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# MacNamara v. Korean Air Lines: The Best Solution to Foreign Employer Job Discrimination under FCN Treaty Rights

## **Cover Page Footnote**

International Law; Commercial Law; Law

## NOTES

### ***MacNamara v. Korean Air Lines: The Best Solution to Foreign Employer Job Discrimination Under FCN Treaty Rights***

#### **Introduction**

The United States Supreme Court recently denied certiorari to the Third Circuit's decision in *MacNamara v. Korean Air Lines*<sup>1</sup> allowing foreign employers, pursuant to Friendship, Commerce, and Navigation ("FCN") Treaties,<sup>2</sup> intentionally to discriminate against U.S. citizens on the basis of citizenship, but not on the basis of age, race, sex, or national origin.<sup>3</sup> The decision in *MacNamara* is significant because it represents a departure from the conclusions of other courts of appeals<sup>4</sup> and because of the United States' widespread use of similar treaties with other countries.<sup>5</sup> More generally, the issue is significant because it involves the extent to which governments will forego their domestic laws, and the protection of their citizens, in order to attract foreign investment.

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<sup>1</sup> 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989).

<sup>2</sup> Treaties of Friendship, Commerce, and Navigation are a series of post-World War II bilateral treaties that were generally designed to "define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property, and their enterprises." Walker, *Modern Treatises of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958) [hereinafter *Modern Treatises*]. See generally Walker, *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 59 (1957) [hereinafter *Treaty Program*]; Walker, *Treaties for the Encouragement and Protection of Foreign Investment—Present United States Practice*, 5 AM. J. COMP. L. 229, 229 (1956) [hereinafter *Treaties for Protection*]. Herman Walker Jr. served as the Adviser on Commercial Treaties at the State Department and was responsible for formulation of the postwar FCN treaties. See *Sumitomo Shoji America Inc. v. Avagliano*, 457 U.S. 176, 181 n.6 (1982) (citing Department of State Airgram A-105, Jan. 9, 1976).

<sup>3</sup> *MacNamara*, 863 F.2d at 1140, 1141. According to *MacNamara*, American companies operating abroad have an identical right to discriminate under the FCN treaties. The treaties are subject to varying interpretations by host country judiciary systems, but no conflict between U.S. courts and foreign governments has yet arisen. See Brief for the United States as Amicus Curiae at 10-11, *Korean Air Lines v. MacNamara*, 110 S. Ct. 349 (1989).

<sup>4</sup> *MacNamara vs. Korean Air Lines—Job Discrimination in U.S. by Foreign Companies*, Vol. XI, No. 4, INT'L LAW. NEWSL. 10, 11 (1989). For a detailed discussion of the split among the circuits, see *infra* text accompanying notes 42-79.

<sup>5</sup> *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 182 n.7 (1982). See, e.g., *infra* note 6.

The heart of the controversy lies in the interpretation of article VIII(1) of the FCN Treaty between the United States and Korea, which provides that Korean companies with branch operations in the United States can hire executive and other specialist employees "of their choice" in the host country.<sup>6</sup> Foreign companies with overseas operations seek a broad interpretation of the provision, one that allows them to hire and fire employees without interference from host country discrimination laws.<sup>7</sup> On the other hand, domestic citizens employed by these foreign branches seek a narrow interpretation of the employer choice provision, one that provides them with the greatest amount of protection from the discriminatory acts of their employer.<sup>8</sup> The court's role is merely to give effect to the intent of the treaty parties;<sup>9</sup> only when it is clear that Congress intended to depart from the treaty obligations will inconsistent federal legislation govern.<sup>10</sup>

This Note examines the right of foreign companies under FCN treaties to engage in employment discrimination in the United States, and the competing right of U.S. citizens, under Title VII<sup>11</sup>

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<sup>6</sup> Treaty of Friendship, Commerce, and Navigation, Nov. 28, 1956, United States-Korea, art. VIII, para. 1, 8 U.S.T. 2217, 2223, T.I.A.S. No. 3947, at 8. Article VIII, paragraph 1 provides:

Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts *regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party*, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

*Id.* (emphasis added). Similar provisions are contained in FCN treaties between the United States and other countries. See, e.g., Treaty of Friendship, Commerce, and Navigation, Dec. 26, 1951, United States-Greece, art. XIII, para. 4, 5 U.S.T. 1829, 1857-59, T.I.A.S. No. 3057, at 13; Treaty of Friendship, Commerce, and Navigation, Aug. 23, 1951, United States-Israel, art. VIII, para. 1, 5 U.S.T. 550, 558, T.I.A.S. No. 2948, at 8; Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. VIII, para. 1, 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593, at 8.

<sup>7</sup> See, e.g., *MacNamara*, 863 F.2d at 1138.

<sup>8</sup> *Id.*

<sup>9</sup> *Sumitomo*, 457 U.S. at 185.

<sup>10</sup> *McCullough v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (citing *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

<sup>11</sup> 42 U.S.C. §§ 2000e to 2000e-17 (1988). Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), provides:

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

and the Age Discrimination in Employment Act ("ADEA"),<sup>12</sup> to be free from discrimination based on their age, race, sex, citizenship, and national origin.<sup>13</sup> Part I of this Note provides the facts and holding of the *MacNamara* decision. Part II elaborates on the decisions of other circuits and illustrates how *MacNamara* creates a further split of authority on this issue. Part III provides an in-depth analysis of the *MacNamara* decision, examining first the intent of the parties and general purpose of the FCN Treaty between the United States and Korea; second, the critical distinction between citizenship discrimination permitted under the Treaty and national origin discrimination prohibited under Title VII; and third, the imposition of liability on foreign companies for unintentional discrimination based on "disparate impact."<sup>14</sup> This Note concludes that the Third Circuit's decision in *MacNamara* provides the best solution to foreign employer job discrimination in the United States in that it comports with the U.S. foreign policy goal of effectuating the intent of the parties to the Treaty while at the same time remaining consistent with the domestic policy goal of protecting our citizens from discriminatory treatment in employment.

## I. The Facts and Holding of *MacNamara*

### A. The Facts

Thomas MacNamara is a U.S. citizen who began working as a

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employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a).

<sup>12</sup> 29 U.S.C. § 623(a) (1988). Section 4(a) of the Age Discrimination in Employment Act of 1967, as amended, provides:

It shall be unlawful for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

<sup>13</sup> *Id.* See also *supra* note 12.

<sup>14</sup> "Disparate impact" discrimination is unintentional discrimination. A claim based on disparate impact is supported by a showing that a particular employer's hiring practices operate in a way that disproportionately excludes members of a protected class. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971). To establish a prima facie case of disparate impact discrimination, the "plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). The employer may defend against Title VII liability by demonstrating that the practice is a business necessity. See, e.g., *Dothard*, 433 U.S. at 329; *Griggs*, 401 U.S. at 432. The plaintiff may counter the business necessity defense by showing that there are other equally effective hiring practices with fewer discriminatory effects. See *Griggs*, 401 U.S. at 432.

salesman with Korean Airlines ("KAL") in 1974.<sup>15</sup> In 1977, MacNamara received a promotion to the position of district sales manager for the area covering Delaware, Pennsylvania, and southern New Jersey.<sup>16</sup> In June 1982, MacNamara was terminated at the age of 57 and was replaced by a 42-year-old Korean man who formerly held a top position at KAL's office in Washington.<sup>17</sup> As part of the apparent reorganization of its U.S. operations, KAL terminated a total of six American managers in the United States, including MacNamara, and replaced them with four Korean citizens.<sup>18</sup>

In November 1982, MacNamara filed suit against KAL alleging that he had been discriminated against on the basis of age, race, and national origin.<sup>19</sup> In January 1983, KAL filed a motion to dismiss the complaint, insisting that its conduct was privileged under the "of their choice" provision of article VIII(1) of the Korean FCN Treaty.<sup>20</sup> MacNamara responded that this provision granted foreign companies only the right to hire managerial and technical personnel on the basis of citizenship, and did not permit them a broad exemption under Title VII and the ADEA which prohibit discrimination on the basis of age, race, sex and national origin.<sup>21</sup>

#### B. *The District Court's Decision*

The district court granted KAL's motion to dismiss on the ground that the signatory countries, particularly the United States, intended that foreign companies would be assured of their ability to "manage investments in the host country without interference."<sup>22</sup> The court reasoned that, because the unconditional language of the Treaty was drafted to provide foreign companies with immunity from domestic employment laws, the Treaty could not be reconciled with Title VII and the ADEA.<sup>23</sup> It is settled law, as the district court noted, that when a conflict arises between domestic legislation and rights afforded in a treaty, the treaty must prevail.<sup>24</sup> Thus, the district court held that in employment decisions regarding "essential personnel,"<sup>25</sup> foreign companies could discriminate in any manner,

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<sup>15</sup> *MacNamara*, 863 F.2d at 1137.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1138.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* The Third Circuit on appeal found that the Treaty language, "permitted to engage . . . executive personnel," meant that the proper inquiry for determining who are "essential personnel" or who is an "executive" is not whether the replaced employee was considered an "executive," but whether his job responsibilities had been reassigned to a person who was an "executive" within the meaning of the Treaty. *Id.* at 1140-42 (empha-

without regard to U.S. laws, as long as the result of the conduct was to favor a Korean citizen. Those decisions that did not favor a Korean citizen or involve an essential position would be subject to Title VII and the ADEA.<sup>26</sup>

### C. *The Third Circuit's Decision*

The Third Circuit reversed and remanded the summary judgment ruling of the district court, holding that foreign companies were only permitted under the Treaty to hire their own citizens over citizens of the host country when that decision was made because of their citizenship.<sup>27</sup> This decision is significantly distinguishable from the district court's decision to permit discrimination that favors foreign citizens.<sup>28</sup> While the district court would permit age, race, sex, and national origin discrimination so long as a citizen of the employer's home country was hired (i.e., "favored") as a replacement, the court of appeals would not tolerate those forms of discrimination regardless of who was hired. It is also important to note that the Third Circuit's view prohibits citizenship discrimination when it is deliberately used as a pretext for age, race, sex, or national origin discrimination.<sup>29</sup>

In reaching this conclusion, the Third Circuit in *MacNamara* made two significant "sub-holdings." First, in order to avoid a total conflict between the Treaty and domestic law, the court found that intentional national origin discrimination, as prohibited by Title VII, and intentional citizenship discrimination, as permitted by article VIII(1) of the Treaty, are separate and distinct phenomena.<sup>30</sup> In support of this conclusion, the court cited the Supreme Court's decision in *Espinoza v. Farah Manufacturing Co.*<sup>31</sup> to illustrate that Title VII's prohibition of national origin discrimination was not intended to bar discrimination on the basis of citizenship.<sup>32</sup> The plaintiff in

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sis added). The requirement of "executive" status under the Treaty may be satisfied even if the replacement was considered an executive only by reason of his duties *in addition* to the duties he received from the former employee. *Id.*

Furthermore, being admitted to the United States with E-1 Treaty Trader status is strong evidence of "executive" status. *Id.* at 1142. An analysis of the employment status covered under the Treaty is beyond the scope of this Note.

<sup>26</sup> *Id.* at 1138.

<sup>27</sup> *Id.* at 1140. The court stated: "Article VIII(1) was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or pragmatically conflict with the right to select one's own nationals as managers *because of their citizenship.*" *Id.* (emphasis in original).

<sup>28</sup> *Id.* at 1138.

<sup>29</sup> *Id.* at 1141. The court stated: "We believe that a foreign business may not deliberately undertake to reduce the age of its workforce by replacing older Americans with younger foreign nationals." *Id.*

<sup>30</sup> *Id.* at 1146.

<sup>31</sup> 414 U.S. 86 (1973).

<sup>32</sup> *MacNamara*, 863 F.2d at 1147 (citing *Espinoza*, 414 U.S. at 88). The Third Circuit stated: "Inherent in the [Supreme] Court's reading of Title VII and its history, is a Con-

*Espinoza* was a Mexican citizen who was refused employment by a U.S. company because she was not a U.S. citizen.<sup>33</sup> The Court found that a refusal to hire those who lack U.S. citizenship does not by itself constitute national origin discrimination as prohibited by Title VII.<sup>34</sup> The Court noted, however, that a citizenship requirement may be illegal if it has the purpose or unintended effect of creating national origin discrimination.<sup>35</sup> Since the defendant company was found by the Court to have not discriminated against employees of Mexican ancestry<sup>36</sup> (i.e., Mexican national origin), the citizenship requirement was upheld.<sup>37</sup>

The second sub-holding of *MacNamara* was that liability for unintentional discrimination based on disparate impact claims (as opposed to intentional disparate treatment claims) could not be imposed on foreign employers.<sup>38</sup> This decision was made because the court perceived a partial conflict between Title VII and article VIII(1) of the Treaty.<sup>39</sup> The conflict occurs when foreign companies from countries with homogeneous population exercise their Treaty rights to hire their own citizens.<sup>40</sup> Since their citizens were largely of the same national origin, the companies' managerial and technical staff are almost exclusively composed of a single national origin. The result is unintentional disparate impact discrimination prohibited by Title VII.<sup>41</sup>

## II. The Split Among the Circuits

The Third Circuit's decision in *MacNamara* does not stand alone on the issue of foreign employer job discrimination in the United States. Three other circuits have considered the issue and all have reached different conclusions. The disagreement among the courts focuses not only on the proper scope of the treaty rights, but also on the methodology employed in reconciling those rights with the rights provided under Title VII.

### A. The Second Circuit

The Second Circuit in *Avigliano v. Sumitomo Shoji America, Inc.*<sup>42</sup>

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gressional determination that a trier of fact can distinguish national origin discrimination from citizenship discrimination and, accordingly, that courts can impose liability on the basis of the former without imposing it for the latter." *Id.*

<sup>33</sup> *Espinoza*, 414 U.S. at 87.

<sup>34</sup> *Id.* at 95-96.

<sup>35</sup> *Id.* at 92.

<sup>36</sup> *Id.* at 93.

<sup>37</sup> *Id.* at 95-96.

<sup>38</sup> *MacNamara*, 863 F.2d at 1148.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 638 F.2d 552 (2d Cir. 1981), *rev'd*, 457 U.S. 176 (1982).



was the first appellate court to consider the relationship between FCN treaties and Title VII.<sup>43</sup> Sumitomo Shoji America is a wholly owned New York subsidiary of a Japanese commercial firm. Female secretarial employees brought a class action against the corporation under Title VII alleging that the corporation had a discriminatory policy of filling its management-level positions exclusively with male Japanese nationals.<sup>44</sup>

The court first concluded that the Japanese subsidiary, although incorporated in the United States, could invoke the FCN treaty<sup>45</sup> rights to the same degree as a Japanese corporation incorporated in Japan. The court then held that the Treaty did not, however, give the subsidiary sweeping immunity from American discrimination laws.<sup>46</sup> Reasoning that article VIII(1) was primarily intended to exempt foreign companies from local "percentile legislation"<sup>47</sup> which is a law requiring foreign companies to employ a certain percentage of American citizens, the court suggested that the Treaty and Title VII could be reconciled by broadening the bona fide occupational qualification (BFOQ) exception to Title VII.<sup>48</sup> This exception permitted intentional discrimination should the discriminatory conduct be reasonably necessary to the normal operation of the employer's business.<sup>49</sup>

The Third Circuit in *MacNamara* and the Second Circuit in *Avigliano* agreed on the proper scope of article VIII(1) of the FCN treaties. Both courts found that the aim was to avoid percentile legislation and not to grant a broad exemption from all discrimination laws.<sup>50</sup>

<sup>43</sup> A New York federal district court previously considered the same issue and was the first to apply the theory later announced by the Second Circuit in *Avigliano*. See *Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979).

<sup>44</sup> *Avigliano*, 638 F.2d at 553.

<sup>45</sup> Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, United States-Japan, art. VIII, para. 1, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863, at 8. The FCN treaty with Japan is identical in relevant part to the Korean treaty at issue in *MacNamara*. See *supra* note 6.

<sup>46</sup> *Avigliano*, 638 F.2d at 558.

<sup>47</sup> *Id.* at 559 (citing Walker, *Treaty Protection*, *supra* note 2, at 234).

<sup>48</sup> *Id.*

<sup>49</sup> Title VII provides in pertinent part:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

<sup>42</sup> U.S.C. § 2000e-2(e). Traditionally the exception has been construed narrowly. See *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). Since the defense was designed to accommodate legitimate business needs, it requires the employer to prove that: (1) there was a reasonable basis to believe that all or substantially all of the protected class cannot perform the job safely or efficiently; or (2) that it is impossible or highly impractical to deal with the class on an individual basis. Note, *Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 MICH. L. REV. 237, 249 (1984).

<sup>50</sup> See *Avigliano*, 638 F.2d at 558-59; *MacNamara*, 863 F.2d at 1144.

The Third and Second Circuits significantly differed, however, on the method of reconciling the treaties with Title VII. The Third Circuit simply found that the national origin discrimination prohibited under Title VII and the citizenship discrimination permitted under the Treaty did not conflict.<sup>51</sup> By contrast, the Second Circuit apparently found such a conflict and created the enlarged BFOQ exception to reconcile Title VII with the foreign employer's rights under the Treaty.<sup>52</sup>

### B. *The Supreme Court*

In *Sumitomo Shoji America, Inc. v. Avagliano*,<sup>53</sup> the Supreme Court vacated the Second Circuit's decision and found that the wholly owned subsidiary incorporated in the United States was not a company of Japan under the meaning of article XXII(3) of the Treaty<sup>54</sup> and was therefore not covered by the FCN Treaty.<sup>55</sup>

Although the Court expressly declined to interpret the scope of article VIII(1) of the U.S.-Japan FCN Treaty,<sup>56</sup> it did state in dictum that the FCN treaties were intended to allow foreign companies to operate in the United States on an equal basis with domestic companies.<sup>57</sup> There was no intent, declared the Court, to provide foreign companies with greater rights than domestic companies.<sup>58</sup>

### C. *The Fifth Circuit*

Several months after the Second Circuit's decision in *Avigliano*, but before the Supreme Court's decision in *Sumitomo*, the Fifth Circuit expressed a very different interpretation of the employer choice provision in the Japanese FCN Treaty. *Spiess v. C. Itoh & Company (America)*<sup>59</sup> involved a wholly owned New York subsidiary of a Japanese corporation which was sued by its employees for making pro-

<sup>51</sup> *MacNamara*, 863 F.2d at 1147.

<sup>52</sup> See *supra* notes 48-49.

<sup>53</sup> 457 U.S. 176 (1982). The correct spelling of respondent's name is "Avagliano," not "Avigliano," as used in the lower courts.

<sup>54</sup> Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, United States-Japan, art. XXII, para. 3, 4 U.S.T. 2063, 2079-80, T.I.A.S. No. 2863, at 22. Article XXII, paragraph 3 provides:

As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

*Id.* (emphasis added).

<sup>55</sup> *Sumitomo*, 457 U.S. at 189.

<sup>56</sup> *Id.* at 180 n.4.

<sup>57</sup> *Id.* at 187-88.

<sup>58</sup> *Id.*

<sup>59</sup> 643 F.2d 353 (5th Cir. 1981), cert. dismissed, 454 U.S. 1130, vacated, 457 U.S. 1128 (1982).

motions and benefits available only to employees of Japanese citizenship.<sup>60</sup> The company moved for dismissal on the grounds that it was absolutely immune from U.S. discrimination claims under article VIII(1) of the Treaty.<sup>61</sup>

The trial court reasoned that since the company had been incorporated under the laws of the United States, it was not a "company of Japan" within the meaning of article XXII(3) and could not assert any of the protections afforded under the Treaty.<sup>62</sup> The Fifth Circuit reversed, however, holding that the Treaty not only covered the actions of a foreign subsidiary incorporated in the United States,<sup>63</sup> but also that it permitted these companies to decide who will manage their investment in the host country "without regard to host country laws."<sup>64</sup>

*MacNamara* and *Spiess* are in direct conflict. *MacNamara* held that the U.S.-Korea FCN Treaty provides foreign employers with the ability to discriminate only because of citizenship.<sup>65</sup> *Spiess* held that the U.S.-Japan FCN Treaty provides foreign employers with an absolute immunity from all types of discrimination claims so long as the replacement is an executive or technical employee and is a citizen of Japan.<sup>66</sup>

#### D. The Sixth Circuit

Three years after the Fifth Circuit's decision in *Spiess*, and two years after the Supreme Court's decision in *Sumitomo*, the Sixth Circuit in *Wickes v. Olympic Airways*<sup>67</sup> articulated yet another view of the relationship between domestic discrimination laws and FCN treaties.

<sup>60</sup> *Id.* at 355.

<sup>61</sup> *Id.*

<sup>62</sup> *Spiess v. C. Itoh & Co. (America)*, 469 F. Supp. 1, 6 (S.D. Tex. 1979), *rev'd*, 643 F.2d 353 (5th Cir. 1981), *cert. dismissed*, 454 U.S. 1130, *vacated*, 457 U.S. 1128 (1982).

<sup>63</sup> *Spiess*, 643 F.2d at 358-59. This part of *Spiess* has been overruled by the Supreme Court in *Sumitomo*, 457 U.S. at 189.

<sup>64</sup> *Spiess*, 643 F.2d at 360-61. The court stated:

We agree [with plaintiffs] that an overriding goal of the Treaty negotiators was to provide national treatment to foreign businesses operating in the host country. However, national treatment was not the Treaty's exclusive measure of the rights to be accorded to foreign nationals. It is apparent that article VIII(1)'s "of their choice" provision was intended, not to guarantee national treatment, but to create an absolute rule permitting foreign nationals to control their overseas investments. As we noted above, absolute rules played a significant role in defining the rights of parties. The language of article VIII(1) makes clear that the "of their choice" provision was designed to establish such a rule. Use of the phrase "of their choice" does not express the requirement that the parties are limited to national treatment. This is accentuated by the fact that the phrase "nationals of either Party shall be accorded national treatment" appears repeatedly in other provisions in the Treaty.

*Id.* See *infra* text accompanying notes 96-104 for a discussion of treatment standards.

<sup>65</sup> *MacNamara*, 863 F.2d at 1140.

<sup>66</sup> *Spiess*, 643 F.2d at 361.

<sup>67</sup> 745 F.2d at 364 (6th Cir. 1984).

Olympic Airways, an airline incorporated in Greece,<sup>68</sup> was sued by Wickes, a 61-year-old former district sales manager in Michigan. Wickes claimed that Olympic discriminated against him on the basis of age and national origin in violation of Michigan's Civil Rights Act of 1976.<sup>69</sup> The defendant filed a motion for summary judgment, claiming a wholesale immunity from Title VII under article XII(4) of the 1951 U.S.-Greece FCN Treaty.<sup>70</sup>

The Sixth Circuit rejected Olympic Airway's broad proposition and found that there was substantial evidence from the Treaty's legislative history that the parties to the Treaty intended article XII(4) to be narrowly construed.<sup>71</sup> Thus, Greek companies operating in the United States were permitted to discriminate "in favor of their own nationals or citizens for certain high level positions, but not to discriminate against others in the labor force of the host country on any other basis."<sup>72</sup>

Despite the court's use of the troubling language "discrimination in favor of,"<sup>73</sup> it is clear from the opinion as a whole that the Sixth Circuit is directly in accord with the Third Circuit's decision in *MacNamara*. Both courts hold that foreign companies are permitted to favor their own citizens only when the decision is based solely on citizenship, and not on any of the grounds prohibited under Title

<sup>68</sup> *Id.* at 364. Since the defendants were incorporated in Greece, there was no issue in this case of whether or not the Treaty covered the defendants.

<sup>69</sup> *Id.* The plaintiff in *Wickes* did not properly file the federal administrative claims which are a prerequisite to a suit under Title VII of the ADEA and was thus barred by the statute of limitations from bringing his claim under federal law. *Id.* The claim was brought under the analogous Michigan law which provides that an employer may not:

Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight or marital status.

MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West Supp. 1984).

<sup>70</sup> Treaty of Friendship, Commerce and Navigation, Aug. 3-Dec. 26, 1951, United States-Greece, art. XII, para. 4, 5 U.S.T. 1829, 1859, T.I.A.S. No. 3057, at 8. The language of article XII, paragraph 4 differs from article VIII, paragraph 1 of the Treaty with Korea. It provides:

Nationals and companies of either party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other employees of their choice among those legally in the country and eligible to work. Moreover, such nationals and companies shall be permitted to engage, on a temporary basis, accountants and other technical experts, regardless of nationality.

*Id.* (emphasis added).

<sup>71</sup> *Wickes*, 745 F.2d at 365.

<sup>72</sup> *Id.* at 367. The court noted: "The words 'of their choice' merely reflect the intent of both the United States and Greece to give the other's companies the freedom to fill designated critical positions without interference from local laws and regulations." See generally H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 37-78 (1968). The "local laws and regulations" referred to by the court were percentile restrictions. See *Wickes*, 745 F.2d at 367 n.1.

<sup>73</sup> *Wickes*, 745 F.2d at 367. See *infra* notes 27-29 and accompanying text for discussion on the distinction between discrimination "in favor of citizens" and discrimination "because of citizenship."

VII.<sup>74</sup>

The Third and Sixth Circuits also employed the same methodology in reaching their conclusions, as neither court perceived a conflict between the Treaty and Title VII.<sup>75</sup> While the Third Circuit relied on Supreme Court precedent to distinguish citizenship discrimination from national origin discrimination,<sup>76</sup> the Sixth Circuit simply stated that "[c]itizenship *per se* is not a classification listed in the Michigan employment discrimination law."<sup>77</sup>

Thus, the Second, Fifth, Sixth, and Third Circuits have all ruled on the relationship between FCN treaties and Title VII. Among these decisions, there are two different interpretations of the scope of the Treaty,<sup>78</sup> and three different methods of analysis.<sup>79</sup> Part III of this Note examines the *MacNamara* decision, and concludes that the Third Circuit provides not only the best solution to the problem, but also the best method of arriving at that solution.

III. Analysis of the *MacNamara* Decision

*MacNamara v. Korean Airlines* is the most recent judicial declaration on the rights of foreign corporations to engage in employment discrimination in the United States under FCN treaties. As a result, the Third Circuit had before it the full range of judicial precedent, including the Supreme Court's decision in *Sumitomo*. This Note analyzes the reasoning behind, and impact of, the Third Circuit's decision to: (1) limit foreign employer discriminatory conduct to decisions made on the basis of citizenship; (2) distinguish national origin discrimination from citizenship discrimination; and (3) disallow claims for disparate impact liability against foreign companies protected under the Treaty.

## A. Analysis of the Third Circuit's Reasoning

## 1. Interpretation of the Treaty

The basic controversy is whether a literal or non-literal interpre-

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<sup>74</sup> Silver, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies To Hire Executives "Of Their Choice,"* 57 FORDHAM L. REV. 765, 772-73 (1989).

<sup>75</sup> See *Wickes*, 745 F.2d at 368; *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1140-41 (3d Cir. 1988), cert. denied, 110 S. Ct. 349 (1989).

<sup>76</sup> See *MacNamara*, 863 F.2d at 1146-47, where the court relied on *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

<sup>77</sup> *Wickes*, 745 F.2d at 368.

<sup>78</sup> The disagreement in the scope of the Treaty is between *Spieß* on the one side, and *Avigliano*, *Wickes*, and *MacNamara* on the other.

<sup>79</sup> The disagreement in analysis is a three-way split between *MacNamara* and *Wickes* on one side, *Spieß* on the second side and *Avigliano* on the third. *Avigliano* differs from *MacNamara* and *Wickes* because the former apparently found a conflict between Title VII and the Treaty while the latter two cases did not. Since these three cases agreed on the scope of the Treaty, *Avigliano* must have construed Title VII to prohibit citizenship discrimination.

tation of article VIII(1) of the U.S.-Korea FCN Treaty should be followed. The following is an analysis of the issues that have been raised in arriving at a proper construction of the Treaty. Again, the court's role is to give effect to the intent of the signatory parties,<sup>80</sup> and, whenever possible, construe the Treaty in a way that avoids conflict with domestic law.<sup>81</sup>

*a. The plain language argument*

The first issue that the courts have considered is whether the plain meaning of the "of their choice"<sup>82</sup> language in article VIII(1) offers any guidance. The Supreme Court stated in *Sumitomo* that absent substantial reasons to the contrary, the plain meaning of the Treaty should control.<sup>83</sup> At issue in *Sumitomo*, however, was not the scope of the Treaty rights under article VIII(1),<sup>84</sup> but simply whether a wholly owned subsidiary incorporated in the United States could invoke such rights.<sup>85</sup> In order to address that issue, the Court had to define the term "company of either party" as used in article VIII(1).<sup>86</sup> The Court resorted to the definitional provision of the Treaty, article XXII(3),<sup>87</sup> and it was the language of that provision to which the Court applied the literal language test.<sup>88</sup>

By contrast, the disputed language in *MacNamara* is not defined in the Treaty. There is no expressed intention of the signatory parties that is deserving of a literal interpretation. The most literal interpretation of the words "of their choice" would permit foreign companies to be free from discrimination laws altogether, even when making decisions among solely American applicants.<sup>89</sup> Both parties agreed that such an interpretation would be untenable.<sup>90</sup>

KAL instead argued that it is permitted to ignore discrimination

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<sup>80</sup> *Sumitomo*, 457 U.S. at 185.

<sup>81</sup> *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 143 (1938); *United States v. Pink*, 315 U.S. 203, 230 (1940). Although these cases dealt with state laws, a fortiori, the same rule applies to federal laws. See Brief for Respondent at 25, *Avigliano v. Sumitomo Shoji (America), Inc.*, 638 F.2d 552 (2d Cir.), cert. granted, 454 U.S. 962 (1981), vacated and remanded, 457 U.S. 176 (1982).

<sup>82</sup> See *supra* note 6 and accompanying text.

<sup>83</sup> *Sumitomo*, 457 U.S. at 180. In *Sumitomo*, the Court stated: "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Id.* (citing *Maximov v. United States*, 373 U.S. 49, 54 (1963) and *The Amiabile Isabella*, 19 U.S. (6 Wheat.) 1, 72 (1821)).

<sup>84</sup> The Court expressly declined to reach the issue of the scope of the Treaty and its relation to Title VII. See *Sumitomo*, 457 U.S. at 180 n.4.

<sup>85</sup> *Id.* at 177-78.

<sup>86</sup> See *supra* note 6.

<sup>87</sup> See *supra* note 54.

<sup>88</sup> *Sumitomo*, 457 U.S. at 189.

<sup>89</sup> *MacNamara*, 863 F.2d at 1143.

<sup>90</sup> *Id.*

laws only when its decision favors a Korean citizen.<sup>91</sup> This argument appears equally untenable, however, because the strong second sentence of article VIII(1) is inconsistent with such an interpretation.<sup>92</sup> This sentence provides that foreign companies can employ their own "experts" even though they may not meet the qualifications or standards required by similar American experts.<sup>93</sup> If the first sentence gives foreign employers the absolute right to hire their citizens without restraint from any domestic employment laws, the additional right expressly given in the second sentence would be unnecessary and redundant.<sup>94</sup> Since such an inconsistency is unlikely to have escaped the scrutiny of the Treaty drafters, it is plausible to assert that the first sentence was not intended to grant such broad immunity.<sup>95</sup>

*b. The standard of treatment argument*

The second factor involved in interpreting the treaty is the "standard of treatment" that the host country was, by agreement, to afford the visiting companies of the other treaty party. The highest standard is the "absolute" or "non-contingent" standard. When it applies, the foreign companies can have certain privileges "whether or not a host government provides the same rights to the indigenous population."<sup>96</sup> The next highest standard is "national treatment." This standard assures foreign nationals that they will be treated equally with native citizens.<sup>97</sup> Lastly, "most-favored-nation treatment" promises foreigners that they will be treated at least as favorably as any other foreign nationals residing in the United States.<sup>98</sup>

The Third Circuit concluded, with the consent of both MacNamara and KAL, that the rights given in article VIII(1) extend "beyond national treatment."<sup>99</sup> Although the parties did not specifically agree on how far beyond national treatment these rights go,<sup>100</sup> they are necessarily stating that foreign companies operating in the United States have some right under the Treaty that domestic companies do not have. It may appear that the court has not granted a greater right by merely allowing foreign employers to discriminate on the basis of citizenship because American companies are also per-

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<sup>91</sup> *Id.* at 1144. The court stated: "KAL argues in effect that it has the right under Article VIII(1) to choose a citizen of Korea for an executive position *for any reason* and a concomitant right to be free from judicial scrutiny of its subjective motivation in choosing the Korean citizen." *Id.* (emphasis in original).

<sup>92</sup> *Id.* at 1145.

<sup>93</sup> *See supra* note 6.

<sup>94</sup> *MacNamara*, 863 F.2d at 1145.

<sup>95</sup> *Id.*

<sup>96</sup> Walker, *Modern Treaties*, *supra* note 2, at 823 n.2. *See also* Wilson, *Postwar Commercial Treaties of the United States*, 43 AM. J. INT'L L. 262, 264 (1949).

<sup>97</sup> Walker, *Modern Treaties*, *supra* note 2, at 811 n.2.

<sup>98</sup> *Id.*

<sup>99</sup> *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1143 (3rd Cir. 1988).

<sup>100</sup> *Id.* at 1144.

mitted to engage in citizenship discrimination.<sup>101</sup> Nevertheless, when citizenship discrimination has the purpose or effect of discriminating on the basis of national origin, Title VII will prohibit such conduct.<sup>102</sup> Although the court never expressly stated this rationale, it appears that the "greater right" given foreign companies under *MacNamara* is freedom from disparate impact liability, i.e., the right to hire on the basis of citizenship even though the exercise of such right could result in the almost exclusive employment of Korean national managers and specialist employees.<sup>103</sup> Domestic companies do not have such a right.<sup>104</sup>

*c. The negotiating history of article VIII(1)*

A third issue raised in interpreting the Treaty was the historical background or origin of the employer choice provision. By tracing its origin, the court hoped to establish the true intent or purpose of the provision and consequently determine its scope. The only substantive evidence of the drafters' intent in including the employer choice provision appears to be governmental documentation (i.e., letters and despatches) indicating that the main objective was to avoid percentile restrictions.<sup>105</sup> KAL argued that the provision was aimed at "percentile restrictions *and the like*,"<sup>106</sup> and that the latter

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<sup>101</sup> *Espinoza*, 414 U.S. at 95. The Court stated: "[N]othing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage." *Id.*

<sup>102</sup> *Id.* at 92. The Supreme Court stated in *Espinoza*:

[A] citizenship requirement might be but one part of a wider scheme of unlawful national origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination. Certainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.

*Id.*

<sup>103</sup> See *infra* text accompanying notes 131-137 for a discussion of disparate impact liability under *MacNamara*.

<sup>104</sup> *Espinoza*, 414 U.S. at 92.

<sup>105</sup> See, e.g., Foreign Service Despatch No. 144 from the U.S. Embassy, The Hague, to Dept. of State, Aug. 16, 1954 ("the big problem to which [article VIII(1)] was addressed was so-called percentile legislation . . ."); Foreign Service Despatch No. 914 from the U.S. Embassy, Brussels, to Dept. of State, Mar. 11, 1955 ("The Belgians proposed to clarify the wording [of article VIII(1)] by inserting a local laws clause; but the U.S. side replied that such a broad exception would leave the way open for precisely the abuse the sentence was designed to correct, namely, 'percentile' laws and other governmental fiat circumscribing freedom of choice of high-grade personnel on a purely nationality basis."); Foreign Service Despatch No. 2075 from the U.S. Embassy, Paris, to Dept. of State, May 7, 1959 (U.S. negotiators worried about French percentile laws); Foreign Service Despatch No. 2529 from HICOG, Bonn, to Dept. of State, Mar. 18, 1954 (Purpose of article VIII(1) of Treaty with Germany "is to preclude the imposition of 'percentile' legislation. It gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law.")

<sup>106</sup> KAL found that language in Walker, *Treaties for Protection*, *supra* note 2, at 234 n.2. "[F]irm rights are provided for the entry and indefinite sojourn of international traders and principal investors. Though equal provision for subordinate investor-enterprise employees is not yet possible owing to lack of statutory authority, such personnel is to an



part of that phrase included discrimination laws."<sup>107</sup> KAL reasoned that the treaty drafters meant to exclude all such laws from application to foreign companies because discrimination laws, much like percentile legislation, inhibited foreign investment by restricting critical employment decisions.

It seems unlikely, though, that a goal as significant as avoiding host country discrimination laws would, intentionally or mistakenly, be left out of the language of the Treaty. It is even more unlikely that such an intent, if it existed, would not be reflected in any of the same Treaty negotiations that discussed percentile restrictions.

*d. The "Model Treaty" argument*

The fourth significant factor in interpreting the Treaty is the extent to which the treaty with Uruguay,<sup>108</sup> which served as a model for most subsequent FCN treaties, indicates the intentions of the drafters of the treaty with Korea. The Uruguayan treaty uses the language "of their choice . . . regardless of nationality," while the Korean treaty simply reads "of their choice."<sup>109</sup> It is clear that the Uruguayan treaty expressly permits discrimination on the basis of nationality (or citizenship) without providing similar language for age, sex, race, or national origin.

One possible explanation of why this qualifying language was left out of the Korean treaty is that the phrase "of their choice" was merely shorthand for "of their choice . . . regardless of nationality."<sup>110</sup> Another possibility is that the drafters left it out because they no longer wanted the discrimination to be limited to a citizenship basis only. Neither argument is particularly persuasive. First, it is unlikely that treaty drafters employ shorthand methods without so indicating. Second, it is inexplicable why the drafters, if they desired other forms of discrimination to be permitted, did not simply add the language "regardless of age, race, sex, and national origin."

It seems, then, that the language in other treaties is not particularly helpful in determining the scope of article VIII(1). The only observation with any potential significance is that while some FCN treaties employ, or have employed, the "regardless of nationality"

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extent provided for, in that management is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from 'percentile' restrictions and the like." *Id.* (emphasis added).

<sup>107</sup> *Spieß v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 362 (5th Cir. 1981), *cert. dismissed*, 454 U.S. 1130, *vacated*, 457 U.S. 1128 (1982).

<sup>108</sup> Treaty of Friendship, Commerce and Economic Development, Nov. 23, 1949, United States-Uruguay, art. V, para. 4, *reprinted in* 96 CONG. REC. 12,082, 12,083 (1950).

<sup>109</sup> See *supra* note 6.

<sup>110</sup> See *Hearing Before the Subcomm. of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 9 (1953) (describing four treaties, including three with the shortened "of their choice" language, as containing a "[r]ight to engage technical and managerial personnel regardless of nationality").

language,<sup>111</sup> there are no FCN treaties that have ever stated "regardless of nationality, age, race, sex, and national origin."

*e. The State Department's viewpoint*

The final issue, one that all courts have found significant, is the meaning attached to article VIII(1) by the Department of State. Since the State Department is the agency charged with the negotiation and enforcement of FCN treaties, its view is entitled to "great weight."<sup>112</sup> The State Department's amicus brief in *MacNamara* declared that article VIII(1) merely "creat[ed] a *limited privilege* to hire [its own citizens], not a broad exemption from laws that prohibit discrimination on grounds unrelated to citizenship."<sup>113</sup> KAL argued in *MacNamara* that the State Department's interpretation conflicted with that of the Korean government's.<sup>114</sup> The Third Circuit found no such conflict.<sup>115</sup> Indeed, the Korean government only twice expressed its views on the matter, and neither of those views dealt with the scope of the treaty right.<sup>116</sup> Apparently, if Korea does disagree, they are doing so silently.

*2. Intentional vs. Unintentional Discrimination*

*a. No conflict exists between Title VII and article VIII(1) regarding intentional discrimination*

Since a treaty prevails over conflicting domestic law,<sup>117</sup> the only way the Third Circuit in *MacNamara* could prohibit intentional discrimination based on age, race, sex, and national origin was to conclude that there is no conflict between Title VII and article VIII(1) of the Treaty.

The Supreme Court, in *Espinoza v. Farah Manufacturing, Inc.*, clearly stated that nationality (or citizenship) refers to the status of belonging to a country through birth or naturalization while national origin refers to the country from which a person or his ancestors came.<sup>118</sup> Congress never intended national origin discrimination

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<sup>111</sup> See, e.g., Treaty with Uruguay, *supra* note 108.

<sup>112</sup> *Sumitomo*, 457 U.S. at 184-85 (citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)). See also *Société Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 552, 535-36 & n.17 (1987).

<sup>113</sup> *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1146 (3rd Cir. 1986), *cert. denied*, 110 S. Ct. 349 (1989) (emphasis added) (citing the State Department's Brief).

<sup>114</sup> See Brief for Petitioner at 9, *Korean Airlines v. MacNamara*, 110 S. Ct. 349 (1989) (Nos. 88-1449 and 88-1551).

<sup>115</sup> *MacNamara*, 863 F.2d at 1146 n.13. KAL offered no support for this assertion. See Brief for the United States as Amicus Curiae at 11, *Korean Air Lines v. MacNamara*, 110 S. Ct. 349 (1989) (Nos. 88-1449 and 88-1551) (hereinafter U.S. Brief).

<sup>116</sup> U.S. Brief, *supra* note 115, at 11.

<sup>117</sup> *Id.*

<sup>118</sup> *Espinoza*, 414 U.S. at 88.

under Title VII to embrace citizenship discrimination.<sup>119</sup> In fact, if such an intent did exist, Congress has "flouted its own declaration of policy"<sup>120</sup> because the federal government has, in various circumstances, engaged in citizenship discrimination.<sup>121</sup>

Although *MacNamara* relied on these findings to avoid a conflict of law, neither the Second Circuit in *Avigliano*, the Fifth Circuit in *Spiess*, nor the Sixth Circuit in *Wickes* ever cited the Supreme Court decision in *Espinoza*. In fact, it is apparent that the Second Circuit in *Avigliano* found a direct conflict between Title VII and article VIII(1). As a result, the court was forced to create a broadened bona fide occupational qualification exception under Title VII<sup>122</sup> in order to achieve the desired result of reconciling the Treaty with domestic law.

As *MacNamara* has illustrated, manipulating established exceptions to Title VII is unnecessary and overly burdensome on the foreign employer. The Third Circuit noted that it is more difficult for the foreign employer, under the Second Circuit's approach, to prove that the use of foreign managers is reasonably necessary to the success of its business, than it is for the employer, under the Third Circuit's analysis, to simply show that it favored its own citizens because they were such citizens.<sup>123</sup>

The *Spiess* court never attempted a reconciliation of the two laws because they found that the plain, unequivocal language of the Treaty created an absolute right to discriminate not only on citizenship, but also on age, race, sex, and national origin.<sup>124</sup> The Fifth Circuit, therefore, had no reason to seek out a Supreme Court case distinguishing citizenship from national origin because it still would have had to reconcile the remaining issues of age, race, and sex discrimination with Title VII.

The Sixth Circuit in *Wickes* also failed to make reference to the Supreme Court's holding in *Espinoza*. The Sixth Circuit simply stated that there was no conflict between article VIII(1) citizenship discrimination and the Michigan statute.<sup>125</sup> The most likely reason for the Sixth Circuit's failure to cite *Espinoza* was that the conflicts issue was never brought out by the parties. The court stated that, "[t]o the extent that plaintiff may claim on remand that Greek citizenship and national origin are synonymous and that Michigan law prevents Olympic from giving preference to Greek citizens in management and technical positions, such a claim would conflict with the

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<sup>119</sup> *Id.* at 89.

<sup>120</sup> *Id.* at 90.

<sup>121</sup> *Id.* at 89.

<sup>122</sup> See *supra* notes 48-49.

<sup>123</sup> *MacNamara*, 863 F.2d at 1146-47 n.14.

<sup>124</sup> *Spiess*, 643 F.2d at 359.

<sup>125</sup> *Wickes*, 745 F.2d at 368.

Treaty and the Treaty would prevail."<sup>126</sup> It is likely that if the issue were addressed on remand, the parties by that time would have discovered the *Espinoza* decision and disputed its precedential force.

Thus, because *MacNamara* interpreted the Treaty to permit only citizenship discrimination, it then could rely on *Espinoza* to reconcile Title VII and article VIII(1). Both the foreign employer's Treaty rights, as the court defined them, and the U.S. citizen's domestic rights, were upheld in the context of intentional discrimination.

*MacNamara* also found that no conflict existed with regard to "mixed-motive" cases.<sup>127</sup> These are cases in which the plaintiff has succeeded in showing that the intentional discrimination was a substantial or motivating factor, but not the sole factor, in the employer's conduct.<sup>128</sup> The plaintiff can only prevail if he can show that "but for" the impermissible factor, the challenged conduct would not have occurred.<sup>129</sup> Thus, the court noted that in situations where KAL's desire to favor Korean citizens may have played some role in its decision to replace an American employee, there can be no liability "unless the same decision would not have been made absent the race, national origin, or age of the replaced individual."<sup>130</sup> KAL is not immune from such claims, however, and it must defend its employment decisions in U.S. courts.

*b. A potential conflict does exist between Title VII and article VIII(1) regarding unintentional discrimination*

No courts prior to *MacNamara* considered whether citizenship discrimination permitted under FCN treaties may have the effect of creating unintentional national origin discrimination prohibited under Title VII. *MacNamara* found that although no conflict existed between the two laws for intentional discrimination, a conflict does exist in the context of unintentional discrimination.<sup>131</sup>

Some courts have found that the logic underlying the Supreme Court's decision in *Espinoza* is equally applicable whether the discrimination conduct favors U.S. citizens or whether it favors individuals having other nationalities.<sup>132</sup> Nonetheless, at least one commentator has argued that *Espinoza* is inapplicable to foreign em-

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<sup>126</sup> *Id.*

<sup>127</sup> *MacNamara*, 863 F.2d at 1147 n.15.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1148.

<sup>132</sup> *Dowling v. United States*, 476 F. Supp. 1018, 1022 (D. Mass. 1979) (holding that U.S. citizen failed to state a claim under Title VII for discrimination against United States citizens in favor of Canadian citizens). *See also* *Novak v. World Bank*, 20 Empl. Prac. Dec. (CCH) 30,021 (D.D.C. 1979) (holding discriminatory hiring practices of World Bank insufficient to state a claim under Title VII); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 958 (1979).

ployer job discrimination suits because that decision was made in the context of a U.S. citizenship requirement, not a foreign citizenship requirement.<sup>133</sup>

The significance of the distinction between a United States citizenship requirement and a Korean citizenship requirement lies in the fact that the United States is a heterogeneous society and Korea is a homogeneous society. Thus, when companies like KAL hire their own citizens within their article VIII(1) rights, the result is that almost all of their employees will be of the same national origin and race.<sup>134</sup> In *Espinoza*, the Supreme Court clearly stated that citizenship discrimination is prohibited under Title VII when it has the purpose or effect of discriminating on the basis of national origin.<sup>135</sup> Since the Third Circuit in *MacNamara* recognized the conflict, it held that U.S. citizens cannot state a claim against foreign employers for disparate impact liability because their right to do so has been superseded by the treaty.<sup>136</sup>

As noted earlier, this holding gives foreign employers greater rights than domestic companies and is consistent with the "beyond national treatment" standard applied by the Third Circuit to the employer choice provision.<sup>137</sup> A contrary holding would in essence be an act of discrimination against Korea on the basis of their society's homogeneity. Their treaty rights would be significantly more restricted than countries with heterogeneous populations because Korean companies trying to avoid disparate impact liability would have to hire enough U.S. citizens (or perhaps citizens from other countries) to balance out the statistical makeup of their managerial workforce. This result is plainly undesirable and inequitable, and the Third Circuit's decision to disallow disparate impact claims is well justified.

It is interesting to note that *MacNamara* did not limit the ban on disparate impact claims to companies from only homogeneous countries. Presumably, this was done because the court did not wish to set a precedent that would require courts to enter into factual determinations of whether a particular country was homogeneous or heterogeneous.

*B. Impact of the MacNamara Decision on Foreign Investment in the United States*

The United States, as well as other nations, encourages foreign investment because it creates jobs, broadens capital markets, and

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<sup>133</sup> See Note, *supra* note 49, at 245-46.

<sup>134</sup> *MacNamara*, 863 F.2d at 1148.

<sup>135</sup> See *supra* note 96.

<sup>136</sup> *MacNamara*, 863 F.2d at 1148.

<sup>137</sup> See *supra* text accompanying notes 96-104.

contributes to overall productivity and economic growth.<sup>138</sup> Facilitating foreign investment is the primary objective of FCN treaty negotiators.<sup>139</sup> The Third Circuit's decision in *MacNamara* may adversely affect foreign investment in the United States in two theoretically significant ways.

First, by subjecting the decisions of foreign employers to Title VII constraints, *MacNamara* limits the ability of these companies to fill critical positions with the people in whom they have the most confidence.<sup>140</sup> This in turn limits the success of overseas operations.

There are several legitimate reasons why foreign companies may need to employ their own citizens. Unlike the vast majority of citizens of the host country, their citizens have: (1) unique linguistic and cultural skills; (2) knowledge of their country's products, markets, customs and business practices; (3) familiarity with the personnel and workings of the principal or parent enterprise in their home country; and (4) acceptability to those persons with whom the company and branch does business.<sup>141</sup>

These factors are important to successful business operations, and *MacNamara* does not deny foreign employers the right to hire their own citizens for any of these legitimate reasons. *MacNamara* does prohibit hiring these citizens for the purpose of replacing old employees with young ones, female employees with males, or employees of American national origin with those of Korean national origin. These factors are not recognized as necessary for successful business operations in either domestic or foreign markets.

The second source of concern over the *MacNamara* decision is the increased litigation costs that will result from having to defend employment decisions in U.S. courts.<sup>142</sup> Although litigation over personnel decisions is a burden that is shared by domestic companies, foreign companies feel that the confusion or local prejudice of fact finders puts them at a disadvantage.<sup>143</sup> The Third Circuit addressed this concern:

[W]hile we recognize that factfinders can and do err from time to time, the relevant issue is whether there is reason to believe that the instances of error will be materially greater in Title VII and ADEA cases where a foreign employer has exercised its Article VIII(1) right than in other cases filed under those statutes. Where a foreign business has chosen one of its own citizens as an executive because he or

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<sup>138</sup> Note, *supra* note 49, at 251.

<sup>139</sup> See Walker, *Treaty Program*, *supra* note 2, at 59; Walker, *Treaties for Protection*, *supra* note 2, at 229.

<sup>140</sup> *Spieß v. C. Itoh & Co. (America)*, 643 F.2d 353, 362 (5th Cir. 1981), *cert. dismissed*, 454 U.S. 1130, *vacated*, 457 U.S. 1128 (1982).

<sup>141</sup> *MacNamara*, 863 F.2d at 1139.

<sup>142</sup> *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), *rev'd*, 457 U.S. 176 (1982).

<sup>143</sup> *MacNamara*, 863 F.2d at 1147.

she is such a citizen, we think the plaintiff is no more likely to succeed than any other employment discrimination plaintiff in convincing the trier of fact that the decision was made for some different, impermissible reason.<sup>144</sup>

If foreign companies were, in fact, treated with prejudice by U.S. fact finders, the question still remaining would be whether the amount of this prejudice is significant enough to justify granting them a wholesale immunity from domestic discrimination laws.

Concern over the impact of the *MacNamara* decision is not without foundation.<sup>145</sup> But none of the defendants in *Avigliano*, *Spiess*, *Wickes*, or *MacNamara* have offered proof of any kind that they, or companies like them, will discontinue investment in the United States. The Third Circuit's decision is not a novel development, and there has been no indication as yet that foreign investment has been deterred as a result of the holding.<sup>146</sup> Additionally, the State Department has made it clear that they have received no representations by foreign governments that their country's business sector is disinclined to invest in the United States.<sup>147</sup> One possible conclusion is that income from operating in the United States simply outweigh the costs, including litigation fees and unfavorable judgments, of doing business in the United States.

If the *MacNamara* court had adopted the alternate solution and permitted foreign companies to discriminate in favor of their citizens on any basis, the consequences could have been considerably worse not only for the United States, but for foreign investors as well. Top U.S. managers and specialists, aware of the treaty rights of foreign companies, would avoid working for such companies for fear of being legitimately fired under discriminatory motives. Thus, these companies would be hurting their chances of employing American personnel who, due to their knowledge of the business and cultural aspects of the United States, could be vital to a successful overseas operation.

Assuming an American did show an interest in a foreign company, he or she would most likely insist on a clause in the employment contract providing assurances that the company will, despite the treaty, act in accordance with domestic discrimination laws. Thus, if a foreign employer ever decided to experiment with host country personnel, the employer's treaty rights might be "contracted away" one employee at a time.

A contrary holding would also have adverse impacts on the United States. The morale of American citizens would be diminished by losing the protection from discrimination that they have

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> U.S. Brief, *supra* note 115, at 14.

<sup>147</sup> *Id.*

come to rely upon. Although it can be argued that they assumed such a risk by working for a foreign company, some may have had no alternative due to a tight job market, while others may simply have been unaware of the companies' treaty rights until they actually suffered the consequences.

This loss of confidence in the law and government might also be directed against foreign investors. Stories of blatant discrimination by "foreigners" would make excellent headlines in local and national newspapers. The result could be to create a fear among foreign companies of an inhospitable and economically unsupportive American populace; a fear that could potentially be the most significant deterrent to foreign investment in the United States.

#### IV. Conclusion

In summary, *MacNamara* is the most recent interpretation by the American judiciary on the relationship between FCN treaty rights and domestic discrimination laws. In making its decision, the Third Circuit had the benefit of the fully developed views of the Department of State, the experience of the other circuit courts, and the directives of the Supreme Court. The *MacNamara* court employed sound reasoning and considered all relevant factors in reaching an interpretation that effectuated the most probable intent of the treaty parties. The court effectively utilized the *Espinoza* decision to accommodate both the rights of foreign employers and the rights of domestic employees without conflict. The decision was also comprehensive and flexible in that it eliminated claims for unintentional disparate impact without providing foreign companies immunity from mixed motive liability. Lastly, *MacNamara* offers a solution that should continue to facilitate foreign investment in the United States without diminishing the morale of our nation's citizens, whom the American judiciary has a solemn duty to protect.

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