreign compulsion is placed in a very delicate position because, by definition, foreign compulsion occurs when both nations have legitimate claims to jurisdiction over the conduct in question. In the case of true compulsion a court order to enforce United States law, to at least some extent, will violate the sovereignty of another nation. For this reason, a court can only apply United States law when the United States has a stronger claim to jurisdiction than the

---

33 Mannington Mills, 595 F.2d at 1292. Originally the act of state doctrine was based on principles of sovereignty and dignity of independent nations which precluded American courts from sitting in judgment of the acts of a foreign sovereign. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The modern doctrine is based on a separation of powers analysis and the need to give the executive branch deference in matters of foreign policy. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). Whatever its theoretical foundation, by precluding inquiry into the validity of a foreign governments acts the doctrine requires American courts to reject private claims based on the contention that the damaging act of another nation violates either American or international law. Mannington Mills, 595 F.2d at 1292 (Discussion of the evolution of the act of state doctrine and its relationship to foreign compulsion). *See infra* notes 49-53 and accompanying text for discussion of relationship between foreign compulsion and act of state.

34 Maracaibo, 307 F. Supp. at 1298. This phrase has caused some courts to merge the two doctrines. *See, e.g.*, O.N.E. Shipping, 830 F.2d at 453. However, most have recognized foreign compulsion and act of state as similar, but conceptually distinct. *See* Mannington Mills, 595 F.2d at 1293. For an in depth discussion of the conceptual distinction between the two doctrines *see infra* notes 48-53 and accompanying text.

35 *Mararaibo*, 307 F. Supp. at 1298. *See also* Hawk, *Special Defenses and Issues*, 50 ANTITRUST L.J. 559, 571 (1982); *Panel Discussion*, *supra* note 17, at 101 (Remarks of M.R. Joelson).

other country. Because of the inherent difficulty of resolving conflicting jurisdictional claims, authorities do not agree on the appropriate method for resolving this conflict.[36]

The RESTATEMENT explicitly recognizes that the traditional jurisdictional limitation of territoriality determines which law will prevail in a given situation.[37] According to the RESTATEMENT, territoriality operates as the principle of preference between conflicting exercises of jurisdiction.[38] In other words, a court should give preference to the law of the nation in which the activity is to be done.

The RESTATEMENT recognizes, however, that this territorial preference is not absolute.[39] Often the conduct in question may take place in more than one sovereignty.[40] Additionally, cases may arise where the conduct abroad has direct effects in both the United States and the host country, or is so egregious that it is reasonable for the United States to insist that the person desist from such conduct, even if it requires the entity to leave the host nation.[41] Under principles of fairness, the state of nationality may reasonably regulate the conduct of its nationals overseas more broadly when the conduct or activity has not yet begun, since compliance with such regulations should prove less burdensome than would compliance with regulations that conflict with the host nation's commands concerning activity already undertaken.[42]

Absent unusual circumstances, courts should adhere to principles of territorial sovereignty. The power of a sovereign to control activity inside of its borders is an undisputed principle of international law.[43] Ex-

---

36 Some courts have advocated a comity analysis which balances the interests of the two nations. *See* TACA, 748 F.2d at 911. Other courts and commentators have based the defense on more expansive principles of territoriality. *See* Maracaibo, 307 F. Supp. at 1296-1299; Hawk, *supra* note 35, at 571. Most courts have avoided the issue by finding that the activity in question was not actually compelled. *See supra* note 23.

37 *See supra* note 16.

38 RESTATEMENT, *supra* note 3, § 441 comment a (A state may not absent unusual circumstances, require a person, even one of its nationals, to do abroad what the territorial state prohibits. . . . [T]he territorial state may in principle exercise its authority over any person, including a foreign national, even in the face of a conflicting law of the state where he is a national).

39 *Id.*

40 RESTATEMENT, *supra* note 3, § 441 comment c at 342. For example, the court in *Maracaibo* accepted the defense when the activity prohibited by foreign law (the delivery of oil to the plaintiff) occurred outside of the foreign state. 307 F.Supp. at 1296.

41 Such a situation may easily arise in antitrust or discovery request cases because the conduct occurring in the foreign state often has the primary purpose of affecting either markets or litigation within the United States. *cf.* Maracaibo, 307 F.Supp. at 1296 (Foreign compulsion applied where conduct had effects in United States). In employment law cases, justification for an exception to territoriality may not be as strong. *See infra* notes 103-114 and accompanying text.

42 RESTATEMENT, *supra* note 3, § 441 comment d at 343.

43 See RESTATEMENT, *supra* note 3, § 402 comment c at 343. ("The territorial principle is by far

traterritorial jurisdictional principles, although justified in some circumstances, rest on more questionable doctrinal grounds.[44] While under modern doctrines certain situations may dictate extraterritorial jurisdiction, it cannot be appropriate when it would force a party to disobey a territorial sovereign in order to comply with United States law. The justifications underlying this principle make up the subject of the next section.

B. Justifications for the Defense

The primary reason for the inconsistent application of the defense stems from an inability of courts and commentators to agree on an underlying rationale for the defense. The policies underlying the foreign compulsion defense have received considerable scrutiny, particularly in the area of antitrust law.[45] Commentators have discovered as many as five rationales supporting the defense in the context of antitrust law.[46]

Three of these rationales—the act of state doctrine, international comity, and fairness—have been used to justify the application of the defense in employment law.[47] A careful analysis of the important policy considerations underlying the doctrine show that while all three rationales may justify application of the defense in some instances; the primary justification of general applicability is one of fairness to the defendant.

1. Act of State Doctrine

Probably the most commonly cited rationale for the foreign compulsion defense comes from a direct extension of the act of state doctrine. The act of state doctrine represents a principle of law designed primarily to avoid judicial inquiry into the affairs, policies, and motives, underly-

---

the most common basis for the exercise of jurisdiction to prescribe, and it has generally been free from controversy").

44 See RESTATEMENT, *supra* note 3, § 402 comments d, e at 239-40.

45 *See* Waller, *supra* note 19, at 788; *Antitrust Guide*, *supra* note 21; Comment, *supra* note 26; *Panel Discussion*, *supra* note 17; Hawk, *supra* note 35, at 971.

46 *See* Waller, *supra* note 19, at 788; Comment, *supra* note 26, at 134-144. These rationales include, fairness to the defendant, extension of the act of state doctrine, international comity, statutory construction of the Sherman Act, and analogy to the antitrust state action doctrine.

47 *See* McGhee, 871 F.2d at 1419 (act of state doctrine as justification); TACA, 748 F.2d at 971 (comity analysis); EEOC Decision, 2 Emp. Prac. Guide at 7052 (fairness analysis). The two other rationales, statutory construction of the Sherman Act, and analogy to the state action doctrine, deal specifically with substantive antitrust law and hence are at most marginally relevant to a discussion of the defense in an employment law context. For a discussion of these rationales *see* Waller, *supra* note 19, at 788, 792; Comment, *supra* note 26, at 134-136, 138-139.

ing the actions of a foreign government.[48] Many courts conceptually link the act of state doctrine and foreign compulsion defense. Several cases have reflected the notion that foreign compulsion is no more than a "corollary of the act of state doctrine."[49]

A comparison of the two doctrines shows that although interrelated, both have conceptually different justifications. Similarity exists in the fact that both preclude inquiry into the validity of sovereign acts. Beyond this restriction, however, the policy concerns underlying each doctrine are distinct. The act of state doctrine, based on separation of powers principles, represents a judicial formula reflecting deference to the executive branch, which courts presume is better qualified to handle the diplomatic and political consequences of an act of state. Foreign compulsion, on the other hand, represents a substantive defense based on the theory that the defendants engaged in illegal activity only because a foreign sovereign compelled them to do so.[50]

The foreign compulsion defense is distinct from the act of state doctrine because the inability of an American court to inquire as to the validity of foreign governmental act does not in and of itself justify releasing a private plaintiff from liability. Nothing in the act of state doctrine precludes a court from deciding to subject a private defendant to liability and let the defendant choose which master to follow. The question that the court must ask in a foreign compulsion analysis is whether the alleged compulsion, valid or invalid, actually occurred.[51]

Out of a sense of fairness, when a court finds actual compulsion, the court may exempt the defendant from United States law. The act of state doctrine acts as a presumption preventing the adjudication of a foreign sovereign's acts and therefore functions not as a direct justification for the foreign compulsion defense, but merely as a restriction under which American courts must operate when evaluating the legitimacy of a for-

---

48 O.N.E. Shipping, 830 F.2d at 452.

49 Timberlane, 549 F.2d at 606. *See also* Linseman, 439 F.Supp. at 1324; Phoenix Canada Oil Co., Ltd., v. Texaco, Inc., 78 F.R.D. 445, 459 n.61 (D. Del. 1978) ("The essence of the [foreign] compulsion defense is that an act performed within a foreign country under the direct mandate of a foreign authority represents the de facto action of the sovereignty."). Part of this confusion has resulted from cases where the defendant is partially owned by a foreign government. In these cases courts have tended to merge the two doctrines completely. *See* O.N.E. Shipping, 830 F.2d at 453 ("where as here, the conduct of the appellees has been compelled by the foreign government they are entitled to assert the defense of foreign government compulsion and the act of state doctrine is applicable.")

50 Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts & Economic Coercion*, 55 TEX. L. REV. 1, 20-21 (1977).

51 Maracaibo, 307 F.Supp. at 1298-1299.

eign compulsion defense.[52]

2. *International Comity*

Principles of international comity provide another commonly cited rationale given for the foreign compulsion defense. International comity consists of that body of rules which states observe towards one another from courtesy or mutual convenience, although they do not form part of international law.[53] Under a comity analysis a court balances such factors as the vital interests of the two nations, the potential hardship to the defendant, the nationality of the defendant, the location of the conduct, and the ability of each nation to enforce its legal norms.[54] Several courts have utilized such a balancing approach in evaluating the validity of a foreign compulsion claim.[55]

Consideration of comity principles has long been considered appropriate any time the extraterritorial application of United States law is involved.[56] Courts and commentators have advocated the use of comity principles when deciding whether to exert jurisdiction over extraterritorial activity.[57]

Although principles of international comity support the use of the foreign compulsion defense,[58] direct invocation of comity principles fails to assist a court in deciding when the defense should apply in a particular case. A court's ability to balance appropriate factors on a case by case basis has been severely questioned.[59] First of all, a court attempting to measure and compare the interests of sovereign nations under a comity analysis engages in the type of political analysis foreclosed under the act

---

52 Moreover, the validity of the act of state doctrines in cases involving private defendants has been questioned. *See* Waller, *supra* note 19, at 791. The act of state doctrine is a creature of public international law, and cannot be translated to issues which concern the rights of individuals. *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). The dilemma facing a corporation subject to conflicting laws is a subject commonly thought to be the province of private international law which refers to the transnational and foreign laws which govern the behavior of individuals and private entities such as corporations.

53 *See* Hilton v. Guyot, 159 U.S. 113 (1895).

54 Waller, *supra* note 19, at 787.

55 *See* TACA, 748 F.2d at 971. Courts have acknowledged as many as ten factors to consider in balancing jurisdictional interests. *See* Mannington Mills, 595 F.2d at 1297; Timberlane, 549 F.2d at 614.

56 *See* RESTATEMENT, *supra* note 3, § 402.

57 Note, *Predictability and Comity, Toward a Principle of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310 (1985).

58 *See* Comment, *supra* note 26, at 142; For instance the territorial limitations on the defense may be rationalized under comity principles, because international comity recognizes the importance of territorial sovereignty.

59 *Id. See also* Laker Airways v. Sabena, Belgian World Airways, 731 F.2d 909, 948-952 (D.C. Cir. 1984).

of state doctrine.[60] Second, balancing relevant factors on a case-by-case basis robs the process of any certainty.[61] Therefore, a comity analysis does not offer guidance in business planning for a firm facing potentially conflicting government orders.[62] A court determining the validity of a foreign compulsion claim must ascertain when a corporation has no choice but to violate United States law.[63] The formation and application of *a-priori* rules better achieves this goal.[64]

Principles of comity only answer the question: Why should deference be given to foreign law in instances where the foreign compulsion defense applies? It cannot answer the equally important question: When should the defense apply? Situations where the foreign compulsion defense should apply occur when the balancing of comity principles fails to solve the jurisdictional dispute.[65] By definition, the foreign compulsion defense applies when both nations possess a valid interest based on accepted jurisdictional principles,[66] both nations have the power to enforce their legal norms,[67] and the laws of the foreign state leave no choice but to violate the law of the United States[68]. Absent true compulsion, both states maintain valid jurisdiction and the corporation should be able to follow the mandates of both states without undue hardship.[69] In cases of potential compulsion, the potential hardship on the private defendant created through enforcing American laws represents the only unaccounted comity factor.[70] Although comity principles support the use of the defense, the balancing of comity principles as a means of analyis in individual cases obscures the essential question in cases of potential foreign compulsion: When is it unfair to make a private defendant submit to the laws of both nations?

3. *Fairness to the Defendant*

Fairness to the private defendant represents the most obvious reason

60 Comment, *supra* note 26, at 141. *See supra* notes 48-52 and accompanying text.

61 *See* Laker, 731 F.2d at 948-952.

62 *See* Waller, *supra* note 19, at 787.

63 *See supra* notes 22-35 and accompanying text.

64 Comment, *supra* note 26, at 142.

65 Laker, 731 F.2d at 952 ("There is, therefore, no rule of international law holding that a 'more reasonable' assertion of jurisdiction mandatorily displaces a 'less reasonable' assertion of jurisdiction as long as both are . . . consistent with the limitations imposed by international law.").

66 *See* RESTATEMENT, *supra* note 3, § 441 Introductory Note.

67 If the nations did not have power to enforce their legal norms, the problem of compulsion would not exist.

68 *See supra* notes 22-35 and accompanying text.

69 *See* Laker, 731 F.2d at 952.

70 *See supra* note 54 and accompanying text.

for allowing the foreign compulsion defense. Fairness requires that private parties should not be subject to conflicting demands of different sovereigns. Without the protection of a foreign compulsion defense, enterprises would frequently find themselves stuck in the unenviable position of either violating the law of one or more nations, or ceasing to do business in one of the nations.[71] The courts,[72] the RESTATEMENT,[73] and numerous commentators recognize the importance of fairness[74].

The foregoing discussion of the act of state doctrine and comity principles supports the primacy of fairness considerations in foreign compulsion analysis. Each of the rationales discussed above provides some basis for the foreign compulsion defense, but fails to adequately justify the defense in and of itself. The act of state doctrine tells us why in some cases deference should be given to foreign governments, but does not explain why an individual defendant subject to conflicting laws should be released from liability in the United States.[75] Similarly, comity principles justify deference to the law of a foreign sovereign in some instances, but do not help a court determine when a case of actual compulsion has occured.[76] As a result, neither the act of state doctrine nor international comity can adequately serve as a rule of law which justifies a decision to exempt a private defendant from liability in a particular case.

a. Failure of Current Doctrine

Because courts have obscured the fundamental importance of fairness to the defendant in past analysis of the foreign compulsion defense, past application of the defense has fallen far short of fulfilling the goal of fairness. Inconsistent application has resulted in the absence of legal certainty. The promotion of certainty and predictability should stand as the first goal of a fair doctrine.[77] International businesses require knowledge of which acts may create liability.[78] If the doctrine's goal is to protect

---

71 Maracaibo, 307 F. Supp. at 1298.

72 *Id.*

73 Supra note 3, § 441. The importance of fairness to the defendant is demonstrated throughout section 441. Section 441, comment a, specifically states that "This section applies [principles of preference] to *protect persons* caught between conflicting commands."(emphasis added). Similarly the Introductory Note to the chapter on foreign state compulsion states: "International law has developed principles to reduce the severity of the dilemma for affected persons."

74 Waller, *supra* note 19, at 787; Comment, *supra* note 26, at 143; Hawk, *supra* note 35, at 571.

75 *Supra* note 48-52 and accompanying text.

76 *See supra* note 65-70 and accompanying text.

77 *See* Note, *supra* note 57, at 1319-1323.

78 Comment, *In Re Japanese Products Antitrust Litigation: Sovereign Compulsion, Act of State, and the Extraterritorial Reach of United States Anti-trust laws*, 36 AM. U.L. REV. 721, 749-750 (1987).

the defendant caught between two sovereigns, at the very least a rule of law must be developed which will give a multinational corporation an opportunity to determine *a priori* if true compulsion exists.[79] Fairness requires that courts adopt a rule of law which allows a party to comply with the foreign government mandate in a manner which limits potential liability under United States law.

Section 441 of the Restatement (Third) of Foreign Relations Law of the United States, adopted in 1987, represents a needed yet ultimately inadequate step toward certainty and fairness in the doctrine of foreign compulsion.[80] The territorial guidelines, as adopted by the RESTATEMENT, exists as an important component of a fairness analysis.[81] Fairness requires that parties subject to direct coercion from foreign governments should not be subject to United States law which conflict with the orders of that government.

In other respects, the RESTATEMENT suffers from the same basic flaw as the case law on which it is based; namely, it fails to provide adequate guidelines to determine when a case of foreign government compulsion actually exits, and therefore fails to fulfill the fundamental goal of fairness. Current doctrine, as embodied in the RESTATEMENT, reflects a misguided concern over the form rather than substance of the alleged compulsion. Rather than providing a rule of law to apply, the RESTATEMENT merely lists various factual scenarios which may give rise to the defense. Scholars have criticized this placement of form over substance of compulsion as failing to promote fairness.[82]

An example of the RESTATEMENT'S misguided concern over the form of the alleged compulsion is the suggestion that compulsion may usually only come in the form of binding laws or regulations.[83] Any doctrine designed to promote fairness must recognize that foreign compulsion may occur through methods which fall short of binding rules and regulations. Other countries often effectuate their policies through informal understandings.[84] "Courts must be aware that, in the present sophisticated international business system, government control over its industries, both public & private comes in many forms."[85] Unlike the

79 Comment, *supra* note 26, at 142.

80 *See supra* note 16.

81 Comment, *supra* note 26, at 144.

82 Waller, *supra* note 19, at 798; Hawk, *supra* note 35, at 571.

83 *See supra* note 3, § 441 comment c.

84 Waller, *supra* note 19, at 749, *citing* Statement of Ministry of Inter. Trade (MITI) in, Brief of Govt. of Japan as Amicus in support of cert. pet. in Re Japanese Products Antitrust Litigation, 723 F.2d 238 (3rd Cir. 1983)(Describes tacit understanding between ministry and business that failure to comply with export price directive would lead to sanctions).

85 Comment, *supra* note 78, at 750.

conflicts between regulated and free market society in the United States, many countries operate under a system of close informal cooperation between business and government.[86]

These fairness concerns, as well as inherent limitations on the power of United States courts, prevent an inquiry into the validity or form of a foreign government order. Requiring a valid sovereign act in the form of binding law as a prerequisite to the compulsion defense would require a United States court to render an opinion as if it were a court in that country.[87] The act of state doctrine clearly forecloses such an analysis.[88] Moreover, practical considerations prevent such an inquiry; if courts of a foreign nation had not definitively passed on the question at hand, American courts would have no basis for their decisions.[89]

The difficulty courts face in determining the validity of a foreign government order pales in comparison with the plight of a private party who must decide whether or not to comply with a foreign command. A private party unfamiliar with the laws and customs of the host country may have no way to ascertain the ultimate validity of the order. Additionally, the mere fact that the foreign government claims its order to be valid may not prove dispositive in a United States court.[90] At best, a private party can comply in good faith with a government order which it reasonably believes valid. For this reason, the validity of a foreign government order should only prove relevant as evidence that the defendant acted in good faith in obeying the foreign government order.[91]

b. Good Faith Standard.

Fairness requires that courts consider the plight of corporations operating under the unfamiliar laws of foreign lands. For this reason a court should invoke the foreign compulsion defense if the defendant can prove that the violation of United States law resulted from an attempt at good faith compliance with the law of the host nation.[92] Such a rule would provide relief to deserving defendants while insuring that foreign compulsion is not invoked as a pre-text for otherwise illegal behavior.

Such a good faith standard has precedent in the Uniform Commer-

---

86 *See* Griffine, *A Primer on Extraterritoriality*, 13 INT'L. BUS. L. 23, 25 (Nov. 1985).

87 Waller, *supra* note 19, at 807.

88 *See supra* notes 48-52 and accompanying text.

89 Waller, *supra* note 19, at 807.

90 Even when a foreign government has specifically stated that an order giving rise to alleged compulsion was valid, United States courts have refused to accept the defense. *See* Japanese Products, 723 F.2d at 315; Uranium Antitrust, 617 F.2d at 1254; *supra* note 23.

91 Waller, *supra* note 19, at 809.

92 *Id.*

cial Code which excuses non performance of a contract if a party proves "compliance in good faith with any applicable foreign . . . governmental regulation or order whether or not it later proves to be invalid."[93] A test requiring good faith compliance would bring a measure of certainty and finality to business decisions, and is consistent with the act of state doctrine and the need for respect for the decisions of foreign sovereigns.

Under a good faith compliance test a court would limit its inquiry to whether the defendant knew, or could reasonably have known, that the foreign compulsion was invalid. Courts could apply the good faith standard regardless of the form which the compulsion takes, thereby taking into account situations where foreign nations create compulsion through informal government acts.

The good faith standard, because it rests on the general principle of fairness, has potential application in many instances where a party confronts conflicting substantive laws. So far this comment has discussed foreign compulsion as a concept independent from any particular area of substantive law. The next section discusses foreign compulsion as a defense to liability under United States employment law.

III. Foreign Compulsion and Employment Law

A. Introduction

United States employment laws, when applied to employers doing business in other nations, may conflict with the laws of the host nation. When such a situation occurs a foreign compulsion analysis is appropriate.[94] Defendants have attempted to invoke foreign compulsion as a defense against United States anti-discrimination laws,[95] as a defense to a breach of a collective bargaining agreement,[96] and as a defense to a wrongful discharge action[97]. No court has relied on the defense, but several courts have recognized the appropriateness of applying the defense if a foreign government actually compelled the conduct giving rise to liability in the United States.[98] The 1985 amendments of the Age Discrimination in Employment Act,[99] which extended jurisdiction of the statute extraterritorially,[100] incorporate a foreign compulsion defense. More-

93 U.C.C. § 2-615 (1987).

94 *See* Restatement, *supra* note 3, § 441 comment b.

95 Bryant, 502 F.Supp. at 490; EEOC Decision, 2 Emp. Prac. Guide at 7052.

96 TACA, 748 F.2d at 971.

97 McGhee, 87 F.2d at 1419.

98 Abrams v. Baylor College of Medicine, 805 F.2d 528, 532 (5th Cir. 1986); Pfeiffer v. W.M, Wrigley Co., 755 F.2d 554, 559 (7th Cir.1985); Bryant, 502 F.Supp. at 490-91.

99 Hereinafter ADEA.

100 Older Americans Act Amendments of 1984, Pub.L. 98-459, § 802(b)(1), 98 Stat. 1792; 29

over, the Equal Opportunity Employment Commission[101], while not specifically invoking the defense by name, has applied a foreign compulsion analysis to exempt a corporation from liability under Title VII of the Civil Rights Act[102].

In order to more accurately analyze the proper application of the defense to specific employer-employee disputes this comment first briefly discusses the principles developed in the foregoing section as they apply to employment law issues generally.

1. Employment Law and Territoriality

Courts have traditionally narrowly construed employment laws to preclude extraterritorial application.[103] Employment activities have been traditionally characterized as "predominantly local."[104] Nations have a legitimate interest in maintaining control over employment practices as a means of minimizing interference with local customs or economic regulations.[105] Under principles of international law, therefore, transnational corporations must respect social and cultural traditions of the countries in which they operate.[106] In limited instances courts have justified application of United States law against U.S. companies operating abroad to protect the legitimate interests of U.S. employees working overseas,[107] although some courts have questioned these applications in the absence of express legislative intent.[108]

U.S.C.A. § 623(f)1 (West 1985); Pfeiffer, 755 F.2d at 559. For a discussion of the extraterritorial application of the ADEA see Zanar, *Recent Amendments to the Age Discrimination in Employment Act*, 19 GEO. WASH. J. INT'L L. & ECON. 165, 186-190 (1985).

101 Hereinafter EEOC.

102 EEOC Decision, 2 Emp. Prac. Guide at 7052.

103 *See supra* note 4; Boureslan v. Arabian American Oil Co., 857 F.2d 1014, 1017 (5th Cir. 1988), *cert. granted*, 111 S.Ct. 40 (1990) (Title VII does not apply extraterritorially); Pfeiffer, 755 F.2d at 556-557 (Pre-amendment ADEA does not apply extraterritorially); *cf.* Bryant, 502 F.Supp. at 482 (Title VII does apply extraterritorially).

104 Note, *Equal Employment Opportunities for Americans Abroad*, 62 N.Y.U. L. REV. 1288, 1321 (1987). *See also supra* note 4.

105 U.N DEP'T. OF INT'L & SOCIAL AFFAIRS, MULTINATIONAL CORPORATIONS IN WORLD DEVELOPMENT AT 44, U.N. DOC. ST/ESA/190, U.N. Sales No. E.73.II.A.11 (1973) ("[F]oreign control of key sectors by multinational corporations is regarded in many quarters as a serious infringement upon political independence, and even sovereignty itself.").

106 *U.N. Draft Code of Conduct for Transnational Corporations, U.N. Commission on Transnational Corporations: Report on Special Session*, U.N. DOC. E/1983/17/ Rev. 1 (1983), Art. 12. *See also* Note, *supra* note 104, at 1323-24.

107 Under the principle of nationality a state may prescribe law relating to the conduct of its nationals, even when that conduct occurs outside of the state's territorial boundaries. RESTATEMENT, *supra* note 3, § 402 comment e. *See* Bryant, 508 F. Supp. at 482; Boureslan, 857 F.2d at 1021 (King, J., dissenting).

108 *See* Boureslan, 857 F.2d at 1020; Wrigley, 755 F.2d at 556.

This presumption against extraterritorial jurisdiction over employment conduct mandates strict adherence to territorial principles when conflicts between the United States and the jurisdiction of a host country arise.[109] Exceptions to territoriality, arguably appropriate in areas such as antitrust law where an entity may intend activity in another country to have a specific effect on markets within the United States, should normally hold no force in an employment law context where the activity at issue is usually limited in effect.[110]

When employment activity crosses international boundaries courts usually resolve conflicts through adherence to the principle that a country may only prescribe activity that occurs within its borders. The problem of transnational employment frequently arises within the transportation industry,[111] or in cases where an employer engages in hiring activity within the United States for overseas positions[112]. For instance, when an employer engages in hiring activity within the United States, foreign compulsion doctrine may require that the hiring take place in accordance with United States law, but possibly subject to restrictions of the country in which the employee will be working.[113] The mere fact that a person will work abroad does not exempt a United States employer from United States law. The good faith standard, as developed throughout this comment, places the burden on the employer to prove that only the law of a host country influenced its hiring policies, and not any improper motive. Although a court may resolve most cases through the use of this standard, where employment activity fails to fit into a territorial scheme, conflicts in jurisdiction may best be resolved through diplomatic channels.[114]

2. *Employment Law and "Actual" Compulsion*

When the United States has valid jurisdiction over the extraterritorial employment conduct of its nationals, the unique nature of the employer-employee relationship warrants close scrutiny of the employer's conduct. The interdependent nature of the employer-employee relationship requires that courts consider issues of fairness to both the employer

109 *See supra* notes 36-44 and accompanying text.

110 *See supra* notes 40-43 and accompanying text.

111 *See* TACA, 748 F.2d at 533; text *infra* notes 138-143.

112 McGhee, 871 F.2d at 1414 (Contract executed in Texas for employment in Saudi Arabia); *see infra* notes and accompanying text. *See also*, Abrams, 805 F.2d at 530 (Doctors applied for training program in Saudi Arabia, while located in Texas).

113 EEOC Decision, 2 Emp. Prac. Guide at 7054.

114 This is likely to happen in the transportation area, where employment activity occurs in several countries. In such cases, intergovernmental agreements may be the best method of regulating employment conduct. *See* TACA, 748 F.2d at 968-69; *infra* notes 138-156 and accompanying text.

and employee. The good faith standard as developed in Part II of this comment remains the best means of balancing these two interests. The good faith standard ensures that the employer makes an affirmative effort to shield employees from the adverse effects of a foreign state order.[115] This comment now turns to a discussion of the use of the good faith standard in the three employment related areas where the defense has been invoked.

B. Past and Future Application of Foreign Compulsion to Employment Law

Application of the foreign compulsion defense to United States employment law has met with mixed results. A foreign compulsion analysis based on a good faith standard has been implicitly adopted as a defense to liability under Title VII. Courts in other contexts have adopted the common fallacies surrounding the doctrine, thereby preventing proper application of the foreign compulsion principle to employment issues. This section first discusses the application of the defense under Title VII in order to provide an example of proper foreign compulsion analysis. The remainder of the section discusses foreign compulsion when invoked as a defense to a breach of a collective bargaining agreement and as a defense to a wrongful discharge action, two areas where courts have failed to engage in a proper analysis of the defense. In order to promote the future legitimate application of the defense as a useful tool for solving jurisdictional disputes, the comment concludes with a brief discussion of how consistent future application will lead to a more equitable international business environment.

1. Title VII and the Foreign Compulsion Defense

In many instances the laws of the country in which an employer operates may require gender, religion, or nationality based discrimination[116], and therefore may violate Title VII of the Civil Rights Act[117]. Authorities have recognized that the decision to process a case against an

115 *See infra* notes 134-138 and accompanying text.

116 This is particularly true in Arab nations such as Saudi Arabia where discriminatory practices based on religion and gender are common. Kern v. Dynalectron, 577 F. Supp. 1196 (N.D. Tex. 1983) (Saudi law requiring Moslem pilot to fly into Mecca); Abrams, 805 F.2d 1136. In addition to Title VII, hiring practices for employment in Arab countries may be regulated by the Antiboycott provisions of the Export Administration Act which prohibits discrimination on the basis of religion against any United States individuals or corporations. 50 U.S.C. app. § 2407 (a)(1)(b)(1982). *See* Abrams, 805 F.2d at 532 n.4; *Jewish M.D. is Denied Arabic Employment*, 178 Labor L. Rep. (CCH) No. 351, (March 7, 1989). Courts have found a foreign compulsion applicable as a defense to the EAA for activity occurring completely within the foreign country. *See* Bechtel, 1979-1 Trade Cas. (CCH) ¶ 62,429 (Injunction preventing company from entering or implementing provision in con-

employer operating overseas might involve issues that go beyond the notion of the traditional employee-employer relationship.[118] These concerns raise the issue of whether it would be appropriate to apply Title VII to overseas employment conduct in the face of conflicting foreign laws.[119]

Several courts and the EEOC have implicitly accepted the foreign compulsion defense against liability under Title VII.[120] According to the EEOC, in order for an employer to invoke the defense of foreign compulsion, "the employer must have a current, authoritative, and factual basis for its belief, and it must rely upon that belief in good faith. Otherwise, the Commission will view the employer's proffered reason for rejecting the individual as pretextual."[121]

Relying on this standard the EEOC found that rejecting a female applicant for a position of air traffic controller in a foreign county did not amount to unlawful sex discrimination when the laws and customs of the host nation prohibited the employment of females in jobs where there was contact with the opposite sex.[122] The EEOC stressed that the defendant utilized procedures providing ample evidence of good faith reliance on the government order. The employer accepted the plaintiff's

---

tract for boycott of any United States persons, as subcontractor in the United States, but permitting company to enter such agreements outside the United States if required by foreign law).

117 Civil Rights Act of 1964, § 701 (as amended by 42 U.S.C.A. § 2000e (West 1978)).

118 *Policy Statement, supra* note 2, at 6065. *See also supra* notes 103-108 and accompanying text.

119 *See supra* notes 103-108 and accompanying text. Courts have accepted that Title VII applies as long as the hiring activity takes place within the United States. *See* Abrams, 805 F.2d at 531; Fernandez v. Wynn Oil, 653 F.2d 1273 (9th Cir. 1981). However, it is uncertain whether Title VII applies to conduct which occurs entirely outside of the United States. The EEOC as well as several courts have found that legislative history reveals a Congressional intent to include the employment of United States citizens by United States corporations overseas within the scope of Title VII. *Policy Statement* at 6064; Bryant, 502 F. Supp. at 481-483, *rev'd on other grounds*, 675 F.2d 562; Love v. Pullman, 12 Emp. Prac. Dec. (CCH) ¶11,225 (D. Col. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978). As of this writing, the Supreme Court has granted *certiorari* to the most recent case addressing this issue. In this case the Court of Appeals for the Fifth Circuit in an *en banc* decision has held that the lack of clear congressional intent precludes the application of Title VII to purely extraterritorial activity. Boureslan, 857 F.2d at 1019-1020, *as adopted en banc*, 892 F.2d 1271 (5th Cir. 1990), *cert. granted*, EEOC v. Arabian American Oil Co., 111 S.Ct. 40 (1990). Commentators are also split on this issue. *See* Note, *supra* note 104, at 1291; Comment, *The Multinational Corporation and Employment Discrimination: A Strategy for Litigation*, 16 U.S.F. L. REV. 491, 502-506 (1982) (Congressional intent allows for extraterritorial application); *cf.* Kirschner, *The Extraterritorial Application of the Civil Rights Act*, 34 LABOR LAW J. 394, 407 (1983). (Application of Title VII extraterritorially, "may enmesh the United States and its business community in a foreign relations quagmire").

120 Bryant, 502 F. Supp. at 490; EEOC Decision, 2 Emp. Prac. Guide at 7054.

121 EEOC Decision, 2 Emp. Prac. Guide at 7054.

122 *Id.* The identity of the host country was not cited in the EEOC opinion in order to retain the confidentiality of the parties to the charge, as well as the identity of the host country as required by section 706(b) and section 709(e) of Title VII, 42 U.S.C. § 2000e. et seq. *See* EEOC Decision, 2 Emp. Prac. Guide at 7056 n.6.

application, and submitted it to the host country for approval.[123] Additionally, the employer notified the plaintiff of the host country restrictions, and processed her application pursuant to normal business procedures. The EEOC also noted that the evidence showed that the host country would not permit foreign companies to disregard laws against the commingling of the sexes. Moreover, even if the host country issued a work permit to a woman, the host country could still deport her, and subject her employer to sanctions under the host country's law.[124]

Two federal courts have undertaken a similar analysis in evaluating the validity of a foreign compulsion claim.[125] In *Bryant v. International School Services*,[126] the plaintiffs claimed that the hiring policy of the defendant, a United States corporation which operated schools in Iran for the benefit of children of American citizens employed in Iran, unlawfully discriminated on the basis of sex because it resulted in a disproportionate number of lower paying jobs going to married women.[127] The defendant, International School Services,[128] invoked a foreign compulsion defense

123 *Id.* at 7054.

124 *Id.* The EEOC, rather than invoking the foreign compulsion defense by name, relied on a pragmatic interpretation of Title VII to conclude that respondent's actions did not violate Title VII because its behavior was based not on the sex of the defendant, but on the law of the host nation. Even though the results are the same, a more explicit foreign compulsion analysis seems to be preferable to the position taken by the EEOC. Foreign compulsion, as its name implies, applies only when such preferences are compelled by a foreign government. The Commission's analysis obscures the real reason that liability was not justified, by implying that third party preferences may generally be a legitimate defense. This downplays an important distinction between public and private action. It is well established that a party cannot escape the net of Title VII by arguing that discriminatory behavior was based on the discriminatory preferences of private individuals in a foreign country. *See* Fernandez, 653 F.2d at 1273 (foreign customer preference cannot provide defense against Title VII liability based on theory of business necessity).

125 Bryant, 502 F. Supp. at 481; Abrams, 805 F.2d at 533.

126 *Id.* at 483. In *Bryant* the plaintiff presented a prima facie case of sex discrimination based on a disparate impact theory. In a disparate impact case a plaintiff must carry the initial burden of establishing a prima facie case of discrimination. Under a disparate impact theory, plaintiffs make out a prima facie case by establishing (i) that they belonged to a protected class (in this case women), McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and (ii) the policies of the corporation had the effect of discriminating against that class. *Id.*

127 The defendant awarded its teachers two different employment contracts providing for substantially different benefits based on whether the teacher was hired within the United States and brought to Iran, or whether the teacher was already in Iran for some independent purpose. This practice resulted in a disproportionate number of lower paying, local-hire contracts, going to married women. ISS explained its policy on the grounds that Iranian law prohibits an ISS employee from receiving extra benefits which his/her spouse were already receiving through another employer. The court held that the dual employment contracts, as mandated by both business reality and Iranian law, did not violate Tite VII. The court however, did find that "[the defendant's] *method* [emphasis added] of implementing this valid policy had the effect of discriminating against the plaintiffs on the basis of sex, and that ISS failed to articulate any reason, much less a legitimate nondiscriminatory reason, for this method." *Id.* at 487.

128 Hereinafter ISS.

and claimed that Iranian law prohibiting the payment of certain benefits to an employee if the employee's spouse also worked in Iran mandated the defendant's conduct. The court found that the defendant violated Title VII, not because of the policy against the payment of double benefits, but because the defendant failed to advise its teachers of its hiring criteria.[129] The court found that it was this failure to advise that created the discriminatory impact against married women.[130] Therefore, the evidence could not support a finding that the discriminatory activity was compelled.

In *Abrams v. Baylor College of Medicine*,[131] two anesthesiologists brought a Title VII action claiming they were denied participation in a medical school program at a Saudi Arabian hospital because they were Jewish. The court implied that defendants could have escaped liability upon a showing that the Saudi Arabian government prohibited the employment of the plaintiffs because they were Jewish.[132] The court, however, could find no evidence that the Saudi authorities compelled the defendant's activity. In order to escape liability "Baylor would have to prove that the official position of the Saudi government forbade or discouraged the participation of Jews in the program."[133] The court found, however, that Baylor officials unilaterally undertook the exclusionary practices. No evidence showed that Baylor officials took any appropriate steps to determine the actual policy of Saudi Arabia towards Jews participating in the program. Moreover, Baylor took no steps to alleviate or

129 This failure to inform prevented a married teacher from establishing her qualifications for a higher paying contract, if her primary purpose for being in Iran was, in fact, to teach at the ISS school. If the teacher's spouse worked for an American company in Iran, ISS assumed that the teacher's primary purpose for being in Iran was not to teach at ISS but to accompany the spouse. *Id.* at 490.

130 *Id.*

131 805 F.2d at 528.

132 *Id.* at 533. The court stated that a bonafide occupational qualification ("BFOQ") defense might be available upon such a showing. Religion has been held to be a legitimate BFOQ in one other instance involving the application of Title VII in Saudi Arabia. Kern, 577 F.Supp. at 1196. The EEOC, however, has rejected the use of a BFOQ defense in the context of foreign discriminatory laws and has expressed a preference for a foreign compulsion type analysis. EEOC Decision, 2 Emp. Prac. Guide at 7055 n.2. (defense of BFOQ did not apply because the respondent failed to allege that the charging party did not have the ability to do the job on the basis of her sex). *See also* 29 C.F.R. § 1604.2 (1984)(sex as a bfoq). A foreign compulsion analysis seems to be preferable in an international context because it deals specifically with the problem at hand, namely the discriminatory laws of the host nation. For instance in EEOC Decision, the reason a woman was not qualified for the job had nothing to do with the nature of the job itself, but only with the nation in which the job was located. 2 Emp. Prac. Guide at 7055 n.2. Moreover, the use of a BFOQ defense may collide with the anti-discrimination provisions of the Export Administration Act. Abrams, 805 F.2d at 533 n.7. Under either doctrine the fairness justifications are similar.

133 Abrams, 805 F.2d at 533.

rectify the effects of any perceived discriminatory practices and policies on the part of the Saudis.[134]

Principles of fairness, as developed within Title VII jurisprudence discussed above, require that a court excuse a United States company from liability only upon a showing that the employer reasonably believes that the host country law mandates the discriminatory action. This standard promotes fairness to both employer and employee because it insures that an employer may not rely upon mere conjectures or stereotypes about the policies of the host country, but protects the employer from liability when faced with real foreign government imposed restrictions.[135] An employer must justify its actions by making affirmative steps to determine the policy of the host nation before any violation of United States law occurs, thereby lessening the ability of an employer to invoke the defense *ex post facto*. While imposing liability in the face of true compulsion is manifestly unfair,[136] imposing a burden on the corporation to show that it actually thought such compulsion existed does not seem unfair, especially given the need to protect United States employees from potential unfairness resulting from foreign government actions.

The analysis courts utilize in Title VII cases may apply more broadly to a variety of employment issues. Generally, in order for an employer to successfully invoke the defense, it must possess evidence supporting its belief in the existence of a foreign law or order, and inform the employee of the possible adverse effects the foreign law may have on potential employment relationships. Such a communication demonstrates that the employer was aware of the foreign law, and that it acted in good faith compliance with that law. A failure to warn employees as to the existence of the foreign law indicates either that the defendant (1) was unaware of the law at the time the activity in question took place and therefore did not act under true compulsion, or (2) knew of the law, but did not base its behavior on that law.[137] Absent other sufficient evidence of a government order, however, the mere warning of an employee as to

---

134 *Id.* The EEOC in adopting its standard specifically contrasted the behavior of the respondent before the Commission with the behavior of the defendant in Abrams. EEOC Decision, 2 Emp. Prac. Guide at 7054 n.5; *cf.* Abrams, 805 F.2d at 535.

135 *See* EEOC Decision, 2 Emp. Prac. Guide at 7054.

136 *Id.*

137 For instance, in EEOC Decision, 2 Emp. Prac. Guide at 6581, the fact that the defendant company advised the charging party of the restrictive employment laws, and that such laws did in fact exist, demonstrates that the defendant's behavior was based on good faith compliance with that law. *See supra* notes 122-125 and accompanying text. *Cf.* Bryant 502 F.Supp. at 488 (Failure to advise plaintiffs that employment policy was based on an Iranian prohibition against payment of double benefits, precluded invocation of a foreign compulsion defense). *See supra* notes 127-130 and accompanying text.

the potential existence of such an order does constitute evidence of good faith compulsion.[138]

The treatment of the foreign compulsion defense under Title VII has created a workable doctrine which may serve as a model for the application of the foreign compulsion defense in other areas of employment law where the doctrine has not yet fully developed. This comment now turns to a discussion of these areas.

2. *Foreign Compulsion and Collective Bargaining Agreements*

One defendant has invoked the foreign compulsion defense in an attempt to escape its collective bargaining agreement obligations executed within the United States and required under United States law. In *Airline Pil. Ass'n. Etc. v. TACA International Airlines*[139] the defendant, TACA Airlines, a corporation under the laws of El Salvador,[140] claimed an intergovernmental agreement between the United States and El Salvador, as well as the El Salvador constitution, required that the airline move its base of operations from the United States to El Salvador[141].

The airline further claimed that the foreign compulsion defense excused its breach of a collective bargaining agreement.[142] The court refused the defense and issued an injunction against the airline. The United States Court of Appeals for the Fifth Ciruit evaluated the validity of the foreign compulsion claim by balancing the policy interests of both El Salvador and the United States.[143] The court found that since collective bargaining agreements "are a cornerstone of our national labor pol-

138 *See* Abrams, 805 F.2d at 533; *supra* notes 131-134 and accompanying text.

139 748 F.2d 965.

140 TACA airlines was incorporated under the laws of El Salvador with 4/5ths of its stock controlled by El Salvadorans. *Id.* at 967.

141 Since 1968 TACA and the union had executed successive collective bargaining agreements as required under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1990). On December 20, 1983, during negotiations for the continuation of the current collective bargaining agreement, El Salvador adopted a new constitution which provided that Salvadoran public service companies would have their base of operation in El Salvador. The next day officials from the Salvadoran Ministry of Labor ordered TACA to move its pilot base to El Salvador. TACA then immediately notified its pilots that the pilot base would be moved to El Salvador, that new individual employment contracts were to be executed, and that the union would no longer be recognized as the pilot's bargaining agent. In response the union petitioned for injunctive relief. The district court subsequently entered a temporary restraining order, and eventually a permanent injunction, prohibiting TACA from relocating its base, unilaterally changing terms of employment, recruiting replacement pilots and interfering with the pilots choice of the union as their bargaining agent. *Id.* at 967-968.

142 The airlines also claimed its actions were justified by the Air Transportation Agreement between the United States and El Salvador, and that the act of state doctrine precluded inquiry into the controversy. *Id.* at 967.

143 *Id.* at 971.

icy,"[144] neither the act of state doctrine nor the foreign compulsion defense barrred the injunction. The court made it clear, however, that its conclusion did not "denigrate the interest of El Salvador or minimize its participation in this dispute."[145] The court recognized that El Salvador had ordered a corporate national to comply with its constitution, and stressed that the holding did not prevent TACA from relocating its pilot base, but only required that relocation must follow applicable United States labor law.[146]

The court in *TACA*, by balancing the interests of the two nations, fell into the common doctrinal trap which has hindered the devolpment of the foreign compulsion defense.[147] A balancing process lacks certainty and implicitly violates the act of state doctrine.[148] A balancing approach, while perhaps reaching the correct analysis in any given case, proves inadequate because it prevents the development of a coherent doctrine.

Under an analysis based on fairness to the defendant the court may have resolved this case without the court balancing the interests of the two nations. The facts of the case demonstrate that the defendant lacked good faith justification for breaching the collective bargaining agreement, because nothing in the El Salvadoran order prevented it from honoring its collective bargaining obligations.[149] The court's focus on the interests of the respective governments obscured the real issue: whether the foreign nation actually compelled the defendant's actions.

The weakness of a balancing approach, while not apparent in a case such as *TACA* where actual compulsion is absent, may be demonstrated in cases where true compulsion may actually exist. Consider a situation where El Salvador required that the airline move to El Salvador, and El Salvadoran law additionally prohibited union representation of the pilots in El Salvador.[150] In this hypothetical situation, a court's mere assertion

---

144 *Id.* at 972.

145 *Id.* at 971.

146 *Id.* at 972.

147 *See supra* notes 53-70 and accompanying text.

148 *See supra* notes 60-64 and accompanying text.

149 El Salvador only ordered the Airlines to move its base of operations, it did not order a breach of collective bargaining obligations. TACA, 748 F.2d at 972.

150 Such a situation arose in an earlier case involving litigation between TACA and the pilot's union. *See* Ruby v. TACA, 439 F.2d 1359 (5th Cir. 1971). In that case, TACA began relocation efforts at the request of the El Salvadoran government. The district court granted the union injunctive relief from the relocation on the grounds that El Salvadoran law prohibited the collective bargaining agreement. While the court did not address the issue directly, it seems that *Ruby* involved less than true compulsion because the relocation was instituted upon the request, not on the command of the El Salvadoran government. The fact that fourteen years later the airline still had its base in New Orleans indicates that it was not under such compulsion to move in 1969. The hypo-

that United States collective bargaining policies held more importance than the policies of El Salvador would not prove determinative of the foreign compulsion claim.[151]

The application of traditional territorial principles would better resolve such a problem. Under the general rule, "a state may require a person of foreign nationality to do an act in that state even if it is prohibited by the law of the state of which he is a national . . . ."[152] In the above hypothetical, the act sought to be proscribed, namely compliance with the collective bargaining agreement, occurred within the United States since at the time the dispute arose the pilot base and the collective bargaining agreement existed within the United States[153] Therefore, El Salvador would merely exist as the state of nationality, and hence unable to force the airline to breach its agreement in the United States.

Under a territorial analysis, the United States collective bargaining agreements apply not because of the importance of United States labor policies, but because of the interest the United States has in prescribing conduct within its borders. In this hypothetical, given the predominant interest which a host nation has in enforcing its labor laws, a United States court could justifiably present the airline with either the choice of withdrawing from the United States market completely, or complying with domestic labor laws, in return for allowing it to fly within the United States. The determination of such a purely territorial interest does not exceed the scope of judicial power or expertise.[154]

While such an outcome may create substantial hardship for an airline and its employees, under the foreign compulsion analysis the burden of protecting the interests of nationals rests on the country of nationality. Just as the laws of the United States cannot trump the laws of another nation within the other nation's territory,[155] another nation cannot enforce its laws to compel one of its nationals to violate United States law within the United States[156].

---

thetical presented here assumes a situation where such relocation would be required under threat of immediate sanctions.

151 *See supra* notes 65-70 and accompanying text.

152 RESTATEMENT, *supra* note 3, § 441(2)(a).

153 *See* TACA, 748 F.2d at 965.

154 *See* RESTATEMENT, *supra* note 3, § 441.

155 *See, e.g.*, EEOC Decision, *supra* note 15, at 7052.

156 *See supra* note 16. Traditional principals of jurisdiction place the burden on the country of nationality to allow compliance with the foreign law. In other words, if El Salvador wants the airlines base within its country and it wants to enable its company to stay in business in the United States it must allow compliance with United States law. The inherent difficulty faced by the corporation in either case suggest that any conflict ultimately would be best resolved through diplomatic channels.

3. Foreign Compulsion and Wrongful Discharge Actions.

A defendant has most recently invoked the foreign compulsion defense in an attempt to escape liability from a claim of wrongful discharge. The plaintiffs, former employees of the defendant Arabian American Oil Co. ("ARAMCO"), in Saudi Arabia, brought suit for wrongful discharge pursuant to an employment contract, executed in Texas, and governed by Texas law.[157] The plaintiffs claimed that ARAMCO violated terms of the employment contract incorporating a Saudi labor law requirement that employees could only be terminated for a valid reason. Conversely, ARAMCO claimed that plaintiffs had engaged in illegal commercial activity within the ARAMCO compound, and that ARAMCO had fired the plaintiffs and confiscated their property under the compulsion of Saudi government officials.[158]

The plaintiffs admitted operating a commercial business without a license on the ARAMCO compound in violation of Saudi law. Evidence suggested that ARAMCO knew of plaintiffs conduct prior to the Saudi Government action, and knew of its probable illegality under Saudi law. ARAMCO, however, did nothing to warn its employees of their violations. Instead, the company, having knowledge of the illegal activity, solicited advice from the Saudi chief of police and requested that ARAMCO be allowed to handle the matter internally. Saudi authorities agreed to let ARAMCO take care of the matter, provided ARAMCO terminated the plaintiffs' position in Saudi Arabia and repatriated the plaintiffs to the United States.[159]

The United States Court of Appeals for the Ninth Circuit, in its refutation of defendant's foreign compulsion claim demonstrated the confusion and uncertainty which has plagued the defense. While it appears doubtful that a proper analysis of the defense would have exempted

---

157 McGhee, 871 F.2d at 1414-15. Plaintiffs also brought claims based on defamation, intentional infliction of emotional distress, and conversion, giving rise to potential question of the applicability of the defense to traditional common law tort claims. Questions which are beyond the scope of this article.

158 *See id.* at 1415. ARAMCO also claimed that under the terms of the contract incorporating Saudi law, the orders of the Saudi official constituted a valid reason for dismissal. An expert on Saudi law testified before the district court that direction by government authorities to terminate the contract constituted a valid reason for dismissal under Saudi law. The jury, however, found that ARAMCO lacked a valid reason for dismissal, and that ARAMCO's conduct was not compelled by the Saudi officials. The district court granted judgment NOV for ARAMCO on the grounds that the jury lacked reasonable basis for concluding that ARAMCO fired the plaintiffs without reasonable justification. The Court of Appeals for the 9th Circuit reversed, concluding that the jury could have reasonably found that the company lacked a valid reason for terminating the plaintiffs. *Id.* at 1415-1417.

159 *Id.* at 1415.

ARAMCO from liability, the court's analysis further confused the defense, thereby possibly hindering future application when appropriate.

The court confused the foreign compulsion defense with the act of state doctrine, thereby causing it to make three erroneous rejections of the defense. First, the court reasoned that the central purpose of the doctrine was to avoid "passing on the validity" of foreign government acts.[160] This analysis obscured the central issue implicated in any case of potential foreign compulsion, namely, whether a court may fairly impose liability on an employer for acts mandated by a foreign government.

Second, relying on this mistaken interpretation of the defense, the court stated that cases involving international contract disputes rarely implicated the purposes of the foreign compulsion doctrine.[161] The court reasoned that an award of damages in a breach of contract action only implied that the corporation contracted to bear the risk of foreign compulsion and did not implicate the legality of the foreign government action.[162]

A breach of contract question does not preclude a foreign compulsion analysis. Both the RESTATEMENT[163] and the Uniform Commercial Code[164] recognize that the order of a foreign government may exempt a defendant from liability under a breach of contract charge.[165] The court's analysis eviscerates the doctrine because it implies that, absent any other evidence, the mere doing of business in a foreign nation requires a company to accept the risk of any liability arising under United States law for acts compelled by a foreign government. By stating that its decision only implicated the allocation of risk, the court implied that ARAMCO contracted either explicitly or implicitly to bear the risk of foreign government compulsion resulting from the illegal acts of its employees. However, the court presented no evidence which indicated either an implicit or explicit assumption of that risk.

The court finally reasoned that the foreign compulsion defense failed because where the legal standards of the foreign sovereign assess liability

160 *Id.* *See supra* notes 48-52 and accompanying text.

161 The court also implied that the defense is only available in the context of international antitrust disputes. McGhee, 871 F.2d at 1419 n.4.

162 McGhee, 871 F.2d at 1419.

163 § 441 comment e.

164 U.C.C. § 2-615(a) (1989).

165 Moreover, courts have established that a corporation may be excused from liability for a breach of contract action when acting under orders of the United States government. *See* Eastern Air Lines v. McDonnell Douglas, 532 F.2d 957, 980 (5th Cir. 1976). The inability of United States courts to inquire into the validity of foreign government acts provides even greater justification for excusing breach when conduct is mandated by the foreign government rather than the United States. *See supra* notes 87-91 and accompanying text.

the purposes of the defense normally are not implicated.[166] Accepting this argument and applying it to the facts of the case leads either to a clear misinterpretation of Saudi law, or an irreconcilable conflict within Saudi law itself.[167] This result demonstrates the inherent difficulty that a United States court faces when interpreting the legal standards of a foreign nation.[168] The court in *McGhee* stated that it applied Saudi legal standards, but the only evidence before the court as to what those standards were seemed to point to an opposite result from that reached by the court.[169]

The court concluded that since liability was assessed under foreign law standards the foreign sovereign probably could not have an interest sufficient to justify the application of the foreign compulsion doctrine.[170] This argument ignores the fact that a foreign state has an interest in the proper application of its laws. The limitations which the foreign compulsion and act of states doctrine impose, are not a function of the law being applied, but are a function of who applies the law. Foreign compulsion doctrine does not represent a traditional conflict of laws doctrine which merely determines the applicable law. Rather, foreign compulsion attempts to resolve jurisdictional conflicts in order to determine which state can proscribe the conduct of the actor in question, regardless of what legal standards apply.[171]

McGhee represents the most recent United States federal court discussion of the foreign compulsion defense in any context and thus may set dangerous precedent for the future. This proves particularly unfortunate since the application of the good faith analysis, as developed in this comment, would have yielded the same result without jeopardizing the future application of the doctrine.

The principles developed throughout this comment, applied to the facts of *McGhee*, suggest that ARAMCO failed to comply with the government order in good faith, and hence failed to show true compulsion. The evidence before the court demonstrated that ARAMCO knew that the Saudi directive giving rise to the termination of the plaintiffs resulted

166 McGhee, 871 F.2d at 1419.

167 The court found that liability could be applied under the portion of the contract incorporating Saudi law which stated that an employee could only be terminated for a valid reason. An expert witness testified that a government order constituted a valid reason for dismissal. *Id.* at 1419. If the expert accurately interpreted Saudi law, ARAMCO, as a matter of Saudi law, did not violate the employment contract because the order of the government official constituted a valid reason for dismissal.

168 *See supra* notes 87-91 and accompanying text.

169 *See supra* note 159.

170 McGhee, 871 F.2d at 1419.

171 *See* RESTATEMENT, *supra* note 3, § 441.

from an earlier failure of the company to follow the orders of Saudi officials.[172]

Since ARAMCO failed to comply with an earlier order which presumably would have prevented the plaintiffs' dismissal, ARAMCO cannot argue that it merely followed the Saudi government's orders in good faith. If not for its own inaction, the company would not have experienced any compulsion whatsoever, except to perhaps put an end to its employees' illegal behavior. This, however, presumably would not have forced ARAMCO to breach the employment contract. Moreover, as the court inferred, compliance with the order did not mandate complete dismissal from the company; mere expatriation to the United States would have sufficed to comply with the Saudi order.[173]

IV. CONCLUSION

The foreign compulsion defense, as developed above, should not operate as a defense which allows a defendant to justify its behavior after it commits the action giving rise to liability. Rather, it should operate as a guide for proper employer behavior when faced with an order of a foreign government which may give rise to liability in the United States. An employer which operates in foreign countries inevitably will run into conflicting government mandates. In such a situation, it is unfair to impose liability for factors beyond an employer's control. Nevertheless, the fact that an employer operates overseas should not excuse a violation of employee rights. Proper application of the foreign compulsion defense in the cases outlined above prescribes the proper steps which a corporation must take (1) to insure that actions are truly compelled, and (2) to limit the harmful effects on employees resulting from compelled conduct.

The good faith compulsion defense takes into account the realities of the international business world. It recognizes that employers and employees operating in a foreign country, in many instances, may find themselves subject to the whims of the host country. For this reason, the important question is what the employer reasonably believes he must do in order to comply with those whims. For this reason an inquiry into the validity or the form of the foreign order does not create a workable doc-

172 In August 1983 the Saudi Deputy Minister of Petroleum and Mineral Resources sent ARAMCO a specific directive outlawing all videotape activities and directing ARAMCO to instruct its employees accordingly. ARAMCO failed to notify its employees that they were in violation of Saudi law. The order requiring ARAMCO to dismiss the plaintiffs came on December 15, almost five months after ARAMCO was informed of its obligation to instruct its employees, and after ARAMCO itself informed Saudi officials of the ongoing violations. McGhee, 871 F.2d at 1415.

173 *Id.* at 1421.

trine.[174] For example, under the facts of *McGhee*,[175] if ARAMCO failed to follow the orders of the Saudi government, its employees, as well as ARAMCO itself, could have potentially faced criminal penalties under Saudi law which would have exceeded either the harm caused to the plaintiffs resulting from their dismissal, or the potential liability of ARAMCO to plaintiffs for unlawful dismissal. The good faith standard recognizes that sanctions under Saudi law may result regardless of the validity of the Saudi order, i.e. regardless of whether the plaintiffs actually violated Saudi law. In such an instance an employee may be better off as a result of their employer's good faith compliance with the foreign government order.

The employer's resulting liability should arise not from its compliance with the foreign government order, but from the harm caused to its employees for its failure to follow government orders in good faith. Such a failure may exist when a company relies on mere conjecture regarding the foreign law requirements,[176] when a company fails to notify its employees of the operational law,[177] when a company's actions clearly exceed the foreign law's requirements,[178] or when evidence shows that the company chooses to obey or disregard foreign orders as it sees fit[179].

The foreign compulsion defense recognizes that in most instances both the employer and employee will benefit from compliance with the host country law, even if that law gives rise to liability in the United States. The foreign compulsion defense, in the context of employer employee relations, deals only with the relationship which gives the United States initial jurisdiction. When the United States exercises jurisdiction over extraterritorial employment activity, its only valid claim to jurisdiction stems from its desire to protect the interests and proscribe the conduct of its own citizens, whether employer or employee. Lacking territorial authority, the United States only has interest in the employee-employer relationship itself. Therefore, a court should only hold a United States corporation operating abroad liable for the harm created by the corporation's own independent action, not for the harm resulting from the orders of a foreign government.

The foreign compulsion defense, properly applied, insures that, to the extent possible under the law of the host country, employers treat employees fairly, but does not protect the employee from unfair or dis-

174 *See supra* notes 87-91 and accompanying text.
175 871 F.2d at 1415; *supra* notes 157-160 and accompanying text.
176 *See* Abrams, 805 F.2d at 533.
177 *See* Bryant, 502 F.Supp. at 472.
178 *See* TACA, 748 F.2d at 972.
179 McGhee, 871 F.2d at 1415.

criminatory practices of the host country itself. The foregoing analysis demonstrates the inherent limitations on the judicial branch when operating in an international context. Ultimately, as a judicially invoked doctrine, foreign compulsion fails to adequately protect United States interests in the international business world. Many instances exist where important United States policy interests may be thwarted as a result of the defense's application.[180] Diplomacy aimed at increasing international cooperation can probably better accomplish such protection. The principle of foreign compulsion, by recognizing the inherent tensions involved in international employment which judicial doctrine cannot resolve, represents only a small step towards a more equitable international business environment.

Michael A. Warner Jr.

180 For instance, commentators have recognized that under principles of international law, foreign compulsion would protect discriminatory employment activity mandated by apartheid in South Africa, as long as the activity occurred completely within South Africa. Comment, *supra* note 120, at 509.