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Critical Analysis of Judicial Attempts to Reconcile the United States-Japan Friendship, Commerce and Navigation Treaty with Title VII, A

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A Critical Analysis of Judicial Attempts to Reconcile the United States-Japan Friendship, Commerce and Navigation Treaty with Title VII

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INTRODUCTION

The United States Court of Appeals for the Seventh Circuit recently overturned an award delivered against a Japanese company for violation of United States anti-discrimination laws. In *Fortino v. Quasar, Co.*,[1] the defendant, a wholly-owned American subsidiary of a Japanese company, had dramatically reduced its work force and not only dismissed American executives of non-Japanese descent while preserving the positions of Japanese nationals, but granted the Japanese executives significant raises. A jury awarded the plaintiffs 2.5 million dollars on an age discrimination claim and a judge, separately hearing a Title VII national origin claim, also found for the plaintiffs and awarded identical damages.[2] The Seventh Circuit, however, vacated the finding of liability for national origin discrimination, specifically ruling that the "right of choice" provision in the Treaty of Friendship, Commerce, and Navigation between Japan and the United States[3] permitted the Japanese company to favor its own citi-

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1 950 F.2d 389 (7th Cir. 1991).

2 Fortino v. Quasar Co., 751 F. Supp. 1306 (N.D. Ill. 1990).

3 Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VIII, para. 1, 4 U.S.T. 2063, 2070 [hereinafter Japan FCN Treaty]. The United States has been signing FCN Treaties since 1789. *See* Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979)

zens when staffing managerial positions.[4]

Despite the vacation of the large award against Quasar, "believed to be the first Japanese-owned firm ordered to pay damages for violating the Civil Rights of its American employees,"[5] discrimination claims against Japanese companies are likely to mount. As investment by Japanese companies in the United States has matured,[6] the conflict between American civil rights laws and the preference of Japanese companies for Japanese executives has come to the forefront.[7] Clashing are the prohibitions against discrimination in Title VII and the apparent right of Japanese companies to freely choose core employees granted by the Japan FCN Treaty (the "right of choice"). Clashing as well are two important policies. Title VII properly protects Americans from discriminatory treatment, while the Japan FCN Treaty stimulates economic growth by allowing United States and Japanese companies to control their overseas investments.[8] *Fortino*, as with several prior rulings, does little to resolve the conflict and advance the underlying purposes because the decision ignores or overestimates the difficulty of applying Title VII terminology such as race and national origin to foreign citizens of a homogeneous nation.[9]

This paper offers a practical solution to the conflict between civil

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(regarding the 1789 FCN Treaty with France). During the heyday of American dominance after World War II, the United States signed FCN Treaties with numerous countries besides Japan. At the time the United States signed the Japan FCN Treaty it was a party to over 130 FCN Treaties and approximately twenty-five of those treaties included a "right of choice" provision similar to the "right of choice" provision in the Japan FCN Treaty. *Id.*

4 *Fortino*, 950 F.2d at 394. The court reversed the age discrimination claim on other grounds. *Id.*

5 William Brady, *Quasar Case Fuels Debate on Global Law*, CHI. TRIB., Oct. 16, 1991, at C1.

6 Japanese investment in the United States continues to rise. *See* William Neikirk, *Auto Industry on Road South*, CHI. TRIB., Dec. 4, 1991, at C1 (southern automobile belt has significant number of Japanese "transplants"); Percy R. Luney, Jr., *American Women Face Discrimination in Seeking Employment with and Working for Japanese Companies Operating in the United States*, 18 N.C. CENT. L.J. 42, 59 (1989) (Japanese companies show preference for Japanese executives); Michael Cassell, *Japan in the U.K. 6: The Lure of the Open Share Market*, FIN. TIMES, Sept. 20, 1991, at VI (half of all Japanese 1990-91 overseas investment was in North America).

7 William H. Lash, III, *Unwelcome Imports: Racism, Sexism, and Foreign Investment*, 13 MICH. J. INT'L L. 1, 3-28 (1991) (describing Japanese discrimination against Burakumin, Koreans, Pakistanis, Jews, Black and Hispanic Americans, and women).

8 Japanese companies have exercised this preference in the United States as well as engaging in other racist and discriminatory practices. *Id.* at 24-37 (documenting discrimination in the United States by Japanese firms).

9 The rulings to date are: Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988); Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984); Spiess v. C. Itoh & Co., 643 F.2d 353 (5th Cir. Apr. 1981), *vacated*, 457 U.S. 1128 (1982); Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2d Cir. 1981), *vacated*, 457 U.S. 176 (1982) (Lisa Avagliano's name was chronically misspelled as "Avigliano" in most of the District Court and Second Circuit opinions. *See* Tamar Lewin, *Sex Bias or Clash of Cultures*, N.Y. TIMES,

rights and economic growth through a new, but sensible, interpretation of the "right to choose" provision. Part I explains the conflicting rulings of the five Courts of Appeals that have addressed this issue. Part II concludes that the courts' various reconciliations between Title VII and the Japan FCN Treaty are, in each case, impossible to apply consistently or fairly. Courts have wrongly attempted to preserve the protections of Title VII for American employees of foreign corporations by asking fact-finders to draw impossibly fine distinctions between permissible and prohibited criteria for employment decisions. Part III argues that the only fair interpretation of the Japan FCN Treaty is that Japanese companies in the United States do have the right to select Japanese nationals for key positions for any reasons, including race and national origin. However, Part III further argues that although Japanese employers should be permitted to assert their "right of choice," they should not be permitted to use that right to fend off obligations acquired by voluntary entrance into the United States employment market.

If a Japanese company chooses to hire an American executive, it should face subsequent loss or modification of its "right of choice" through express agreement, waiver or estoppel. If this were the law, long-time American employees would not suddenly lose their positions as a result of a previously unexpressed preference for Japanese nationals. At the same time, Japanese companies could preserve their "right of choice" by not agreeing or allowing an employee to believe that he or she would be free from discriminatory treatment.

I. JUDICIAL ATTEMPTS TO RECONCILE TITLE VII AND THE "RIGHT OF CHOICE"

A. The Conflict Between the "Right of Choice" and Title VII

The two texts are in obvious conflict. 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 employee because of such individual's *race, color, religion, sex, or national origin*.[10]

Apr. 8, 1982, at D1. Citations in this article to the case retain the spelling used by the relevant court.); Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979).

[10] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982) (emphasis added).

Pursuant to these prohibitions, any employment decision by a Japanese company motivated by the race, color or national origin of an employee or applicant violates Title VII.[11] Title VII does permit discrimination on the basis of national origin, but not race, pursuant to the bona fide occupational qualification (the "BFOQ") exemption.[12] Under this narrow provision, a defendant avoids liability for intentional discrimination if he or she shows that an employment decision motivated by national origin is reasonably necessary to the operation of the business. Pursuant to the plain meaning of the statute and governing Supreme Court decisions, Title VII does not, however, prohibit Japanese companies from making employment decisions motivated by the citizenship of the employee or applicant.[13]

Title VII also protects employees from employer use of facially neutral procedures with a disparate impact upon the treatment of individuals of a particular race, color, or national origin.[14] In a disparate impact case, the plaintiff must identify the specific employer practices producing a disparate impact. Liability attaches if "the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[15]

Given these causes of action, the language of the "right of choice"

Title VII is not the only substantive basis for a civil rights action against a Japanese employer. 42 U.S.C. § 1981 supports claims for racial but not national origin discrimination. *See* Adames v. Mitsubishi Bank, Ltd., 751 F. Supp. 1548 (E.D.N.Y. 1990). Because the Title VII issues subsume the § 1981 issues, this paper does not separately address § 1981. Moreover, this article does not address sex or age discrimination although much of the analysis is applicable to those areas as well.

11 The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), recently codified the definition of the act of discrimination, an area of long-standing judicial and political turmoil. Section 107 of that bill modifies 42 U.S.C. § 2000e-2 with the following subsection:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

12 42 U.S.C. § 2000e-2(e)(1) reads:

> [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.

13 Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

14 The standards for disparate impact cases were codified in the Civil Rights Act of 1991.

15 Civil Rights Act of 1991 § 105. The law also provides that the complainant may rebut the proof of business necessity by showing that alternative practices with a non-discriminatory impact would serve equally well. The respondent may avoid liability following such proof in some circumstances by adopting that practice. The BFOQ defense is narrower than the defense to the disparate impact claim because it requires a showing of necessity rather than relatedness, and therefore does not normally play a role in disparate impact cases. *See generally* 3 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 72.11 (1991).

provision permits practices that, apart from the Treaty, would be actionable under Title VII:

> Nationals and Companies of either Party [Japan and the United States] *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.[16]

The unequivocal "shall" appears to allow Japanese employers to favor Japanese nationals on the basis of race and national origin or on facially neutral criteria, such as knowledge of Japanese business markets, that would overwhelmingly benefit Japanese nationals.

No easy rules allow the resolution of this conflict between a treaty and a later enacted statute. As a matter of theory, a federal statute overrules a prior conflicting treaty provision.[17] Title VII was promulgated eleven years after the United States and Japan signed the FCN Treaty suggesting that Title VII controls the employment practices of Japanese companies operating in the United States. However, the federal courts will not conclude that Congress intended that a statute overrule a treaty in the absence of clear intent to the contrary.[18] Nothing in Title VII or its legislative history speaks to FCN Treaties and thus a perfectly good contrary position is that the Japan FCN Treaty controls in lieu of Title VII. Traditional canons go further, however, and admonish courts to reconcile treaties and federal statutes to the extent possible.[19] Accordingly, a court addressing this conflict has the doctrinal freedom to strike a balance that best serves the purposes of both the Japan FCN Treaty and Title VII.

B. The Judicial Resolution of the Conflict Between the "Right of Choice" and Title VII Rests on Unrealistic Factual Distinctions

Beginning in 1979, the circuits attempted to find a standard that would reconcile the "right of choice" and Title VII. As a result of the important policy goals of both Title VII and the Japan FCN Treaty and the relative judicial freedom to implement these goals, no two courts have yet arrived at the same solution.

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16 Japan FCN Treaty, *supra* note 3, art. VIII, para. 1, at 2070 (emphasis added).

17 *See, e.g.*, Reid v. Covert, 354 U.S. 1, 18 (1957).

18 *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984) (preference against finding implicit treaty repeal).

19 *See, e.g.*, United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981).

1. Avigliano and Spiess

In the mid-1970's plaintiffs in two separate cases, *Avigliano v. Sumitomo Shoji America, Inc.*[20] and *Spiess v. C. Itoh & Co.*,[21] charged that Japanese-owned American companies violated their civil rights when their employer replaced them with Japanese nationals. In both cases, the Japanese employers raised a novel defense, the "right of choice" provision in the Japan FCN Treaty.[22] The Japanese Companies argued that their "right of choice" for the enumerated core personnel was absolute and immune from Title VII strictures.[23] Both district courts ruled that a domestic corporation "has neither standing nor need to invoke the aegis of the Treaty."[24] Both cases were appealed.

The Second Circuit held that a subsidiary of a Japanese company had standing to raise the "right of choice."[25] The Second Circuit further ruled, after looking to the history of the Treaty, that the limited purpose of the Treaty was to permit foreign companies to avoid percentile legislation.[26] According to the court, "[a]t the time when the Treaty was negotiated, a number of American states and many foreign countries severely restricted the employment of noncitizens within their boundaries."[27] The court thus found no general exemption from Title VII arising from the "right of choice."

The court, however, as suggested by the standard canons of construction, attempted to reconcile the two documents through the BFOQ exemption. The Second Circuit "believe[d] that as applied to a Japanese company enjoying rights under Article VII of the Treaty it must be con-

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20 473 F. Supp. 506 (S.D.N.Y. 1979), *aff'd*, 638 F.2d 552 (2d Cir. 1981), *vacated*, 457 U.S. 176 (1982). In *Avigliano*, the plaintiffs claimed both sex and national origin discrimination under Title VII and 42 U.S.C. § 1981.

21 469 F. Supp. 1 (S.D. Tex. 1979), *rev'd*, 643 F.2d 353 (5th Cir. Apr. 1981), *vacated*, 457 U.S. 1128 (1982).

22 Jonathan B. Schwartz, Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employees*, 31 STAN. L. REV. 947 (1979) ("defendants' appeal to the Japanese Treaty as a defense to the American Civil Rights Laws is unprecedented"). The first court to rule on this issue addressed the "right of choice" provision in the Treaty of Friendship, Commerce and Navigation with Protocol, Oct. 1, 1951, U.S.-Den., 12 U.S.T. 908. Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979), concluded that the limited purpose of the "right of choice" provision was to "exempt specialized employees of foreign countries and companies from the admission requirements of the host country." *Id.* at 1186. No other court has taken this position, and *Linskey* was effectively overruled by the subsequent Second Circuit decision in *Avigliano*, discussed *infra*.

23 *Avigliano*, 473 F. Supp. at 508; *Spiess*, 469 F. Supp. at 3.

24 *Avigliano*, 473 F. Supp. at 513; *Spiess*, 469 F. Supp. at 9.

25 Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552, 555-58 (2d Cir. 1981).

26 *Id.* at 558. "Percentile legislation" is domestic legislation designating that a certain percentage of a foreign company's work force be citizens of the host country.

27 *Id.* at 559.

strued in a manner that will give due weight to the Treaty rights and the unique requirements of a Japanese company doing business in the United States."[28] The court suggested, for example, that Japanese linguistic and social skills be made a part of the BFOQ inquiry.[29]

Spiess also concluded that the domestic subsidiary had standing to assert the "right of choice." *Spiess*, though, had a sharply divergent view of the scope of the "right of choice." According to *Spiess*, the Japan FCN Treaty created "an absolute rule permitting foreign nationals to control their overseas investments.[30]

The Japan FCN Treaty, under the *Spiess* analysis, provided three types of rights. First, in many cases, the Treaty afforded foreign nationals "national treatment," the same treatment afforded citizens.[31] Second, in sensitive areas, foreign nationals received most-favored-nation treatment "or treatment as favorable as that enjoyed by the citizens of any foreign nation."[32] A third type of rules, absolute rules, "were intended to protect vital rights and privileges of foreign nationals in any situation."[33]

Spiess concluded that the "right of choice" was this third, non-contingent right. Not only did the court look to the language of the provision, which is non-contingent,[34] but also to the purpose of the Japan FCN Treaty—facilitating American investment in Japan. The court believed that the reciprocal character of the "right of choice" required an interpretation facilitating Japanese investment rights in the United States.[35]

The Supreme Court subsequently vacated both decisions by ruling that domestic companies such as the defendants in *Avigliano* and *Spiess* could not invoke the protections of the Japan FCN treaty by virtue of their Japanese ownership.[36] Despite some careless *dicta*, the Supreme

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28 *Id.*

29 *Id.* The court outlined four areas of non-exclusive inquiry:

(1) Japanese linguistic and cultural skills;
(2) Knowledge of Japanese products, markets, customs, and business practices;
(3) Familiarity with the personnel and workings of the principal or parent; and
(4) Acceptability to business partners.

30 Spiess v. C. Itoh & Co., 643 F.2d 353, 360-61 (5th Cir. Apr. 1981).

31 *Id.* at 359.

32 *Id.* at 360.

33 *Id.*

34 *Id.* at 361.

35 *Id.* at 361-62.

36 Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982); Spiess v. C. Itoh & Co., 457 U.S. 1128 (1982). Subsequently, on remand, the Texas district court ruled that even an allegation that the subsidiary and the parent share employees does not give the subsidiary standing to invoke the "right of choice" provision. *See* Spiess v. C. Itoh & Co., 725 F.2d 970, 973 (5th Cir. 1984) (quoting from an unpublished district court order of Sept. 27, 1983).

Court probably did not disturb the substantive rulings of either circuit addressing the relationship between the Japan FCN Treaty and Title VII.[37]

2. *Wickes*

In 1984, the Sixth Circuit offered its opinion on the "right of choice" provision in the Greek FCN Treaty.[38] In *Wickes v. Olympic Airways*,[39] a 61 year-old sales manager sued Olympic airways, incorporated in Greece, claiming age and national origin discrimination after Olympic terminated him following thirteen years of service. The Sixth Circuit concluded, analogously to the Fifth Circuit, that the post-World War II FCN Treaties granted foreign employers an absolute right to select core employees. The Sixth Circuit concluded, however, that the "right of choice" "was intended to be a narrow privilege to employ Greek citizens for certain high level positions, not a wholesale immunity from compliance with labor laws prohibiting other forms of employment discrimination."[40] Olympic was 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

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37 The Supreme Court commented that "[t]he purpose of the [FCN] Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage." *Sumitomo*, 457 U.S. at 187-88. This comment may appear to suggest a limitation on the "right of choice" provision, *see* Wickes v. Olympic Airways, 745 F.2d 363, 365 (6th Cir. 1984), but the better view is that it only represents a comment on the undisputed general purpose of the Treaty. Indeed, the Supreme Court went on to state that "[t]he only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)," suggesting that the "right of choice" provision is an exception to the general purpose earlier delineated. *Sumitomo*, 457 U.S. at 189. *Accord* Eric A. Grasberger, Note, *MacNamara v. Korean Air Lines: The Best Solution to Foreign Employer Job Discrimination Under FCN Treaty Rights*, 16 N.C. J. INT'L L. & COM. REG. 141, 148 (1991) (not attributing significance to court's aside). Furthermore, the Supreme Court commented that it expressed "no view as to whether Japanese citizenship may be a *bona fide* occupational qualification for certain positions at Sumitomo or as to whether a business necessity defense may be available." *Sumitomo*, 457 U.S. at 189 n.19. The comment, which incorrectly assumes that Title VII bars citizenship preference, shows that the Court did not seriously address the reconciliation of the Japan FCN Treaty and Title VII which, after all, was not before the Supreme Court.

38 Treaty of Friendship, Commerce and Navigation, Aug. 3-Dec. 26, 1951, U.S.-Greece, art. XII, para. 4, 5 U.S.T. 1829, 1859. The "right of choice" provision in the Greek FCN Treaty is substantially similar to the analogous provision in the Japan FCN Treaty:

> Nationals and companies of either Party *shall be permitted to engage, within the territory 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.

Id. (emphasis added).

39 745 F.2d 363 (6th Cir. 1984).

40 *Id.* at 365.

basis."[41]

The court in *Wickes* unsuccessfully attempted to define the difference between discriminating in favor of one group but not against another group when both groups are competing for the same position. The court first stated that anti-discrimination laws and citizenship preference did not conflict.[42] However, implicitly recognizing some conflict between the two, the court held that "the Treaty provides Greek companies doing business in the United States and American companies in Greece *some* freedom to favor their own citizens for managerial and technical positions within the company so as to ensure their operational success in the host country."[43] The court subsequently defined "some," however, by ruling only that "Olympic has no license to discriminate against or among non-Greek citizens it hires for positions not covered by the Treaty on the basis of race, age, sex, [or] national origin."[44] Whether Olympic had employed these impermissible criteria involved, in the end, open-ended "questions of fact for the District Court to resolve."[45]

3. MacNamara

Four years later, *MacNamara v. Korean Air Lines*[46] looked to *Wickes*, but grappled further with the difference between impermissible discrimination and citizenship preference. After a fifty-seven year-old, American sales manager was fired by Korean Air Lines ("KAL"), he brought claims of age and national origin discrimination. The defendant had discharged MacNamara and five other Americans after nearly a decade of service, ostensibly as part of a reorganization, and hired four younger Korean nationals. Nevertheless, the district court dismissed the suit, accepting KAL's argument that article VIII(1) of the Korean FCN Treaty preempted the action.[47]

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41 *Id.* at 367. The plaintiff claimed discrimination under Michigan law. Thus, the court could not have ruled that Michigan law should be followed over contradictory portions of the Treaty. However, the court confined itself to interpreting the Treaty, *Id.* at 364, and the *Wickes* holding is therefore directly relevant to the conflict between federal anti-discrimination statutes and FCN Treaties.

42 *Id.* at 368.

43 *Id.* (emphasis added).

44 *Id.* at 369.

45 *Id.*

46 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

47 *See* Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-Korea, art. VIII, para. 1, 8 U.S.T. 2217, 2223. The Korean "right of choice" provision is similar to the Japanese and Greek provisions:

> 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

On appeal, *MacNamara*, echoing *Wickes'* limited reading of the "right to choose," argued "that Article VIII(1) secured to a foreign business only the right to select managerial and technical personnel on the basis of citizenship and did not provide a broad exemption from laws such as Title VII."[48] The Third Circuit followed the plaintiff's suggestion and reversed, holding that the Treaty and Title VII were only in partial conflict.

MacNamara grounded its decision on the 1973 Supreme Court decision *Espinoza v. Farah Mfg. Co.*[49] *Espinoza*, not cited by any prior decision addressing the "right of choice," held that although Title VII prohibited discrimination based on national origin it did not prohibit discrimination based on citizenship. Accordingly, *MacNamara*, like *Wickes*, concluded that a foreign company's decision to select its own citizens did not directly conflict with Title VII. *MacNamara* additionally concluded that a trier of fact could "distinguish national origin discrimination from citizenship discrimination and that, accordingly, courts can impose liability on the basis of the former without imposing it on the latter."[50] *MacNamara* held, however, that the Treaty and Title VII did conflict if an American employee brought a disparate impact claim against a foreign employer. A foreign business from a country with a homogeneous population "by merely exercising its protected Treaty right to prefer its own citizens for management positions could be held in violation of Title VII" in a disparate impact case.[51] As a result, *MacNamara* held that the FCN Treaty preempted disparate impact claims against Korean companies doing business in the United States.

4. Fortino

Fortino v. Quasar Co.,[52] the final link in this unsatisfactory chain, went further toward distinguishing prohibited and permissible discrimination. *Fortino*, to begin with, held that the American company Quasar had standing to raise the Japan FCN Treaty because an American subsidiary could assert the parent's treaty rights when the foreign parent had

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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).

48 *MacNamara*, 863 F.2d at 1138.

49 414 U.S. 86 (1973).

50 *MacNamara*, 863 F.2d at 1147.

51 *Id.* at 1148.

52 950 F.2d 389 (7th Cir. 1991).

dictated the subsidiary's discriminatory conduct.[53] Turning to the interpretation of the Treaty, and loosely following *Wickes* and *MacNamara*, the court held that Title VII did not conflict with the limited citizenship preference arising from the "right of choice" provision. Judge Posner attempted to refine the interaction of citizenship and national origin discrimination by concluding that both disparate treatment and disparate impact actions based upon national origin would undermine treaty rights. "[E]quating the two forms of discrimination or, what as a practical matter would amount to the same thing, allowing the first [citizenship discrimination] to be used to prove the second [national origin discrimination]" would effectively remove the "right of choice."[54]

The court, however, eschewed the adoption of a blanket exemption to Title VII and found a distinction between the right "to favor your own citizens to run your foreign subsidiary" and discrimination against others on the basis of national origin or race. Rather than hold that the Treaty did not permit such discrimination, like *Wickes*, the court ruled only that the existence of a blanket exemption was not at issue.

II. Judicial Treatment of the "Right of Choice" Disserves both Americans and Their Japanese Employers

Five separate standards obviously comprise an intolerable system for evaluating the activities of Japanese employers in the United States. The difficulty with the standards, though, goes beyond the fact that separate standards exist. Other than *Spiess*, the standards are unworkable and will never converge into a satisfactory unified standard for judging the employment practices of Japanese companies. Moreover, all of the standards, including *Spiess*, compromise important national policies.

A. None of the Existing Standards Permits Consistent Resolution of Employment Disputes

Apart from *Spiess*, the courts force the fact-finder to resolve impossibly tight issues of fact in an effort to simultaneously preserve both Title VII and the "right of choice." These factual issues, the difference between citizenship preference and impermissible discrimination and the difference between discriminating in favor of one group and against another competing group, are illusory when one competing group contains only citizens of a homogeneous nation.

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[53] *Id.* at 393. *Fortino* correctly noted that *Sumitomo* expressed no opinion "as to whether an American subsidiary may assert the Treaty rights of its Japanese parent." *Sumitomo*, 457 U.S. at 189 n.19. *But see supra* note 36.

[54] *Fortino*, 950 F.2d at 393.

1. The Scope of Permissible Citizenship Preference is Undefined

Espinoza, the 1973 Supreme Court decision, unequivocally held that discrimination on the basis of citizenship is not prohibited by Title VII. Mere recognition of this right, however, does not advance understanding of the relationship between Title VII and the "right of choice" provision. All Japanese companies, in fact all companies domestic and foreign, may in theory hire and fire employees on the basis of citizenship. If no conflict between treaty rights and discrimination law existed, as suggested by parts of *Wickes*, *MacNamara*, and *Fortino*, then the courts' additional clarification would be unnecessary.

As the varying approaches imply, a conflict does exist because the homogeneous character of Japan (and many other nations) means permissible and impermissible bases for employment decisions virtually always overlap.[55] The Japanese citizen will rarely share race or national origin with the aggrieved American. Selection of a Japanese citizen will therefore automatically disfavor an American of non-Japanese heritage. Moreover, Japanese nationals making employment decisions would rarely understand themselves or their employees to have distinguishable race, national origin, and citizenship the way a dark-skinned American from Puerto Rico might consider himself a black U.S. citizen of Puerto Rican descent.[56]

Despite suggestions to the contrary in those same cases, courts have never successfully made such hard distinctions. The court in *Espinoza v. Farah Mfg. Co.*[57] did not confront such questions when deciding that national origin could be distinguished from citizenship. In *Espinoza*, the plaintiffs were of Mexican national origin and Mexican citizenship while more than 95% of the employees of the defendant were of Mexican national origin and United States citizenship.[58] Accordingly, the determination that citizenship was the hiring criterion was easy. Other cases addressing citizenship issues have had similarly easy distinctions at is-

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55 The terms race, color, and national origin have not been fleshed-out by the courts precisely because they overlap and a normal case does not require the identification of one category to proceed to judgement. *See, e.g.*, Enriquez v. Honeywell, Inc., 431 F. Supp. 901, 904 (W.D. Okla. 1977) (line between race and national origin discrimination indiscernible). Definition of those terms accordingly has raised little controversy. *See* 3 LARSON & LARSON, *supra* note 15, § 93.10. The little controversy to date involves a question entirely different from separating closely intertwined issues of race and national origin. *See, e.g.*, Ramos v. Flagship Int'l, Inc., 612 F. Supp. 148 (E.D.N.Y. 1985) (question for jury whether various Hispanic plaintiffs were non-white.).

56 *See, e.g.*, THOMAS SOWELL, THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE 183 (1983) (over one half of United States population is of multiple ancestry).

57 414 U.S. 86 (1973).

58 *Id.* at 93.

sue.[59] A more difficult, if not impossible, distinction is needed when citizenship and national origin and race are almost always identical. Only when the Americans are also of Japanese national origin may citizenship be meaningfully separated from national origin, as Justice Marshall did in *Espinoza* with Mexican citizens and U.S. citizens of Mexican national origin.

Additionally, American plaintiffs apparently may now ground discrimination claims on the basis of so-called American national origin.[60] Not only does the concept of American national origin find little support in the legislative history of Title VII—the bill was designed to end discrimination among Americans[61] but it also cannot be drawn from *Espinoza*. Justice Marshall wrote, "national origin on its face refers to the country where a person was born, or more broadly, the country from which his or her ancestors came."[62] The clear implication in this definition, especially in the use of the word "came," is that national origin refers to a nation other than the United States. No other reading of the opinion is plausible as *Espinoza* openly assumed that the disfavored Mexican citizens and the favored American citizens of Mexican heritage shared the same national origin in order to conclude that the two groups were distinguished on the basis of citizenship.

Nevertheless, the concept of national origin has been stretched to include American national origin claims. If a plaintiff claims that he or she was discriminated against on the basis of his or her American national origin, he or she is claiming, in no uncertain terms, discrimination on the basis of American citizenship. American citizens will have American national origin and foreign citizens will not. Even aggrieved American employees of Japanese descent will have a national origin claim if a catch-all category of American national origin continues to be honored by the courts. This potential claim further undermines any rational process for determining that Japanese citizenship, as opposed to the employee's national origin, motivated an employment decision.[63] Triers of fact asked to decide whether "citizenship" or "national origin" moti-

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[59] *See* Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731 (5th Cir. 1986) (white employee's claim against British corporation dismissed); Rios v. Marshall, 530 F. Supp. 351 (S.D.N.Y. 1981) (complaint that black Jamaicans preferred over black Puerto Ricans dismissed).

[60] Fortino v. Quasar Co., 751 F. Supp. 1306, 1314 (N.D. Ill. 1990).

[61] Janelle M. Diller, Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L.J. 1465 (1985) (surveying legislative history of Title VII).

[62] *Espinoza*, 414 U.S. at 88.

[63] *Fortino*, 751 F. Supp. 1306 (district court did not attempt to distinguish citizenship inquiry from national origin inquiry); *see also*, Adames v. Mitsubishi Bank, Ltd., 751 F. Supp. 1548, 1558-59 (E.D.N.Y. 1990) (using American national origin and citizenship interchangeably when analyzing § 1981 claims).

vated an employment decision when the words simply label the same quality are asked the impossible.

Even if citizenship, race, and national origin could theoretically be untangled, the course of employment discrimination jurisprudence suggests that in practice courts will not arrive at just or fair resolutions. Courts have had difficulty making the necessary factual distinctions. Courts have not, for example, satisfactorily applied Title VII when employers look at accent:

> The puzzle in accent cases is that accent is often derivative of race and national origin. Only Filipino people speak with Filipino accents. Yet within the range of employer prerogatives, it is reasonable to require communication skills of employees. The claim that accent impedes job ability is often made with both sincerity and economic rationality. How then, should Title VII squeeze between the walls of accent as protected trait and speech as job requirement?[64]

The character of the accent cases, and the employment decisions of every employer manifesting citizenship preference, is that prohibited and permissible criteria constitute one indivisible characteristic. None of the "right of choice" cases properly considered this characteristic of the "right of choice" conflict.

Avigliano did not even recognize the legitimacy of citizenship discrimination and instead suggested that characteristics typical of Japanese citizens, such as Japanese linguistic ability, form a BFOQ defense.[65] *Wickes* simply left the decision to the trier of fact without guidelines. *MacNamara* forcefully concluded that the trier of fact could make such a distinction, but did not provide any guidelines for a determination when citizenship, race and national origin completely overlap. In fact, *MacNamara* recognized the difficulty of separating citizenship and na-

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64 Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991). Two cases Matsuda identified as raising intractable factual problems were Fragrante v. Honolulu, 699 F. Supp. 1429 (D. Haw. 1987) (Filipino accent held to impede ability to work in motor vehicles bureau), *aff'd*, 888 F.2d 591 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), and Kahakua v. Hallgren, No. 86-0434 (D. Haw. 1987), *aff'd sub nom.* 876 F.2d 896 (9th Cir. 1989) (Hawaiian Creole accent legitimate reason to reject applicant for weather broadcasting position); *see also* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 19 (1991) (the concept of separable factors in mixed motive employment discrimination cases cannot be given any coherent sense).

65 *Avigliano's* BFOQ proposal is flawed quite apart from the court's failure to recognize that over a decade before its opinion the Supreme Court had held that Title VII did not prohibit citizenship discrimination. The characteristics that *Avigliano* suggests should form part of a BFOQ defense, such as knowledge of Japanese language and culture and markets, are facially neutral reasons for selecting employees. Thus, competent legal counsel would normally claim that those characteristics were not the motivating force for the employment action and instead merely justification for national origin discrimination. Accordingly, lending those qualities BFOQ status has little legal significance.

tional origin when it barred disparate impact actions but inexplicably did not perceive the same dilemma in disparate treatment cases. Only *Fortino* recognized the impossibility of uncoupling national origin and citizenship, implicitly repudiating the prior rulings, but did not further recognize that race and national origin were similarly intertwined.[66] Even *Fortino*, therefore, leaves room for litigation over the scope of citizenship preference.

2. *A Trier of Fact Cannot Rationally Distinguish Between a Preference for one Nationality and Discrimination Against a Different Nationality*

Fortino, which aggressively sought to eliminate the non-existent distinction between citizenship preference and national origin discrimination, retained the theoretical distinction put forth in *Wickes* between the preference for one's own citizens and discrimination on race or national origin grounds against other competing individuals. This distinction, also implicit in *Avigliano* and *MacNamara*, is as ephemeral as the distinction between citizenship preference and impermissible national origin discrimination.

Fortino, for example, held that prohibited discrimination could be separated from "what is implicit in wanting your own citizens to run your foreign subsidiary."[67] Judge Posner explained that a situation in which "a Japanese Company buys an American company, fires all of its new subsidiary's occidental executives because it is prejudiced against occidentals, and replaces them with Japanese" is not a simple case of citizenship preference.[68] The defendant in *Fortino*, however, carried out a reorganization, fired numerous occidental executives, fired no Japanese executives and gave all the Japanese executives raises. This deliberate decision to fire only individuals of different race and national origin can be distinguished from what the Seventh Circuit described as overt discrimination by assuming that such actions only constituted a preference rather than discrimination. But that is assuming the conclusion—that citizenship preference for citizens of a homogeneous nation is a different "thing" from racial and national origin discrimination against non-citizens.

Japanese citizenship and non-Japanese national origin are, however,

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[66] *See* Luney, *supra* note 6, at 61 n.115 (citing GEORGE RUTHERGLEN, MAJOR ISSUES IN THE FEDERAL LAW OF EMPLOYMENT DISCRIMINATION (1987)) (difficult to distinguish between racial and national origin discrimination in the context of a Japanese company).

[67] *Fortino*, 950 F.2d at 393.

[68] *Id.*

essentially mutually exclusive categories. The preference for an employee on the basis of one characteristic requires the discrimination against all other employees who do not possess that characteristic. Thus, no meaningful difference exists between the preference for Japanese citizens and discrimination against Americans. In fact, deciding whether an employer manifested a preference for its own citizens or discriminated against persons with a necessarily different national origin is the same inquiry required to determine the scope of permissible citizenship preference. The fact-finder is asked to determine whether citizenship or national origin motivated the decision.[69]

Accordingly, the *Fortino* distinction between acceptable preference for one's own citizens and discrimination against foreign citizens is unavailing. *Fortino* should have done more than bar the use of citizenship discrimination to prove disparate treatment. The court should have held that any attempt to separate acceptable and unacceptable Japanese discrimination against American employees is unprincipled.

B. Prevailing Standards do not Advance the Purposes of the "Right of Choice" or Title VII

Each of the existing standards, including *Spiess*, frustrates the goals of Title VII and the Japan FCN Treaty. The issues subsequently arising, even assuming that they could be rationally resolved, will always be difficult because citizenship, racial characteristics, and cultural advantages relating to a necessity or BFOQ defense will at a minimum overlap. The employee will still have a non-frivolous action for racial discrimination while the Japanese company will have a non-frivolous claim of citizenship preference or a BFOQ or job-relatedness defense. Each litigant will normally have sufficient factual support for a favorable characterization of the employment decisions. The resulting intricate factual distinctions mean that weak and strong claims alike will resist summary judgment or rational settlement efforts.[70]

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[69] Consider a simple scenario—the replacement of one American executive by one Japanese executive. The Japanese company could assert that it was only showing a preference for its own citizens and was not discriminating against persons of different national origin. The American employee could assert that the employer's motive was to discriminate against the American because of her national origin. No additional facts would assist in deciding between the two assertions. "We need to replace the American" would have the same logical, although not the same emotional, import as "We really should have a Japanese executive." In each case the employer prefers a Japanese national over an American national. Moreover, resolution of the question is not easier if the issue is the scope of citizenship preference or whether the decision was a preference or discrimination. Under either rubric, the fact-finder must determine whether citizenship or national origin "motivated" the employment decision even though, as mutually exclusive characteristics, both did.

[70] *See* Bullard v. Omi Georgia, Inc., 640 F.2d 632, 634 (5th Cir. Mar. 1981) (summary judgment

The *Spiess* approach, a blanket Title VII exemption, does honor the "right of choice" provision and provide needed certainty, but it grievously disserves American employees. Each of the "right of choice" cases involved a clear human tragedy. Men and women who worked hard for many years for a company, often in their fifties or sixties, were dismissed as a result of their race or national origin. This result would be tolerable, one might suppose, if mandated by Congress. Nothing in federal law, however, requires that an important federal statute bow completely to an earlier enacted Treaty.[71] *Avigliano*, *Wickes*, *MacNamara*, and *Fortino* were justified in attempting to avoid granting foreign companies a blanket exemption to Title VII. This is particularly true now because the comprehensive amendments to Title VII contained in the Civil Rights Act of 1991 exempt certain foreign corporations operating overseas from Title VII application but offer no similar exemption for foreign companies' domestic operations. A judicial extension of this exemption to domestic operations of foreign companies would do violence to these recent amendments. The certainty of the *Spiess* standard is therefore not sufficient reason for its universal adoption.[72]

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questionable in employment discrimination cases); Spiess v. C. Itoh & Co., 408 F. Supp. 916, 928 n.17 (S.D. Tex. 1976) (permitting § 1981 action to proceed because race and national origin discrimination intertwined).

71 *See supra* text accompanying notes 17-19.

72 Academic commentary to date has not offered alternatives to the various circuit standards. Although in some cases the commentary has anticipated subsequent developments, the commentators have largely been content to evaluate the judicial solutions. *See* Grasberger, *supra* note 37 (endorsing MacNamara compromise); Andrew J. Lauer, Note, *Title VII, the Age Discrimination in Employment Act and the Friendship Commerce and Navigation Treaty, An Ongoing Conflict: An Analysis of MacNamara v. Korean Airlines*, 17 BROOK. J. INT'L L. 423, 446 (1991) (legislative action necessary for courts to apply a uniform rule); Gerald D. Silver, Note, *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 (1989) (arguing that the Treaty should be given a generous interpretation); Nobukisa Ishizuka, Note, *Subsidiary Assertion of Foreign Parent Corporation Rights Under Commercial Treaties to Hire Employees "Of Their Choice,"* 86 COLUM. L. REV. 139 (1986) (foreign companies should have an absolute non-contingent right to hire employees of their choice for managerial and technical positions); Note, *Yankees out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 MICH. L. REV. 237 (1984) (arguing that even citizenship preference is improper); Schwartz, *supra* note 22 (arguing in favor of a limited role for "right of choice" provisions). *See generally* Barbara A. Ritimsky & Robert M. Jarvis, *Doing Business in America: The Unfinished Work of Sumitomo Shoji America, Inc. v. Avigliano*, 27 HARV. INT'L L.J. 193 (1986); Paul Lansing & Laura Palmer, *Sumitomo Shoji v. Avigliano: Sayonara to Japanese Employment Practices in Conflict with Title VII*, 28 ST. LOUIS U. L.J. 153 (1984); Bart I. Mellito, Note, *The Rights of a Foreign Corporation and Its Subsidiary Under Title VII of the Civil Rights Act of 1964 and Treaties of Friendship, Commerce and Navigation*, 17 GEO. WASH. J. INT'L L. & ECON. 607 (1983). No commentator has proposed a solution that would avoid the impossibly fine distinctions without entirely eliminating the protections of Title VII.

III. THE "RIGHT OF CHOICE" IS ABSOLUTE BUT SUBJECT TO MODIFICATION

A satisfactory approach to the "right of choice" conflict requires the recognition of two propositions. First, the "right of choice," even if in theory extending only to citizenship preference, must extend in practice to the right to consider race and national origin. Second, and overlooked to this point, the "right of choice" provision should not include the right to assume employment obligations through voluntary actions and then selectively invoke the "right of choice" provision to disavow those obligations. Accordingly, Japanese companies should be understood as having the right to discriminate in favor of Japanese nationals for core positions, but that right should be subject to both contractual and non-contractual modification. This treatment of the "right to choose" is not found in the language of either Title VII or the Japan FCN Treaty. Treaty interpretation rules, however, grant federal courts the power to reconcile the conflicting goals of statutes and treaties. The federal appellate courts have expansively exercised that power to direct courts to draw factual distinctions that disserve both the Japan FCN Treaty and Title VII. That same power should be exercised in the future to arrive at a fairer solution.

A. The "Right of Choice" Includes the Right to Consider Race and National Origin for Employment Decisions

The rights granted to Japanese companies by the "right of choice" provision are, regardless of scope, absolute and non-contingent. Only *Avigliano* suggests otherwise and its analysis, lacking a recognition of the validity of citizenship discrimination, is suspect. As all other courts have noted, the wording of the provision is unambiguous and straightforward, and the purpose of the provision, the promotion of foreign investment, supports an interpretation allowing the foreign company to select its core employees. It was the United States, in fact, that insisted upon providing the nationals to both parties to the Japan FCN Treaty the power to control their foreign investments. Moreover, although canons of construction should not be applied blindly, treaty rights are traditionally given an expansive interpretation and the treaty language carefully followed.[73]

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[73] *See* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) (courts must be governed by treaty text solemnly adopted by governments of separate nations); United States v. A.L. Burbank & Co., 525 F.2d 9 (2d. Cir. 1975) (treaties should be broadly construed to carry out purpose of treaty), *cert. denied*, 426 U.S. 934 (1976); Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc., 562 F. Supp. 232 (N.D. Ill. 1983) (when choosing between conflicting constructions, weight of authority mandates construction expanding the rights of the parties); *In Re* Air Crash Disaster at Warsaw, 535

Once the absolute right to choose key employees on the basis of citizenship is accepted, the right to choose on the basis of race and national origin must follow. As the *Fortino* court noted, the right to choose on the basis of citizenship is a nullity if it can be used to prove discrimination on the basis of race or national origin. Moreover, despite the assurances of the *Wickes* and *Fortino* courts, no ascertainable distinction exists between discrimination in favor of one's own citizens and discrimination against persons of other races or national origins. Discrimination in favor of Japanese citizens is discrimination against persons of non-Japanese race or national origin. Honoring the right to control foreign investment granted by the Japan FCN Treaty therefore requires American courts to permit Japanese companies to consider the race and national origin of core employees.

B. The "Right to Choose" is Subject to Contractual and Non-contractual Modification

In each of the "right of choice" cases, American workers, after long service, were suddenly fired for reasons other than merit. The right to take this action cannot be found in the "right of choice" nor are those actions presumptively central to foreign investments. The "right to choose" cannot mean that the Japanese company may make employment decisions and resist the consequences of those decisions.

Treaty rights, including those extending to private persons, may be waived or modified.[74] Accordingly, a Japanese company could not breach a ten-year employment contract with a high-level employee and defend a resulting lawsuit with the FCN "right of choice" provision. Similarly, the "right of choice" provision should be subject to non-contractual modification through waiver or estoppel once the Japanese com-

F. Supp. 833 (E.D.N.Y. 1982) (courts not authorized to disregard treaty provisions upon their own notions of equity), *aff'd*, 705 F.2d 85 (2d Cir.), *cert. denied sub nom.* Polskie Linie Lotnicze v. Robles, 464 U.S. 845 (1983); McElvy v. Civiletti, 523 F. Supp. 42 (S.D. Fla. 1981). A literal reading of the provision would unacceptably grant Japanese companies the right to discriminate among Americans such as, for example, the right to hire only white Americans. No company has claimed this right and therefore it is not at issue. Additionally, this right, were it ever to be at issue, would be easy to read out of the Japan FCN Treaty despite the literal import of the treaty language. The Treaty was designed to permit and encourage foreign investment and discrimination among foreigners can have no rational relation to that goal because no one group of Americans presumptively brings unique skills to a foreign investor. Thus, a literal reading of the FCN Treaty is not an invitation to foreign companies to engage in unacceptable discrimination among Americans.

74 *See* United States v. Townsend, 897 F.2d 989, 992 (9th Cir. 1990) (waiving extradition rights from country of residence); *Maschinenfabrik*, 562 F. Supp. 232 (treaty interpreted like any other contract); *accord* United States v. Bent-Santana, 774 F.2d 1545, 1550 (11th Cir. 1985) (treaty does not automatically grant individuals standing to invoke violations of provisions).

pany voluntarily injects itself into the labor market.[75]

This approach would considerably simplify the issues surrounding Japanese employment of American executives.[76] A proper reason for applying Title VII in the "right of choice" cases should be that the employees believed, as a result of the actions of the Japanese company, that they would not be subject to sudden dismissal under the FCN Treaty. A fifty-five year old executive who devoted fifteen years of service to a Japanese company would have a strong argument that he or she reasonably concluded, to his or her detriment, that he or she would not be fired on the basis of race or national origin. The Japanese company would in turn be hard pressed to argue that the right to fire a meritorious long-term employee that it selected for an important position was central to its right to make basic decisions regarding its overseas investments. Conversely, a young accountant dismissed after six months would probably not be able to prevail under an estoppel theory. Under prevailing standards, these dissimilar cases would raise similar, and tougher issues.

More importantly, recognition that the "right of choice" provision does not allow the Japanese company to discard its acquired obligations would encourage resolution of "right of choice" issues before the employment relationship begins. A Japanese company's failure to raise "right of choice" issues would create an intolerable risk that the right would be lost through waiver or estoppel. Once raised, a Japanese company seeking to hire American executives could either choose to pay the executives additional compensation for the risk of sudden dismissal or waive its "right of choice." Early consideration of these issues would eliminate many bitter employment conflicts that would resist satisfactory resolution regardless of the rule of decision ultimately applied.[77]

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75 Traditional elements of estoppel are (1) the party to be estopped must know the facts, (2) the party to be estopped must intend that his or her conduct be acted upon or must so act that the party asserting the estoppel has reason to believe the conduct is so intended, (3) the party asserting the estoppel must be ignorant of the true facts, and (4) the party asserting the estoppel must rely on the other's conduct to his or her injury. Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981). Waiver would apply when the Japanese company deliberately relinquished a known right. Simonet v. Simonet, 69 Cal. Rptr. 806 (Cal. Ct. App. 1968) (waiver is intentional relinquishment of known right).

76 The employment-at-will doctrine is not a barrier to the non-contractual modification of treaty rights. The employment-at-will doctrine states that an employee only has those rights that are expressly agreed to in his or her written contract of employment. *See* LARSON & LARSON, *supra* note 15, § 117.20. At present, Title VII limits the employment-at-will doctrine by prohibiting firings motivated by race, color or national origin. FCN Treaties thus grant foreign companies greater rights than the existing employment-at-will doctrine. Any derogation of those treaty rights would still allow Japanese companies to rely on the employment-at-will doctrine as currently constituted.

77 This approach will in course raise some difficult issues with respect to the identification of core employees. Consider an employee who is not actually a core employee but who negotiates and signs a year-to-year contract with compensation of $50,000 above market because of the risk of sudden

CONCLUSION

No one can or should close their eyes to the unfairness of a foreign company discarding a good and devoted worker after years of service because he or she has the wrong color or ethnic background. Japanese companies' discrimination against Americans is real and deplorable. On the other hand, American executives might not have jobs with Japanese companies if the Japanese companies limited their investment in this country because our laws prevented them from controlling their investments. Moreover, American companies operating overseas might suffer a backlash if our interpretation of the "right of choice" is overly or unfairly restrictive.

Preventing unacceptable discriminatory treatment, though, does not necessarily conflict with the control the Japan FCN Treaty grants to foreign companies in hiring decisions. If, as suggested, employment relationships between American employees and their Japanese employers are understood to be governed by the same rules of contract and reliance as other relationships, the long-time employee will not be subject to dismissal as a result of the belated invocation of the "right of choice" provision. Moreover, if the foreign employer truly wants to preserve the "right of choice" and hire American employees, it may do so by explicitly addressing mutual expectations when the employment relationship begins.

dismissal. If after five years he or she is replaced by a Japanese employee and brings suit, a court would have the difficult task of determining if he or she has waived his or her Title VII rights. Alternatively, if the Japanese company offered no defense but instead sought return of the extra $250,000, the court would have to decide whether the employee should repay a windfall he or she probably no longer possesses. These issues, however, would occur far less frequently than the fine distinctions guaranteed to arise under existing law. Identification of core employees depends only upon the application of the language "accountants and other technical experts, executive personnel, attorneys, agents and other specialists" to a job description. While lawyers can always find ambiguities in texts, the application of familiar words such as "accountant" to the probably limited or settled information bearing on a job description is unlikely to generate a wide range of novel or difficult issues. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469, 480 & n.46 (1990) (range of information combined with a "vague, ambiguous, or simply opaque linguistic formulation of the relevant rule . . . [is] likely to generate a range of arguments that a thoughtful lawyer might raise in a particular case").