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Abstract

This Note argues that the Third Circuit's definition for unpermitted national origin discrimination best balances the purposes of the FCN Treaty and Title VII, and that U.S. courts should focus on factors such as visa status and differential treatment of executives in applying this definition. Part I discusses the interaction of the FCN Treaty with Title VII. Additionally, Part I focuses on the prevailing doctrine articulated by U.S. circuit courts that the FCN Treaty's "of their choice" provision grants a right to discriminate only on the basis of citizenship, not on the basis of national origin. Part II analyzes the conflicting attempts by U.S. circuit courts to define the scope of national origin discrimination not protected by the FCN Treaty. Part III argues that the Third Circuit has developed the best definition for national origin discrimination and discusses factors that U.S. courts should consider in applying this definition. This Note concludes that U.S. courts evaluating Title VII claims against Japanese companies must focus on the circumstances surrounding employment decisions as well as the companies' decision-making processes in order to effectuate the purposes of the FCN Treaty and Title VII of the Civil Rights Act.

DEFINING DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN UNDER ARTICLE VIII(1) OF THE FRIENDSHIP TREATY BETWEEN THE UNITED STATES AND JAPAN

INTRODUCTION

Article VIII(1) of the United States-Japan Treaty of Friendship, Commerce and Navigation ("FCN Treaty")[1] permits Japanese companies in the United States to hire and fire executives "of their choice."[2] This provision often conflicts with Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits employment discrimination on the basis of national origin.[3] Under the prevailing doctrine articulated by U.S. circuit courts, Article VIII(1) allows Japanese companies to discriminate on the basis of citizenship, but does not permit discrimination on the basis of national origin.[4]

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1. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063 [hereinafter FCN Treaty].

2. *Id.* art. VIII(1). Article VIII(1) provides in part that "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." *Id.* The treaty allows both parties to "engage" executives of their choice in the territories of the other party, but only comes into conflict with Title VII when Japanese companies rely on Article VIII(1) as a justification for discriminatory practices. *Id.*

3. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703(a), 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e - 2000e-2(a)) (1988) [hereinafter Title VII]. Title VII provides that

> [i]t 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.

Id. at 42 U.S.C. §§ 2000e-2000e-2(a) (1988).

4. *Compare* Fortino v. Quasar Co., 950 F.2d 389, 391 (7th Cir. 1991) (stating that citizenship discrimination is permitted under FCN Treaty while discrimination on basis of national origin is impermissible) *and* MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988) (holding that Article VIII(1) of U.S.-Korea FCN Treaty permits discrimination on basis of citizenship, not national origin), *cert. denied*, 493 U.S. 944 (1989) *and* Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984) (holding that discrimination on basis of citizenship by non-U.S. companies is permissible

A problem arises in cases involving Japanese companies, however, because of the high correlation between national origin and citizenship in Japan. Usually, companies violate Title VII's prohibition against national origin discrimination, regardless of their intent, if their employment policies have a discriminatory effect with regard to national origin.[5] Intent to discriminate on the basis of national origin generally is not a prerequisite for finding that a company violates Title VII if the effect of employment policies leads to a statistical disparity in the national origins of a company's employees.[6]

The homogeneity of Japanese society, however, ensures that employment policies of Japanese companies that engage in citizenship discrimination permitted under the FCN Treaty will always create what appears to be a discriminatory effect in U.S. subsidiaries.[7] A finding of Title VII liability on the basis of this discriminatory effect would violate a Japanese company's FCN Treaty rights. U.S. circuit courts, therefore, generally agree that Japanese companies are not liable under Title VII for discriminatory effects, if such effects result from permitted citizenship discrimination.[8] However, because it is diffi-

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under FCN Treaty) *and* Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981) (holding that Article VIII(1) only permits discrimination on the basis of national origin when hired employee possesses bona fide occupational characteristics), *vacated on other grounds*, 457 U.S. 176 (1982) *with* Spiess v. C. Itoh & Co. (Am.), Inc, 643 F.2d 353 (5th Cir. 1981) (holding that the FCN Treaty grants Japanese companies an absoulte right to discriminate in favor of their own citizens, because "of their choice" language cannot be reconciled with anti-discrimination laws and treaty supersedes Title VII), *vacated on other grounds*, 457 U.S. 1128 (1982). Congress defines national origin as the country from which a person comes or the country from which such person's forbears came. *See* 110 CONG. REC. 2549 (1964); H.R. REP. No. 914, 88th Cong., 1st Sess. 87 (1963); *see also* Mack A. Player, *Citizenship, Alienage, and Ethnic Origin Discrimination in Employment Under the Law of the United States*, 20 GA. J. INT'L & COMP. L. 29, 38-39 (1990) (discussing definition of national origin).

5. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973) (holding that discriminatory purpose or effect constitutes national origin discrimination).

6. *See id.*; *see also MacNamara*, 863 F.2d at 1148.

7. *MacNamara*, 863 F.2d at 1147-48. Japanese society is homogeneous because 99 percent of Japanese citizens are of Japanese national origin. *See* Brief for Respondents and Cross Petitioners at 124-25, Sumitomo Shoji Am., Inc. v. Avigliano, 457 U.S. 176 (1982) (No. 80-2070, No. 81-24); *see also* Matthew Orebic, *Japanese Companies on United States Soil: Treaty Privileges vs. Title VII Restraints*, 9 HASTINGS INT'L & COMP. L. REV. 377, 382 (1986) (stating that 99 percent of Japan's population are of Japanese national origin).

8. *See Fortino*, 950 F.2d at 391 (stating that citizenship discrimination is permitted under FCN Treaty while discrimination on basis of national origin is not permitted); *see also MacNamara*, 863 F.2d at 1147 (holding that Article VIII(1) of FCN Treaty

cult to distinguish between citizenship and national origin discrimination, courts disagree as to what constitutes unpermitted national origin discrimination.[9]

Definitions of unpermitted national origin discrimination under Article VIII(1) of the FCN Treaty range from extremely narrow to moderate.[10] The U.S. Court of Appeals for the Second Circuit suggests a narrow definition that renders it almost impossible to find Japanese companies liable under Title VII.[11] In contrast, the U.S. Courts of Appeals for the Sixth and Third Circuits suggest moderate definitions that permit national origin discrimination only when prohibiting it would conflict with FCN Treaty rights.[12]

This Note argues that the Third Circuit's definition for unpermitted national origin discrimination best balances the purposes of the FCN Treaty and Title VII, and that U.S. courts should focus on factors such as visa status and differential treatment of executives in applying this definition. Part I discusses the interaction of the FCN Treaty with Title VII. Additionally, Part I focuses on the prevailing doctrine articulated by U.S. circuit courts that the FCN Treaty's "of their choice" provision grants a right to discriminate only on the basis of citizenship, not on the basis of national origin. Part II analyzes the conflicting attempts by U.S. circuit courts to define the scope of national origin discrimination not protected by the

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permits discrimination on basis of citizenship, not national origin); *Wickes*, 745 F.2d at 369 (holding that discrimination on basis of citizenship by non-U.S. companies is permissible under FCN Treaty).

9. *See* MacNamara v. Korean Airlines, 863 F.2d 1135, 1148 (3d Cir. 1988) (noting difficulty in distinguishing national origin and citizenship caused by homogeneity of Korean society), *cert. denied*, 493 U.S. 944 (1989); *see also* Brief for Respondents and Cross Petitioners at 124-25, Sumitomo Shoji Am., Inc. v. Avigliano, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24).

10. *See MacNamara*, 863 F.2d at 1147-48 (holding that unpermitted national origin discrimination must be defined moderately to effectuate the purposes of Treaty and Title VII); *Wickes*, 745 F.2d at 363 (holding that national origin discrimination only permitted when national origin and citizenship are synonomous); Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981) (holding Japanese company liable under Title VII unless employee possesses bona fide occupational qualification), *vacated on other grounds*, 457 U.S. 176 (1982); Spiess v. C. Itoh & Co. (Am.) Inc, 643 F.2d 353 (5th Cir. 1981) (holding that all national origin discrimination is permitted by FCN Treaty), *vacated on other grounds*, 457 U.S. 1128 (1982).

11. *Avigliano*, 638 F.2d at 552.

12. *See MacNamara*, 863 F.2d at 1147; *Wickes v. Olympic Airways*, 745 F.2d 363, 369 (6th Cir. 1984).

FCN Treaty. Part III argues that the Third Circuit has developed the best definition for national origin discrimination and discusses factors that U.S. courts should consider in applying this definition. This Note concludes that U.S. courts evaluating Title VII claims against Japanese companies must focus on the circumstances surrounding employment decisions as well as the companies' decision-making processes in order to effectuate the purposes of the FCN Treaty and Title VII of the Civil Rights Act.

I. *ARTICLE VIII(1) OF THE FCN TREATY ALLOWS JAPANESE COMPANIES TO DISCRIMINATE ON THE BASIS OF CITIZENSHIP, BUT NOT ON THE BASIS OF NATIONAL ORIGIN*

Since 1981, U.S. federal courts have debated the scope of the protection afforded to Japanese companies under the Treaty of Friendship, Commerce and Navigation between the United States and Japan.[13] Article VIII(1) of the FCN Treaty allows Japanese companies in the United States to "engage executives of their choice" in managing operations in the United States.[14] Title VII of the Civil Rights Act, on the other hand, limits employers' freedom of choice by proscribing discrimination on the basis of national origin.[15] A majority of U.S. circuit courts have held that FCN Treaties protect non-U.S. companies from Title VII liability for discrimination on the basis of citizenship, but not on the basis of national origin.[16] There-

13. *See* MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989); Wickes v. Olympic Airways, 745 F.2d (6th Cir. 1984); Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982); Spiess v. C. Itoh & Co. (Am.) Inc, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

14. *See* FCN Treaty, *supra* note 1, art. VIII(1); *see also* Jerry Choe, Comment, *Fortino v. Quasar Co.: The Availability of a Friendship, Commerce and Navigation Treaty Defense for the United States Subsidiary of a Japanese Parent Corporation*, 15 FORDHAM INT'L L. J. 1130 (1992) (discussing whether "to engage" provision allows Japanese companies to "have" or to "assign" executives of their choice managing their U.S. subsidiaries). Language similar to the "of their choice" provision appears in almost every commercial treaty between the United States and foreign governments. *See* 8 U.S.C. § 1101 (1988 & 1992 Supp.) which lists at least 25 other treaties that contain the "of their choice" provision.

15. Title VII, *supra* note 3 at §§ 2000e-e(2)(a).

16. *See* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); *MacNamara*, 863

fore, the type of discrimination permitted under Article VIII(1) is no longer an issue of contention among U.S. circuits.[17]

A. *Article VIII(1) of The FCN Treaty*

The purpose of the FCN Treaty is to encourage mutually beneficial trade and investment opportunities between the United States and Japan.[18] As one means of achieving this purpose, the FCN Treaty assures Japanese corporations conducting business in the United States that they will receive the same treatment as U.S. companies.[19] The FCN Treaty defines this equal treatment as "national treatment."[20]

Article VIII(1) of the FCN Treaty provides that both parties have a right to engage executives "of their choice."[21] U.S. negotiators, seeking security to manage overseas business in the face of anticipated anti-U.S. sentiment, insisted on the insertion of this language into the FCN Treaty.[22] The "of their

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F.2d 1135; *Wickes*, 745 F.2d 363; *Avigliano*, 638 F.2d at 559 (stating that Japanese companies are not exempt from Title VII's prohibition against national origin discrimination). *But see Spiess*, 643 F. 2d 353 (holding that FCN Treaty exempts Japanese companies from all U.S. employment discrimination laws concerning national origin discrimination).

17. *See Fortino*, 950 F.2d at 391; *MacNamara*, 863 F.2d at 1147-48; *Wickes*, 745 F.2d at 363. In fact, in the two most recent cases concerning Article VIII(1) of the FCN Treaty and Title VII, defendants conceded that only discrimination on the basis of citizenship is permitted under the Treaty. *See* Brief of Defendant-Appellant-Cross Appellee at 15-16, 22-23, Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) (Nos. 91-1123, 91-1197, 91-1564). While the question concerning which types of discrimination are permitted under the Treaty is settled, the scope of this protection is unclear. *See infra* notes 71-109 and accompanying text (discussing different ways that courts have attempted to define unpermitted national origin discrimination).

18. *See Hearing on Commercial Treaties Before the Subcomm. of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 27 (1953) [hereinafer *1953 Hearing*]; *see also* Jonathan B. Schwartz, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 949-50 (1979).

19. *See* FCN Treaty, *supra* note 1, art. XXII, ¶ 1 (defining "national treatment"); *see also* Sumitomo Shoji Am., Inc. v. Avigliano, 457 U.S. 176, 187-88 (1982) (noting that national treatment entitles Japanese companies to same rights as U.S. companies and subjects Japanese companies to same responsibilities as U.S. companies).

20. *See* FCN Treaty, *supra* note 1, art. XXII, ¶ 1. Article XXII, ¶ 1 of the FCN Treaty defines national treatment as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." *Id.* The Supreme Court clarified this definition noting that "[i]n short, national treatment of corporations means equal treatment with domestic corporations." *Sumitomo*, 457 U.S. at 188 n.18.

21. *See* FCN Treaty, *supra* note 1, art. VIII(1).

22. *See 1953 Hearing*, *supra* note 18, at 2-3. *see also Sumitomo*, 457 U.S. at 181 n.6;

choice" clause acts as a means of permitting U.S. companies to hire key U.S. personnel in Japan without legal interference from local laws that discriminate against aliens.[23] The clause also acts as a means for Japanese companies to engage Japanese citizens as managerial personnel in the United States.[24] Pursuant to the FCN Treaty, Japanese citizens, chosen to be executives by Japanese companies under Article VIII(1), may obtain special visas known as E-visas which allow them to work in the United States.[25]

If interpreted broadly, the phrase "of their choice" confers rights that transcend national treatment, because Japanese companies would be wholly exempt from laws to which U.S. companies are subject.[26] Indeed, to define "of their choice" in its broadest manner would grant Japanese companies an absolute right to choose executives in the United States, thus extending to both the Japanese parent, and possibly its U.S. subsidiary,[27] immunity from U.S. employment discrimination laws.[28]

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see Thomas A. Coulter, *Testing the United States' Commitment to International Law: The Conflict Between Title VII and Treaties of Friendship, Commerce and Navigation*, 25 WAKE FOREST L. REV. 287, 300 (1990) ("of their choice" provision inserted to protect U.S. businesses outside of United States). Many countries involved in FCN Treaty negotiations opposed insertion of the "of their choice" provision because they saw it as bestowing significant advantages to U.S. overseas ventures. Coulter, *supra*, at 300 n.168.

23. *See* Herman Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 386 (1956) (articulating reasons for Article VIII(1)); *see also* Herman Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM J. COMP. L. 229, 234 (1956) (discussing purposes of Treaty).

24. *See* FCN Treaty, *supra* note 1, art. VIII(1); *see also* Fortino v. Quasar Co., 950 F.2d 387, 391 (7th Cir. 1991) (noting that citizenship discrimination is protected by FCN Treaty).

25. 8 U.S.C. § 1101 (a)(15)(E) (1988 & 1992 Supp.). The State Department only grants E-visas pursuant to the terms of the FCN Treaty. *Id.* An E-visa holder is "an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national." 21 C.F.R. §§ 41.40, 41.41 (1990).

26. *See* Schwartz, *supra* note 18, at 951.

27. This note does not concern itself with the issue of whether a Japanese subsidiary may assert its parent's FCN Treaty rights. For a discussion of this issue, *see* Choe, *supra*, note 14.

28. *See* Sumitomo Shoji Am., Inc. v. Avigliano, 457 U.S. 176 (1982) (holding that wholly owned subsidiaries of Japanese corporations in United States cannot assert treaty protection meant for their parent company because these subsidiaries are incorporated in United States, not "companies of Japan").

The U.S. Supreme Court has repeatedly held that courts must construe treaties broadly and liberally,[29] stressing that a broad construction of treaty rights by U.S. courts encourages a broad allocation of treaty rights to U.S. companies doing business outside the United States.[30] The Supreme Court has firmly established that when a treaty and a subsequent statute conflict, the statute neither abrogates nor modifies the treaty unless Congress has clearly expressed such purpose.[31] It is an accepted principle of treaty construction, however, that U.S. courts will not intentionally construe a treaty in a manner inconsistent with a subsequent federal statute.[32] Title VII does not contain any language specifically aimed at modifying the FCN Treaty, but a broad construction of the FCN Treaty conflicts with the Civil Rights Act of 1964 because such a construction allows Japanese companies to discriminate on the basis of national origin.

B. *Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 prohibits employers from making employment decisions on the basis of an employee's national origin.[33] Generally, national origin refers to ancestry or the country from which a person's ancestors came.[34] The U.S. Supreme Court has held that an employer violates Title VII when its employment practices have a discriminatory purpose or effect.[35]

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29. *See* Asakura v. Seattle, 265 U.S. 332 (1924). The Court held that "treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Id.* at 342; *see* Bacardi Corp. v. Domenech, 311 U.S. 150 (1940); Factor v. Laubenheimer, 290 U.S. 276 (1933).

30. *See Asakura*, 265 U.S. at 342.

31. *See* Cook v. United States, 288 U.S. 102, 120 (1933) (holding that statutes only preempt treaty rights if congressional intent to do so is clear); *see also* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

32. *See* Baker v. Carr, 369 U.S. 186, 212 (1962) (holding that courts will not undertake to construe treaty in manner inconsistent with subsequent federal statute).

33. *See* Title VII, *supra* note 2, §§ 2000e-2000e-2(a). Title VII allows discrimination on the basis of national origin if the employer involved can prove that its decisions were based on the necessity of employees possessing bona fide occupational qualities. *Id.*

34. 110 CONG. REC. 2549 (1964); H.R. REP. No. 914, 88th Cong., 1st Sess. 87 (1963).

35. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (holding that discriminatory purpose or effect on basis of national origin violates Title VII).

The U.S. Congress originally enacted Title VII to eliminate discriminatory practices that create racially stratified job environments to the disadvantage of minority citizens.[36] The Supreme Court has subsequently recognized that Title VII protects U.S. citizens and resident aliens employed in the United States.[37] Although the statute prohibits discrimination on the basis of national origin, it contains an exception that allows companies to engage in national origin discrimination if their decisions are based on bona fide occupational qualifications ("BFOQ").[38] Under this BFOQ exception, a company may employ workers on the basis of national origin in positions for which knowledge and skills that only these employees possess are reasonably necessary to the successful operation of its business.[39] U.S. courts applying the BFOQ exception must determine whether employees hired on the basis of national origin possess characteristics which aggrieved employees do not possess.[40] Characteristics articulated as possibly essential to the successful operation of a company include language skills, knowledge of the parent company's culture and markets, and an understanding of that culture's unique business prac-

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36. *See* McDonnel Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (noting that Congress enacted Title VII to eliminate discrimination against minorities). The legislative history of Title VII indicates that the statute was aimed at improving conditions faced by minorities in the workplace. 110 CONG. REC. 2549 (1964).

37. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973). The Court stated that it "agree[d] that aliens are protected from discrimination under the Act." *Id.* The Supreme Court derived support for this proposition from Title VII which uses the term "any individual" and also from the exemption in § 702 which provides that Title VII "shall not apply to an employer with respect to the employment of aliens outside any state." *Id.* at 95 (quoting 42 U.S.C. § 2000e-1). The Court reasoned that this statement implies that Title VII "was clearly intended to apply with respect to the employment of aliens inside any state." *Id.*

38. *See* Title VII, *supra* note 3, § 2000 e-2(e). Title VII states that "it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of national origin in those certain instances where national origin is a bonafide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* § 703(e).

39. *See* Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 559 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

40. *Id.* These factors include the Japanese national's language skills and his knowledge of Japanese culture, products, markets, customs, and business practices. *Id.* at 559. The court also suggested that courts must look at the Japanese national's familiarity with the workings of the parent enterprise in Japan and acceptibility to those with whom the company does business. *Id.*

tices.[41]

C. *The Citizenship-National Origin Distinction in Case Law*

When employers engage in national origin discrimination that is not encompassed by the BFOQ exception, they often will assert Article VIII(1) of the FCN Treaty as a defense to Title VII claims. The U.S. Supreme Court has not directly addressed whether Article VIII(1) insulates companies headquartered in homogeneous countries from Title VII liability.[42] A majority of U.S. circuit courts, however, have held that the FCN Treaty does not fully insulate Japanese companies from Title VII.[43] In fact, only the U.S. Court of Appeals for the Fifth Circuit has held that Article VIII(1) exempts non-U.S. corporations from U.S. employment laws proscribing national origin discrimination.[44]

1. Supreme Court Precedent

In *Espinoza v. Farah Manufacturing Co.*,[45] the U.S. Supreme Court distinguished between discrimination on the basis of citizenship and discrimination on the basis of national origin. Considering a Title VII claim brought against a U.S. employer by Mexican citizens, the Court held that Title VII does not make it illegal to discriminate on the basis of citizenship.[46] The Court reasoned that because "national origin" refers to the country from which a person's ancestors came, citizenship in a country, in itself, is not synonymous with national origin.[47] The Court further stated, however, that Title VII prohibits dis-

41. *Id.*

42. *See* Sumitomo Shoji Am., Inc. v. Avigliano, 457 U.S. 176, 180 (1982).

43. *See* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989); Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984); Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

44. Spiess v. C. Itoh & Co. (Am.), Inc, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982). The Fifth Circuit held that Article VIII's "of their choice" language could not be reconciled with employment laws prohibiting national origin discrimination. *Id.* Because treaty obligations prevail in a conflict with domestic legislation, the Fifth Circuit held that the FCN Treaty fully insulates Japanese companies from U.S. employment laws prohibiting national origin discrimination. *Id.*

45. 414 U.S. 86 (1973).

46. *Id.* at 89-90.

47. *Id.* at 88.

crimination on the basis of citizenship whenever the purpose or effect of the actions is to discriminate on the basis of national origin.[48] Although this distinction remains firmly rooted, the boundaries between citizenship and national origin are blurred in cases concerning companies headquartered in countries with homogeneous populations.

In *Sumitomo Shoji Am., Inc. v. Avigliano*, the U.S. Supreme Court considered a Title VII claim against a subsidiary of a Japanese company.[49] The Court, however, did not consider the types of discrimination permitted under Article VIII(1) of the FCN Treaty because this issue was not included in the questions presented to the Court on appeal.[50] The Supreme Court's analysis, however, strongly suggests that Article VIII(1) is not intended to confer an immunity on non-U.S. companies from U.S. laws.[51] In dictum, the Court stated that the FCN Treaty is only intended to assure that Japanese companies have the right to conduct business in the United States exempt from claims of discrimination on the basis of alienage.[52]

2. U.S. Circuit Court Precedent

Although the Supreme Court's language in *Sumitomo* was

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48. *Id.*

49. 457 U.S. 176 (1982). The Court, in *Sumitomo*, focused on whether a subsidiary incorporated in the United States could assert its parent's FCN Treaty rights. *Id.* The Court held that U.S. subsidiaries of Japanese companies, incorporated in the United States, could not assert FCN Treaty rights as a defense to Title VII claims as these subsidiaries are not Japanese companies. *Id.* at 189-90. The Supreme Court "expressed no view," however, on whether a subsidiary could invoke any Article VIII(1) rights of its Japanese parent. *See id.* The only circuit court to consider the issue since *Sumitomo* is the U.S. Court of Appeals for the Seventh Circuit, which held that when a Japanese parent company dictates a subsidiary's discriminatory conduct, the subsidiary can assert its parent's Treaty rights. *See* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); *see also* Choe, Comment, *supra* note 14, at 1144 (discussing subsidiary right to assert parent's treaty rights).

50. *Id.* at 180.

51. *See Sumitomo*, 457 U.S. at 180 n.4. The Supreme Court did not consider the issue of the scope of the "of their choice" provision and Title VII because the issue was "not included in the questions certified for interlocutory review by the Court of Appeals and was not set forth or fairly included in the questions presented for review by [the Supreme] Court." *Id.* However, in dictum, the Court noted that "the purpose of the 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." *See id.* at 187-88.

52. *Id* at 187-88.

merely dictum, U.S. circuit courts considering Title VII claims against companies headquartered in countries protected by "of their choice" language have uniformly concurred in the Court's reasoning that the FCN Treaty permits discrimination on the basis of citizenship but not on the basis of national origin.[53] While the Fifth Circuit continues to view the FCN Treaty and Title VII as irreconcilable, it has not addressed the question of the scope of Article VIII(1) since the Supreme Court's decision in *Sumitomo*.[54] The other three circuits addressing the issue have attempted to harmonize the competing documents by focusing on the purposes of both.[55]

In *Wickes v. Olympic Airways*, the U.S. Court of Appeals for the Sixth Circuit held that the "of their choice" provision of an FCN Treaty between Greece and the United States does not provide a blanket immunity from U.S. employment laws.[56] The Sixth Circuit further stated that FCN Treaties entitle non-U.S. companies to discriminate on the basis of citizenship.[57] The court then held that non-U.S. companies enjoy an absolute right to discriminate on the basis of national origin only when they can show that citizenship discrimination and na-

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53. *See* Whitney v. Robertson, 124 U.S. 190 (1888); *see also* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989); Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984); Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

54. *See* Spiess v. C. Itoh & Co. (Am.), Inc, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982). Some academics argue that the Second Circuit also found that the FCN Treaty and the statute are irreconcilable as it held that the only way to give effect to both documents was to rely on the Bona fide Occupational Qualification [hereinafter BFOQ] exception in Title VII. *See Avigliano*, 638 F.2d at 559. However, reliance on these exceptions allowed the court to reconcile what it saw as a conflict between the treaty and statute in order to effect the purposes of both. *Id.*

55. *See* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert denied*, 493 U.S. 944 (1989); Wickes v. Olympic Airways, 745 F.2d (6th Cir. 1984); *see also* Whitney v. Robertson, 124 U.S. 190 (1888) (noting that courts must attempt to harmonize competing documents by attempting to achieve purposes of each). In *Avigliano*, the Second Circuit did not need to balance the purposes of the FCN Treaty and Title VII as the BFOQ exception served as a means of avoiding the conflict between these competing legislative pronouncements. *See Avigliano*, 638 F.2d at 559.

56. 745 F.2d 363, 369 (6th Cir. 1986) (holding that Article VIII does not provide complete exemption from U.S. employment laws).

57. *Id.* at 365-69.

tional origin discrimination are identical.[58]

The Third and Seventh Circuits affirmed this distinction between protected discrimination on the basis of citizenship and prohibited national origin discrimination.[59] In *MacNamara v. Korean Airlines*, the U.S. Court of Appeals for the Third Circuit held that the U.S.-Korea FCN Treaty, which contains the same language as the U.S.-Japan FCN Treaty, allows Korean companies to discriminate only on the basis of citizenship.[60] The Third Circuit agreed with the Sixth and Second Circuits that the Treaty was not intended to provide non-U.S. businesses with a complete exemption from employment discrimination laws.[61]

The Third Circuit solved the problem caused by the high correlation between citizenship and national origin in homogeneous countries by defining two types of national origin discrimination—disparate impact discrimination and disparate treatment discrimination.[62] Disparate impact discrimination occurs when a company's employment practices have a discriminatory effect, even if such effect is unintended.[63] Disparate treatment discrimination occurs when a company's em-

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58. *Id.* at 368.

59. *See* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); MacNamara v. Korean Airlines, 863 F.2d 1135 (3rd Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

60. 863 F.2d at 1147-48 (affirming the Sixth Circuit's articulation of an Article VIII(1) distinction between citizenship and national origin discrimination). The Third and Sixth Circuits used similar reasoning even though the companies involved in each case are headquartered in different countries. *MacNamara*, 863 F.2d at 1147; Wickes v. Olympic Airways, 745 F.2d 363, 368 (6th Cir. 1984). The fact that Korean Airlines is headquartered in Korea, as opposed to Olympic Airways which is headquartered in Greece, did not alter the Third Circuit's approach because the "of their choice" provision caused analogous problems in both cases. *Id.*

61. *Id.* "Article VIII(1) was not intended to provide foreign business 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).

62. *MacNamara*, 863 F.2d at 1147-48. The Third Circuit took this distinction from the Supreme Court's holding in *Espinoza* that anything having a discriminatory purpose or effect violates Title VII. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). The circuit court then incorporated situations that the Sixth Circuit had articulated where mere citizenship discrimination causes a disparate impact. *Id.* at 94. These three cases highlight the evolutionary process of the Third Circuit's standard for determining if employment policies constitute unpermitted national origin discrimination. *See* MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied* 493 U.S. 944 (1989); *Wickes*, 745 F.2d 363; *Espinoza*, 414 U.S. 86.

63. *MacNamara*, 863 F.2d at 1147. Such an effect is shown via a statistical disparity of the national origins of employees working in the companies in question. *Id.*

ployment practices stem from a discriminatory purpose.[64] Generally, a company violates Title VII if its employment policies have a discriminatory effect or if these policies are prompted by discriminatory purpose.[65] Under the Third Circuit standard, however, disparate impact alone will not constitute a violation of Title VII absent a showing of discriminatory purpose.[66]

In *Fortino v. Quasar Co.*,[67] the U.S. Court of Appeals for the Seventh Circuit treated the citizenship-national origin distinction as an established legal principle. The court stated that the FCN Treaty permits discrimination on the basis of citizenship, but not national origin.[68] The Seventh Circuit, however, chose not to enter the debate concerning whether Title VII confers a blanket immunity upon Japanese companies because it found no evidence of discrimination by the Japanese parent "save for what is implicit in wanting your own citizens to run your foreign subsidiary."[69] However, in making its original statement that "the treaty permits discrimination on the basis of citizenship, not of national origin," the court inferred that a blanket immunity from U.S. employment discrimination laws is impossible.[70] Although it impliedly answered the question concerning the type of discrimination permitted by the FCN Treaty, the Seventh Circuit left open the question of the scope of im-

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64. *See* MacNamara v. Korean Airlines, 863 F.2d 1135, 1147 (1988), *cert. denied*, 493 U.S. 944 (1989).

65. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973) (stating that discriminatory purpose or effect violates Title VII); *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (noting that unintentional discriminatory impact violates Title VII); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (stating that Title VII extends to policies that are fair in form yet discriminatory in nature). Therefore, "Title VII liability can be found where facially neutral employment practices have a discriminatory effect or a disparate impact on protected groups without proof that the employer adopted those practices with a discriminatory motive." *MacNamara*, 863 F.2d at 1148.

66. *See MacNamara*, 863 F.2d at 1148.

67. 950 F.2d 389, 391 (7th Cir. 1991).

68. Fortino v. Quasar Co., 950 F.2d 389, 391 (7th Cir. 1991). However, the Court of Appeals later stated that because the facts before it did not constitute national origin discrimination, it did not have to "choose sides" on the issue of whether Article VIII(1) conferred a blanket immunity against suits brought on the basis of Title VII. *Id.*

69. *See Fortino*, 950 F.2d at 393.

70. *Fortino*, 950 F.2d at 391-92.

permissible national origin discrimination by failing to define the situations in which Japanese companies violate Title VII.

II. *U.S. CIRCUIT COURTS DISAGREE CONCERNING WHAT CONSTITUTES NATIONAL ORIGIN DISCRIMINATION*

U.S. circuit courts have had difficulty defining the conduct that constitutes national origin discrimination in cases involving companies headquartered in homogeneous countries.[71] These courts have utilized three methods to define unpermitted national origin discrimination. The Fifth Circuit has held that the FCN Treaty permits all types of national origin discrimination.[72] The Second Circuit, taking a slightly more restrictive view of the FCN Treaty, narrowly defined unpermitted national origin discrimination by relying on a broad interpretation of the BFOQ exception to Title VII.[73] Most recently, the Third Circuit has adopted a moderate standard which mandates that a court should impose liability on Japanese companies only when the plaintiff can prove disparate treatment.[74]

A. *The Fifth Circuit View: Japanese Companies Are Exempt From U.S. Employment Discrimination Laws*

In *Spiess v. C. Itoh & Co. (Am.), Inc.*,[75] the Fifth Circuit held

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71. *See* MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989); *see also* Wickes v. Olympic Airways, 745 F.2d (6th Cir. 1984). In a "normal" Title VII case the court would find the company liable if the company's practices have a discriminatory purpose or effect. *See* Espinoza v. Farah Mfg., 414 U.S. 86, 88 (1973). However, Japanese companies will invariably make decisions that create a discriminatory effect if they choose only Japanese citizens as executives, because those executives will also be of Japanese national origin. *See MacNamara*, 863 F.2d at 1147. If a Japanese company exercises a preference for Japanese Americans over other United States citizens, this is prima facie evidence of a Title VII violation. *See* Fortino v. Quasar Co., 950 F.2d 387, 391 (7th Cir. 1991). However, usually the issue before courts involves companies where Japanese American executives are not involved.

72. *See* Spiess v. C. Itoh & Co. (Am.), Inc, 643 F.2d 353, 362 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

73. See Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). This burden is easy to satisfy because it suggests a relaxed interpretation of the already broadly phrased BFOQ factors. *Id.* at 559.

74. *See MacNamara*, 863 F.2d at 1148.

75. 643 F.2d 353, 362 (5th Cir. 1981). The Fifth Circuit stated that "the right of Japanese companies to choose essential personnel is a right to maintain Japanese

that Article VIII(1) of the FCN Treaty shields Japanese companies making management personnel decisions from U.S. liability for violations of employment laws proscribing national origin discrimination.[76] The Fifth Circuit stressed that Title VII's ban on national origin discrimination contradicts a Japanese company's Article VIII right to choose its own executives.[77] To resolve this conflict, the Fifth Circuit held that even though the Civil Rights Act was enacted after the FCN Treaty, no evidence exists to suggest that Congress intended that the Civil Rights Act would preempt the FCN Treaty.[78] The court,

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control of overseas investment. To make the right subject to Title VII . . . would render its inclusion in the treaty virtually meaningless." *Id.*

76. The Fifth Circuit held that the "[a]rticle VIII(1) 'of their choice' provision allows Japanes companies to discriminate in favor of their citizens." *Id.* at 362. The court also stated that treaty obligations prevail over Title VII when the two conflict. *Id.* at 361. The court then noted that its holding applies in the context of situations involving national origin discrimination. *Id.* at 362 n.8. This creates a problem because while the court speaks of a right to discriminate on the basis of citizenship, its analysis appears to be tailored to granting an absolute right to discriminate on the basis of national origin. *Id.*

This problem exists because the Fifth Circuit made no attempt to distinguish citizenship from national origin. In fact, it used the terms interchangeably in its opinion. *Compare id.* at 363 (stating that holding conferred right to choose citizens) *with id.* at 363 n.8 (noting that holding can be used to apply in the context of national origin discrimination). In *MacNamara*, the Third Circuit interpreted the Fifth Circuit's holding to "fully . . . insulate [a] company from domestic anti-discrimination laws with respect to the hiring of executives." 863 F.2d 1135, 1139 (3d Cir. 1988). This view is consistent with that expressed by the dissent in *Spiess*, which notes that "the majority opinion concludes that C. Itoh-America is exempt from the requirements of Title VII of the Civil Rights Act of 1964." *Spiess*, 643 F.2d at 363 (Reavley, J., dissenting). These two statements evidence the strong trend to interpret the Fifth Circuit's holding as granting Japanese employers a right to discriminate in favor of their own nationals without the impediment of U.S. laws that proscribe discrimination on the basis of national origin. *See* 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, 772 (1989) (discussing exemption granted by Fifth Circuit); *see also MacNamara*, 863 F.2d at 1139.

77. 643 F.2d at 362.

78. *See* Spiess v. C. Itoh & Co. (Am.), Inc, 643 F.2d 353, 362 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982). In *Whitney v. Robertson*, the Supreme Court held that when a treaty and statute are inconsistent, the one last in date controls provided that the stipulation of the treaty on the subject is self-executing. 124 U.S. 190 (1888). The Fifth Circuit looked to *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 1021 (1963), in which the Supreme Court held that subsequent federal legislation will invalidate treaty obligations if the congressional intent to do so is clearly expressed. However, without this clear expression, the Spiess court "decline[d] to abrogate the American government's solemn undertaking with respect to a foreign national." *Spiess*, 643 F.2d at 362.

therefore, held that it could not undermine the FCN Treaty without a legislative pronouncement.[79] Finally, the court stated that if the signatories of the FCN Treaty intended the "of their choice" provision to be limited, the FCN Treaty language would have been tailored to effectuate that purpose.[80]

B. *The Second Circuit View: Japanese Companies Have Little Title VII Liability*

The Second Circuit, taking a slightly less absolute view of the FCN Treaty, framed a narrow definition of national origin discrimination that makes it almost impossible to hold Japanese companies liable under Title VII.[81] In *Avigliano v. Sumitomo Shoji Am. Inc.*, the Second Circuit held that the only way to reconcile the FCN Treaty and the Civil Rights Act was to rely on a broad construction of the BFOQ exception to Title VII.[82] Under this exception, a company may employ workers on the basis of national origin "in positions where such employment is reasonably necessary to the successful operation of its business."[83] Courts applying this BFOQ exception must examine the qualifications of employees hired on the basis of national origin as compared to the employees whose jobs they are taking.[84] To ensure that its employment decision receives BFOQ status, a company usually must provide evidence of employee characteristics that satisfies a narrow interpretation of the factors set out in the statute.[85] Although courts usually construe the BFOQ exception narrowly, the Second Circuit

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79. *Spiess*, 643 F.2d at 362.

80. *Id.*

81. Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

82. *Id.* at 559.

83. *Avigliano*, 638 F.2d at 559.

84. *Id.* These factors include the Japanese national's language skills and his knowledge of Japanese culture, products, markets, customs and business practices. The court also suggested that courts must look at the Japanese national's familiarity with the workings of the parent enterprise in Japan and acceptibility to those with whom the company does business. *See id.* at 559; *see also* Title VII, *supra* note 3 (articulating BFOQ exception).

85. Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 559 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). "The BFOQ exception of Title VII is to be construed narrowly in the normal context." *See id.*; *see also* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (stating that narrow construction of BFOQ factors must be used in "normal" cases).

held that it must be construed broadly in cases involving companies headquartered in countries that are signatories of treaties containing the "of their choice" provision.[86] The Second Circuit noted that a broad interpretation was a means of avoiding the imposition of an undue burden on Japanese employers.[87]

C. *The Sixth and Third Circuit Views: A Moderate Definition Leads To Some Liability For Japanese Companies Under Title VII*

The moderate definition of conduct that constitutes unpermitted national origin discrimination by Japanese companies has undergone an evolutionary process. First, the Sixth Circuit held that Japanese companies do not violate Title VII if these companies can show that citizenship and national origin are synonymous. The Third Circuit relied on this reasoning in holding that Japanese companies do not violate Title VII without a showing of discriminatory motivation on the part of the company.[88]

In *Wickes v. Olympic Airways*, the Sixth Circuit examined a commercial treaty with Greece containing the "of their choice" provision.[89] In *Wickes*, plaintiffs brought suit under Michigan anti-discrimination laws alleging that Olympic Airways engaged in discriminatory employment practices.[90] Finding that the treaty in question did not conflict with Michigan law, the court saw no reason to invoke something akin to Title VII's BFOQ exception.[91] Instead, the court held that because citi-

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86. *Avigliano*, 638 F.2d at 559. The court stated that "as applied to a Japanese company enjoying rights under Article VIII of the Treaty it must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States." *Id.* Language similar to the "of their choice" provision appears in almost every commercial treaty between the United States and foreign governments. *See* 8 U.S.C. § 1101 which lists at least 25 other treaties that contain the "of their choice" provision.

87. *Avigliano*, 638 F.2d at 559. As the BFOQ exception is already quite broadly phrased, an even broader interpretation with respect to companies protected by an FCN Treaty is likely to provide a relatively relaxed burden of proof.

88. MacNamara v. Korean Airlines, 863 F.2d 1135, 1148 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

89. 745 F.2d 363 (6th Cir. 1984).

90. *Wickes*, 745 F.2d at 364-65. *Wickes* was litigated in a federal court because of an Age Discrimination in Employment Act [hereinafter ADEA] claim brought together with the claim under the Michigan anti-discrimination statute. *Id.*

91. *Id.*

zenship, in and of itself, is not a classification listed in Michigan's statute, Olympic Airways could legitimately hire, promote or fire Greek nationals on account of their citizenship.[92] The court further stated that if a non-U.S. company can show that citizenship is equivalent to national origin, a finding of Title VII liability on the basis of discriminatory effect would preempt FCN Treaty rights. Therefore, to protect the FCN Treaty rights of non-U.S. companies, the court held that the U.S.-Greece FCN Treaty must prevail over anti-discrimination laws in such cases.[93] The Sixth Circuit failed to offer a means of determining the conduct that constitutes national origin discrimination when a defendant cannot prove that citizenship and national origin are synonymous.[94]

In *MacNamara v. Korean Airlines*, the U.S. Court of Appeals for the Third Circuit adopted the Sixth Circuit's reasoning and defined unpermitted national origin discrimination in a manner that would not infringe upon the rights guaranteed by the FCN Treaty.[95] The court recognized that citizenship discrimination and national origin discrimination sometimes are synonymous.[96] In these instances, the court noted, the FCN Treaty must prevail.[97] The court held, however, that Article VIII(1) of the FCN Treaty will not shield non-U.S. companies that intentionally discriminate on the basis of national origin from Title VII liability.[98]

In *MacNamara*, the Third Circuit held that a finding of national origin discrimination based solely on a theory of disparate impact cannot be reconciled with Article VIII(1) of the

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92. *Id.*

93. Wickes v. Olympic Airways, 745 F.2d 363, 369 (6th Cir. 1984). In *Espinoza*, the Supreme Court distinguished citizenship discrimination from national origin discrimination. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). However, in cases involving homogeneous countries the distinction between the two becomes blurred. MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir.), *cert. denied* 493 U.S. 944 (1988).

94. *Wickes*, 745 F.2d at 368.

95. 863 F.2d 1135 (3rd Cir. 1988), *cert. denied*, 493 U.S. 944 (1989). *MacNamara* concerned a U.S.-Korea Friendship Treaty with language identical to the U.S.-Japan treaty. *See id*; *see also* Brief for the United States as *Amicus Curiae* at 25, MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741).

96. *MacNamara*, 863 F.2d at 1148.

97. *Id.*

98. *Id.* at 1147-48.

FCN Treaty.[99] The court noted that it should not find non-U.S. companies liable for disparate impact when parent companies merely intend to exercise their FCN Treaty right to engage citizens of their own country as executives in their U.S. subsidiaries.[100]

The Third Circuit holding arose from its recognition that a problem results in a disparate impact case involving a non-U.S. company headquartered in a homogeneous country where citizenship and national origin are highly correlated.[101] If a non-U.S. company based in a homogeneous country wants to control the company's U.S. subsidiary, the parent company will invariably hire executives of the same national origin as the national origin of the parent company's management.[102] Regardless of the parent company's intent, this hiring decision appears to have a discriminatory effect and, therefore, violates Title VII.[103] To find the company in violation of Title VII when the company makes decisions on the basis of citizenship, however, deprives these companies of their FCN Treaty rights. The court held, therefore, that for employment decisions that cause disparate impact, liability must not be imposed on non-U.S. parent companies that want citizens of the homogeneous country in which the parent company is located to run their U.S. subsidiaries.[104]

The other type of national origin discrimination set forth by the Third Circuit involves disparate treatment of employees.[105] Under the disparate treatment theory, a court must impose liability on a non-U.S. company when the court affirmatively finds that the employer was not simply exercising its Article VIII(1) right to discriminate on the basis of citizenship.[106] To determine whether the employer was simply exercising its Article VIII(1) treaty right, the court should utilize a substantive standard that partially relies on statistical evidence show-

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99. MacNamara v. Korean Airlines, 863 F.2d 1135, 1148 (3rd Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

100. *Id.* at 1147.

101. *Id.* at 1147-48.

102. *Id.*

103. *Id.*

104. MacNamara v. Korean Airlines, 863 F.2d 1147, 1148 (1988), *cert. denied*, 493 U.S. 944 (1989).

105. *Id.* at 1148.

106. *See MacNamara*, 863 F.2d at 1148.

ing disparate impact.[107] Disparate impact alone, however, will not suffice as proof of national origin discrimination.[108] This standard allows companies to utilize their Article VIII rights as justification for the disparate impact of their hiring decisions, thereby avoiding an incorrect finding that the company violated Title VII. In the same light, when a company cannot provide satisfactory reasons for disparate impact, the court must find that the company violates Title VII.[109]

III. *COURTS SHOULD ADOPT THE THIRD CIRCUIT'S MODERATE DEFINITION OF UNPERMITTED NATIONAL ORIGIN DISCRIMINATION*

The difficult issue now perplexing the courts concerns the formulation of a definition of conduct that constitutes impermissible national origin discrimination in cases involving companies headquartered in homogeneous countries. The Third Circuit's moderate standard imposes Title VII liability on Japanese companies only when the plaintiff can prove discriminatory motives.[110] This moderate standard, while not impossible to meet, protects FCN Treaty rights and furthers the purposes of U.S. employment discrimination laws. The two other standards suggested by U.S. circuit courts are inadequate because under each of these standards Japanese companies obtain a broad right with which to circumvent U.S. employment laws in their hiring decisions. The Fifth Circuit's standard contradicts U.S. Supreme Court and U.S. federal circuit court precedent by holding that the FCN Treaty permits all types of national origin discrimination.[111] The Second Circuit's definition is flawed as interpreting the already broad BFOQ exception even more broadly makes it increasingly difficult for courts to enforce Title VII against Japanese companies.[112]

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107. *Id.*

108. MacNamara v. Korean Airlines, 863 F.2d 1135, 1148 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

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

110. *See MacNamara*, 863 F.2d at 1147.

111. *See* Spiess v. C. Itoh & Co. (Am.), Inc, 643 F.2d 353, 362 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

112. See Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). This burden is easy to satisfy because it suggests a relaxed interpretation of the already broadly phrased BFOQ factors. *Id.* at 559.

A. *The Third Circuit's Definition of Unpermitted National Origin Discrimination Best Balances the Purposes of the FCN Treaty and Title VII*

1. An Overbroad Definition of Unpermitted National Origin Discrimination Would Deprive Japanese Companies of Their FCN Treaty Rights

Although no U.S. circuit court has suggested an extremely broad definition of unpermitted national origin discrimination by a Japanese company, one could argue that a broad reading should be given to Title VII to further U.S. domestic policies. Under such a definition, Japanese companies would be subject to the "discriminatory purpose or effect" test articulated by the Supreme Court in *Espinoza*.[113] However, this extremely broad definition of unpermitted national origin discrimination is hardly ever raised because it is ineffective in cases involving U.S. subsidiaries of parent companies in a homogeneous country. Finding a Japanese company liable for discriminatory effects, without showing that the company had a discriminatory purpose, violates the FCN Treaty rights of the company because Japan's homogeneous society insures that choosing executives on the basis of citizenship will have a discriminatory effect.[114] Therefore, a broad definition of unpermitted national origin discrimination undermines the prevailing view among U.S. federal appellate courts that the FCN Treaty authorizes citizenship discrimination, because such an interpretation almost always leads to a finding of liability under Title VII.[115]

2. The Third Circuit's Definition of Unpermitted National Origin Discrimination Effectuates the Purposes of the FCN Treaty and Title VII

The Third Circuit's reliance on a distinction between dis-

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113. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 92-93 (1973).

114. *See* MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989); *see also* Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984).

115. *MacNamara*, 863 F.2d at 1147-48. In these days of Japan bashing some might prefer this result, but proponents of this view must remember that the rights conferred and the interpretation of FCN treaties are reciprocal for American companies abroad. *See* Brief for the United States as *Amicus Curiae*, MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741).

parate impact liability and disparate treatment liability provides the best proposed means of determining the conduct that constitutes unpermitted national origin discrimination.[116] The Third Circuit defines unpermitted national origin discrimination as conduct that evinces disparate treatment.[117] Under this view, the FCN Treaty protects employment policies of Japanese companies that produce discriminatory effects, in the absence of proof of disparate treatment.[118] Discrimination on the basis of citizenship presumably falls within the disparate impact category unless aggrieved employees, or aggrieved former employees, can show that the company was motivated by discriminatory purposes.[119] This approach effectively preserves FCN Treaty rights but still enables plaintiffs to prove that Japanese companies impermissibly discriminate on the basis of national origin. The Third Circuit, however, did not articulate the factors which should be employed, along with empirical evidence of disparate impact, to prove unpermitted national origin discrimination.[120]

B. *The Second Circuit's Reliance on a Broad Application of the BFOQ Factors Makes a Finding of Title VII Liability Almost Impossible*

In *Avigliano*, the Second Circuit suggested that the BFOQ exception, which is normally construed narrowly, must be construed in a broad manner to assure that courts give "due weight" to FCN Treaty rights.[121] However, the scope of each

116. *MacNamara*, 863 F.2d at 1147-48.

117. *Id.* Disparate treatment is another way of saying discriminatory motive or purpose. *Id.* The Third Circuit's standard is not only applicable to Japan but instead to all homogeneous countries as evidenced by the fact that *MacNamara* dealt with a Korean company but relied on cases involving the U.S.-Japan FCN Treaty. *Id.* at 1146-48.

118. *MacNamara*, 863 F.2d at 1148.

119. MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989). This confers a greater right to discriminate on Japanese companies than their U.S. counterparts. U.S. companies can be found guilty of a Title VII violation based solely on a showing of disparate impact. *Id.* at 1146-7. The United States is such a heterogeneous culture that disparate impact does not necessarily flow from citizenship discrimination. Thus, if every company were subject to the same standards, U.S. companies woud have an advantage because these companies would be less likely to be found in violation of Title VII.

120. *MacNamara*, 863 F.2d at 1148.

121. Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 559 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

factor in the list that the Second Circuit articulated to help determine whether Japanese employment practices qualify under the exception is already quite broad.[122] Interpreting these factors even more broadly makes it very easy for a Japanese company to argue that national origin is a bona fide occupational quality because of the commonly held feeling in Japan that only Japanese persons can understand Japanese customs and business practices.[123] A relaxed burden of proof, arising from a broad interpretation of the BFOQ factors, would undermine the citizenship-national origin distinction by making it almost impossible for a court to find that Japanese companies violate Title VII.

C. *The Fifth Circuit's Complete Exemption from U.S. Employment Discrimination Laws for Japanese Companies Violates the Purposes of Title VII of the Civil Rights Act of 1964*

The Fifth Circuit's absolute exemption of Japanese companies from Title VII liability contravenes the prevailing doctrine among the U.S. circuit courts that the FCN Treaty only permits discrimination on the basis of citizenship, not national origin.[124] The creation of this distinction between citizenship discrimination and national origin discrimination implies that situations must arise in which Japanese companies violate Title VII. If the FCN Treaty was intended to confer a complete exemption from U.S. employment laws, there would be no need to distinguish between types of discrimination because companies would be exempt from Title VII liability regardless of the type of discrimination involved.

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122. *Id.* at 559. The factors listed by the Second Circuit are: "(1)Japanese linguistic and cultural skills, (2)knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and working of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business." *Id.*

123. *See* TIM ERNST & TOMMY UEMATSU, GAIJIN 9 (1987). Japanese commonly tell foreigners who inquire about Japanese customs or society that foreigners are unable to understand such customs because they are not Japanese. *Id.* A variation of this idea is sometimes advanced by Japanese companies as evidence of the necessity of choosing persons of Japanese national origin as executives. *See Frontline* (PBS Television Broadcast, Feb. 18, 1992) (noting importance of Japanese nationality to employment practices of Japanese companies).

124. *See* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

U.S. Supreme Court precedent also counsels against the Fifth Circuit's holding that the Treaty completely exempts Japanese companies from Title VII's prohibition against national origin discrimination.[125] The Supreme Court originally distinguished between citizenship discrimination and discrimination on the basis of national origin in *Espinoza*.[126] Proponents of an absolute exemption from Title VII for Japanese companies argue that the *Espinoza* distinction is not relevant in cases involving parent companies from homogeneous countries protected by FCN treaties because the Court, in *Espinoza*, made its distinction on the basis of U.S. society where citizenship and national origin are easily distinguished.[127] The *Espinoza* distinction, however, has been applied by the Third, Sixth and Seventh Circuits to cases concerning parent companies located in homogeneous countries.[128] The Third Circuit adopted the Supreme Court's reasoning in *Espinoza* as evidence that courts can distinguish discrimination on the basis of citizenship from discrimination on the basis of national origin.[129]

Another factor that counsels against a blanket immunity from employment discrimination laws for Japanese companies is the Supreme Court's statement in *Sumitomo* that the FCN Treaty is only intended to assure that Japanese companies have the right to conduct business in the United States exempt

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125. *See* Sumitomo Shoji Am., Inc. v. Avigliano, 457 U.S. 176 (1982) (noting that FCN Treaty does not give Japanese companies an absolute exemption from Title VII); *see also* Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

126. 414 U.S. 86.

127. Brief for Respondents and Cross-Petitioners at 124-25, Sumitomo Shoji Am., Inc. v. Avigliano, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24). With a homogenous society it is difficult to make this distinction, but in the United States citizens come from so many different ancestral groups that a distinction is easily made. *Id.* In *Espinoza v. Farah Mfg. Co.*, the Supreme Court upheld a company's right to discriminate on the basis of citizenship as a U.S. citizenship requirement will not eliminate the possibility of a company made up of employees of a diversity of national origins. 414 U.S. at 95. However, a Japanese citizenship requirement creates an extraordinary homogeneous work force. *Id.*

128. *See* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); MacNamara v. Korean Airlines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989); Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984).

129. *See MacNamara*, 863 F.2d at 1147. "Inherent in the [Supreme] Court's reading of Title VII and its history, is a Congressional 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.*

from claims of discrimination on the basis of alienage.[130] The Supreme Court also stated that the purpose of the Treaty is not to give non-U.S. companies greater rights than domestic companies.[131] This language strongly suggests that the Treaty was not meant to invalidate all Title VII claims.[132]

Others have argued that the *Espinoza* distinction cannot be applied in cases involving non-Japanese employees' assertions of discrimination against a Japanese company.[133] This argument hinges on Title VII's stated purpose of eliminating discriminatory practices that create racially stratified job environments to the disadvantage of minority citizens, not to assure non-Japanese of executive postitions in Japanese companies.[134] Proponents of this argument can assert that no stigma attaches in U.S. society to being non-Japanese, and therefore Title VII does not apply to this group. Although the U.S. Congress enacted Title VII to solve problems experienced by minorities, the Civil Rights Act can still protect a victimized member of the majority. Title VII clearly protects individuals who are subject to discrimination on the basis of national origin regardless of their membership in a group that normally faces persecution.

D. *Factors That U.S. Courts Should Consider When Evaluating Title VII Claims Against Japanese Companies*

Although the Third Circuit's definition of unpermitted national origin discrimination best furthers the purposes of the

130. *See Sumitomo*, 457 U.S. at 187-88.

131. *Id.*

132. *See* A. Ritomsky & R. Jarvis, *Doing Business in America: Is This The Unfinished Work of Sumitomo Shoji Am., Inc. v. Avigliano*, 27 HARV. INT'L L. J. 193, 215 (1986). The authors argue that the Supreme Court language in *Sumitomo* supports the conclusion that Article VIII(1) simply makes foreign employers subject to the same employment discrimination laws that apply to American companies.

133. Reply Brief for Petitioner and Cross-Respondent at 47, Sumitomo Shoji Am., Inc. v. Avigliano, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24) "Respondent's effort to remedy their employment grievances by invoking [Title VII] stretches it far beyond what it can bear." *Id.* at 47. Petitioners also asserted that "the class of persons allegedly discriminated against—persons residing in the United States who are not Japanese treaty traders—is, by any measure, overly broad." *Id.* It is surely not the kind of historically disadvantaged class of persons that Title VII was designed to protect. *Id.*

134. *See id.* at 47; *see also* MacDonnel Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (stating that purpose of Congress in enacting Title VII was to eliminate discrimination against minorities).

FCN Treaty and Title VII, the Third Circuit failed to articulate factors that courts should utilize, along with statistical evidence of disparate impact,[135] to find that a Japanese company engages in national origin discrimination. Courts should look at the visa status of the employees involved, and focus on the differential treatment of employees, along with statistical evidence of disparate impact when examining situations where alleged Title VII violations exist.

1. E-visas

One factor that indicates whether differential treatment of executives by a Japanese company results from discrimination based on citizenship or national origin concerns the type of visa that Japanese executives possess. Japanese executives hired pursuant to the terms of the Treaty often receive E-visas which enable them to work in the United States.[136] E-visas are only granted to those executives who qualify under Article VIII(1) of the Treaty.[137] In *Fortino*, the employer argued that differential treatment of Japanese managers by the subsidiary flowed from the E-visa status of the managers.[138] Because the FCN Treaty only permits citizenship discrimination, the subsidiary noted, differential treatment of E-visa executives necessarily arises from discrimination on the basis of citizenship, not national origin.[139]

In an *amicus curiae* brief submitted to the Seventh Circuit in *Fortino*, the Equal Employment Opportunity Commission ("EEOC") disputed the argument that because Japanese executives possess E-visas, all decisions concerning them flow from the FCN Treaty.[140] To support this contention, the EEOC

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135. *See* MacNamara v. Korean Airlines, 863 F.2d 1135, 1147 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

136. 8 U.S.C. § 1101(a)(15)(E) (1988 & Supp. 1992).

137. *Id.* An E-visa holder is defined as "an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national." 8 U.S.C. § 1101(a)(15)(E) (1988 & Supp. 1992).

138. *See* Reply Brief of Defendant, Appellant, Cross Appellee Quasar Company at 13, Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) (No. 87-C4386).

139. *Id.*

140. Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of Plaintiff at 8, Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) (Nos. 91-1123, 91-1197, 91-1564).

noted that E-visas may be issued to a broader class of employees than those identified in Article VIII(1).[141] This argument is predicated on the fact that E-visas may be obtained by employees of U.S. companies if Japanese own more than fifty percent of such companies.[142] This argument, however, is invalid because Article VII of the FCN Treaty permits Japanese companies to obtain majority interest in a U.S. company which it may then "control and manage."[143] Article VIII(1) then allows these companies to engage executives of their choice in the United States.[144] Executives who obtain E-visas to work for these subsidiaries do so under Article VIII(1) because more than fifty percent ownership authorizes control by the majority owner.

The State Department only grants E-visas pursuant to Article VIII(1).[145] Therefore, Japanese executives who possess these visas enter the United States under the protection of the FCN Treaty.[146] This correlation between E-visas and the FCN Treaty suggests that any differential treatment of Japanese executives is based upon citizenship because the FCN Treaty does not permit the issuance of E-visas for national origin purposes. However, E-visa status of Japanese executives does not eliminate the possibility that these executives are employed by U.S. subsidiaries motivated by a desire to discriminate on the basis of national origin. Possession of E-visas by Japanese executives proves that Japanese employees obtained these visas under the FCN Treaty, which only permits citizenship discrimination. However, no authority exists to support the notion that acquisition of an E-visa by an executive ensures that the

141. *Id* at 6. "According to the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 (a)(15)(E)(i) and the Department of State regulations promulgated under the law, an alien may obtain an E-visa where his employer is '[a]n organization at least 50 percent owned by persons having the nationality of the treaty country' 22 C.F.R. § 41.51 (c) (2)." *Id.* at 6-7. The EEOC also asserted that E-visas do not confer rights on companies, but this argument, while true, is weak because the Treaty confers the Article VIII(1) rights that allow employees chosen on the basis of citizenship to obtain E-visas. *Id.*

142. *Id.*

143. *See* FCN Treaty, *supra* note 1, art VII.

144. FCN Treaty, *supra* note 1, art. VIII(1).

145. *See* 8 U.S.C. § 1101(a)(15)(E) (1988 & 1992 Supp.); *see also* 22 C.F.R. § 41.110-.125 (1989) (outlining procedures for application for and issuance of nonimmigrant alien visas).

146. *Id.*

Japanese company did not have a discriminatory motive when it hired such executive. Courts should examine factors that relate to the terms of their employment in determining a company's motives in its executive employment decisions. Thus, the mere fact that Japanese executives possess E-visas does not automatically preclude a finding of unpermitted national origin discrimination.

2. Differential Treatment in Salaries and Evaluation Techniques

The Seventh Circuit failed to address whether impermissible national origin discrimination should be defined broadly or narrowly; nor did it examine the factors that courts should consider with respect to Title VII claims against Japanese companies.[147] Prior to being reversed by the Seventh Circuit, the U.S. District Court for the Northern District of Illinois, however, articulated several factors that courts should use to determine whether an employer has engaged in unpermitted national origin discrimination.[148] The district court held that the U.S. subsidiary engaged in unpermitted national origin discrimination by evaluating and paying managerial employees of Japanese national origin on a different basis than the basis used to evaluate managerial employees of U.S. national origin.[149] This disparity in salaries and evaluation techniques evidences impermissable national origin discrimination because salaries are not strongly related to a Japanese parent company's right to "engage" its own citizens to manage its U.S. subsidiaries. Once the U.S. subsidiary employs these citizens as executives, paying them more than other managers solely

147. Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991).

148. Fortino v. Quasar, 751 F. Supp. 1306 (N.D. Ill. 1990), *rev'd*, 950 F.2d 389 (7th Cir. 1991).

149. *Id.* at 1315. The subsidiary justified plaintiff's discharge as arising out of the necessity for Japanese speaking ability in specific managerial positions and out of the company's dire financial condition. 751 F. Supp at 1315. The district court found that the evidence presented contradicted this justification. *Id.* The district court also noted that Quasar raised salaries of Japanese managers while it maintained the salary status quo for non-Japanese managers. *Id.* The court stated that "Quasar significantly enhanced the financial renumeration received by its managerial employees of Japanese national origin at the very time that Quasar was adversely affecting the employment of its managerial employees of American national origin." *Id.* at 1316.

because they are Japanese is extremely strong evidence of national origin discrimination.

A view commonly expressed in Japanese society is that foreigners are outsiders and that self-protection of Japanese nationals is essential to the Japanese national spirit.[150] Matsushita, the parent company in *Fortino*, prides itself because in its seventy years it has never laid off a Japanese employee.[151] In return for this type of lifetime employment, Japanese workers are expected to remain loyal to their group and are expected to focus inward on their fellow Japanese while living abroad.[152]

This group mentality can be evidence of disparate treatment where Japanese workers gain preferential treatment compared with their non-Japanese colleagues. In *Fortino*, the district court held that the subsidiary discriminated because it exempted all executives of Japanese national origin from its reorganization procedures.[153] This policy could have been interpreted in two ways. First, the subsidiary did not replace its Japanese managers because it wanted Japanese citizens to control departments in which their expertise was necessary. This would constitute permitted citizenship discrimination. However, if the subsidiary fired only its non-Japanese personnel, replacing them with Japanese executives, its actions would constitute unpermitted national origin discrimination unless the Japanese executives possessed some necessary skill or qualification that the non-Japanese managers did not possess.[154] The only way to determine the basis on which the Japanese company makes its decisions would be to compare the workers replacing the responsibilities of the replaced managers with the responsibilities of new executives. If the new executives have the same duties as those employees that previously held their jobs, it is likely that the new workers were hired on the basis of national origin in violation of Title VII.

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150. *See Frontline* (PBS Television Broadcast, Feb. 18, 1992); *see also* ERNST, *supra* note 123, at 8.

151. ERNST, *supra* note 123, at 12. According to Shuichi Kato, one of Japan's leading writers and social critics, "a Matsushita company had pioneered the system of lifetime employment. It is proud that in its 70 years it has never laid off a Japanese employee." *Id.*

152. *Id.*

153. *See* Fortino v. Quasar Co., 751 F. Supp. 1306 (N.D. Ill. 1990), *rev'd*, 950 F.2d 389 (7th Cir. 1991). Reorganization procedures included mass firings. *Id.*

154. *See id.* at 1316.

3. Statistical Evidence

In *MacNamara*, the Third Circuit noted that statistical evidence ordinarily used to support a claim of disparate impact often resembles statistical evidence that is used to help establish disparate treatment.[155] The court further stated that because a homogeneous country's population consists of the same national origin, permitted citizenship discrimination is likely to lead to a substantial statistical disparity between otherwise qualified non-citizens of a particular national origin and citizens of the country's national origin. A problem results if this statistical disparity alone suffices as proof of a Title VII violation.

Although the Third Circuit recognized that statistical evidence of disparate impact alone could not be used to prove that a company headquartered in a homogeneous country violates Title VII, the court did not forbid the use of statistics in Title VII cases.[156] The court noted that the likelihood of an erroneous finding that an employer intentionally discriminates on a basis other than citizenship is slight where an empirical disparity is explainable on the basis of a company's exercise of its Article VIII(1) rights.[157] Subsequently, in *Bruno v. W.B. Saunders Co.*, the Third Circuit noted that the usefulness of statistics in discrimination cases depends upon surrounding facts and circumstances.[158] Therefore, statistical evidence can be used under the Third Circuit's standard as long as a court believes that its application is useful and does not preclude a Japanese company from exercising its treaty rights.

CONCLUSION

In the future, courts should invoke the Third Circuit's standard for determining whether a Japanese company violates Title VII, because this standard avoids the problems created by the narrow standards suggested by the Second and Fifth Cir-

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155. *See* MacNamara v. Korean Airlines, 863 F.2d 1135, 1148 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989); *see also* Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988).

156. *See MacNamara*, 863 F.2d at 1148.

157. *Id.*

158. 882 F.2d 760, 767 (3d Cir. 1989); *see* Int'l Bd. of Teamsters v. United States, 431 U.S. 338, 340 (1977) (noting importance of surrounding circumstances to relevance of statistical evidence).

cuits. The Third Circuit's standard also preserves FCN Treaty rights. This standard, however, does not settle the question of how to define unpermitted national origin discrimination. The factors articulated by the District Court for the Northern District of Illinois and by the Third Circuit are broad enough that courts will always have the flexibility to go either way on the issue. Such is the nature of the U.S. judicial system. However, the appeal of the Third Circuit's definition of national origin discrimination is that in reconciling the purposes of both the FCN Treaty and Title VII, courts have the flexibility to determine whether factors particular to the case tend to prove unpermitted national origin discrimination. Courts should take advantage of this flexibility by applying the Third Circuit's definition of unpermitted national origin discrimination rather than invoking other definitions that limit a court's ability to make case-by-case determinations.

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