

1989

Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives “Of Their Choice”

Gerald D. Silver

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Gerald D. Silver, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives “Of Their Choice”*, 57 Fordham L. Rev. 765 (1989).

Available at: <https://ir.lawnet.fordham.edu/flr/vol57/iss5/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

**FRIENDSHIP, COMMERCE AND NAVIGATION TREATIES
AND UNITED STATES DISCRIMINATION LAW: THE
RIGHT OF BRANCHES OF FOREIGN
COMPANIES TO HIRE
EXECUTIVES "OF THEIR CHOICE"**

INTRODUCTION

After World War II, the United States sought to encourage and facilitate private international investment by negotiating Friendship, Commerce and Navigation ("FCN") Treaties with over two dozen countries.¹ These FCN treaties include a provision giving companies from the signatory countries the right to hire the executive personnel "of their choice" ("employer choice provision") in their operations abroad.²

Foreign investors often favor employing their own citizens to manage their investments abroad because these citizens speak their language, have experience with the company, and are familiar with the company's management techniques.³ This policy has resulted in several lawsuits by American employees charging foreign companies operating in the United States with discrimination in violation of United States law, which forbids a private employer from discriminating on the basis of age,⁴ race,

1. See Walker, *The Post-War Commercial Treaty Program of the United States*, 73 Pol. Sci. Q. 57, 59 (1957); Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 229 (1956) [hereinafter *U.S. Practice*].

2. The employer choice provision does not give companies the right to favor their own citizens for non-executive positions. See, e.g., Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VIII, para. 1, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863 [hereinafter *Japanese Treaty*]. Several FCN treaties contain language that may restrict the employer choice provision. These treaties give foreign companies the right to hire employees of their choice only "in accordance with applicable laws," see, e.g., Treaty of Friendship, Commerce, and Protocol, Nov. 12, 1959, United States-Pakistan, art. VIII, para. 1, 12 U.S.T. 110, 114, T.I.A.S. No. 4683 [hereinafter *Pakistan Treaty*], or "regardless of nationality," see, e.g., Treaty of Friendship, Commerce, and Navigation, Aug. 3-Dec. 26, 1951, United States-Greece, art. XII, para. 4, 5 U.S.T. 1829, 1857-59, T.I.A.S. No. 3057 (these treaties employ the phrase "of their choice . . . regardless of nationality") [hereinafter *Greek Treaty*].

The FCN treaties are bilateral, and thus give foreign companies operating in the United States the right to hire executive personnel of their choice. See *Hearing Before a Subcomm. of the Comm. on Foreign Relations on Treaties of Friendship, Commerce, and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece*, 82d Cong., 2d Sess. 6 (1952) [hereinafter *1952 Hearings*] (statement of Harold F. Linder, Deputy Assistant Secretary of State for Economic Affairs). The bilateral nature of the treaties is important because, in the time since the ratification of the FCN treaties, there has been an enormous influx of foreign investment in the United States, particularly from Japan. See Johnson, *Japanese-Style Management in America*, Cal. Mgmt. Rev. 34-35 (Summer 1988) (since 1984, Japan has made more private investments than any other nation in the United States).

3. See Lansing & Palmer, *Sumitomo Shoji v. Avagliano: Sayonora to Japanese Employment Practices in Conflict with Title VII*, 28 St. Louis U.L.J. 153, 158 (1984).

4. See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982).

color, religion, sex or national origin.⁵

Foreign companies argue that while the employer choice provision does not give them the right to discriminate among Americans or in favor of a third country's citizens on any basis,⁶ it permits them to control their investment by hiring their own citizens to fill managerial positions.⁷ Thus, foreign companies broadly interpret the employer choice provision, and contend that wide discretion is needed to foster international investment as intended by the signatories to the treaty.

Proponents of a narrow interpretation of the employer choice provision insist that the purpose of the provision is to immunize foreign companies from domestic laws that prohibit them from hiring their own citizens (also known as "percentile legislation"),⁸ and that it does not affect other domestic laws restricting the decision-making freedom of foreign companies to select the citizens of their choice.⁹ Thus, if a Korean company fired an American woman in favor of a Korean man, the broad view would bar all causes of action while the narrow view would allow the personnel decision to be challenged in a Title VII lawsuit.

Although the Supreme Court has not addressed the proper interpretation or scope of the employer choice provision,¹⁰ recent decisions by the

5. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1) (1982). Other civil rights laws include the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982) and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982). Cases involving the employer choice provision most commonly refer to Title VII. Accordingly, this Note will focus on Title VII.

6. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1144 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741).

7. See *id.*

8. See *id.* Percentile legislation places restrictions on the number of foreigners a company may employ while operating in the host country.

9. See *id.* at 1144.

10. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982). In *Sumitomo*, the Court held that domestically incorporated subsidiaries of foreign corporations may not assert FCN treaty rights. See *Sumitomo*, 457 U.S. at 183-84. The Court vacated both *Spieß v. C. Itoh & Co. (Am.)*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984), and *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982), because both cases involved defendants that are companies incorporated in the United States. The Court, however, did not interpret the employer choice provision, and, therefore, the portions of the *Spieß* and *Sumitomo* opinions dealing with the effect of the provision are still valid and important.

Although the Supreme Court drastically reduced the number of foreign companies capable of asserting FCN treaty rights, it did state that the employer choice provision is still available to branches of foreign companies operating in the host country. See *Sumitomo*, 457 U.S. at 189.

The employer choice provision may also apply to joint ventures between a foreign corporation and a domestic corporation. See Note, *Employment Rights of Japanese-American Joint Ventures in the United States Under the U.S.-Japan Treaty of Friendship, Commerce, and Navigation*, 16 Law and Pol'y in Int'l Bus. 1225, 1248 (1984). In addition, the Supreme Court specifically left open the question of whether subsidiaries with no independent treaty rights may assert those of their parent corporations. See *Sumitomo*, 457 U.S. at 190 n.19. It has been argued that subsidiaries of foreign corporations, operating in the United States, should be allowed to assert the employer choice provision on behalf of its parent company when the challenged hiring practices involve important

Third Circuit in *MacNamara v. Korean Air Lines*¹¹ and the Sixth Circuit in *Wickes v. Olympic Airways*¹² indicate that the trend is toward a narrow interpretation of the employer choice provision.¹³ The Fifth Circuit, however, in *Spiess v. C. Itoh & Co. (Am.)*,¹⁴ advances a broad interpretation of the provision, holding that this interpretation most accurately expresses the intentions of the signatories.¹⁵

This Note addresses the proper scope of the employer choice provision. Part I details the background and purpose of FCN treaties in general, and then focuses on the employer choice provision. Part II describes the differing views on the proper interpretation of the employer choice provision. Part III employs standard methods of treaty construction to determine the proper interpretation of the provision. This Note concludes that a liberal construction of the provision comports with the intent of the parties and thus should be observed.

I. BACKGROUND OF THE FCN TREATIES, EMPLOYER CHOICE PROVISION AND TITLE VII

A. *FCN Treaties*

The FCN treaties ratified after World War II were influenced by the inability of previous treaties to protect businesses from discriminatory treatment in foreign markets,¹⁶ which inhibited foreign investment.¹⁷ Consequently, the modern FCN treaties define the treatment each coun-

management positions that are vital to the parent company's investment. See Note, *Subsidiary Assertion of Foreign Parent Corporation Rights Under Commercial Treaties to Hire Employees "Of Their Choice"*, 86 Colum. L. Rev. 139, 167 (1986) [hereinafter Note, *Foreign Parent Corporation Rights*]. Thus, the provision may yet apply to some foreign subsidiaries incorporated in the United States.

11. 863 F.2d 1135 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741).

12. 745 F.2d 363 (6th Cir. 1984).

13. *MacNamara* involved the employer choice provision of the United States-Korea FCN treaty. See Treaty of Friendship, Commerce, and Navigation, Nov. 28, 1956, United States-Korea, art. VIII, para. 1, 8 U.S.T. 2217, 2223 T.I.A.S. No. 3947 [hereinafter Korean Treaty]. This provision is identical to the employer choice provision in the Japanese treaty. See Japanese Treaty, *supra* note 2, art. VIII, para. 1, 4 U.S.T. at 2070. This Note will refer to both interchangeably.

14. 643 F.2d 353 (5th Cir. Unit A Apr. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984).

15. See *id.* at 359-62.

16. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1142 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741). Although the postwar FCN treaties differ in some respects, they are fundamentally alike, see 1952 *Hearings, supra* note 2, at 2, and therefore examination of the history and language of one treaty is helpful in discerning the meaning of another.

The FCN treaties are part of a long line of treaties negotiated on a bilateral basis between the United States and other countries, a practice which began over two hundred years ago. See *Spiess*, 643 F.2d at 355-56. FCN treaties are used to regulate private commerce between American citizens and citizens of foreign countries. See Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805, 806 (1958).

17. See *MacNamara*, 863 F.2d at 1142-43.

try owes the citizens of the other, and provide protection for companies and their property.¹⁸

These treaties were designed to establish a rule of law that would govern everyday relations between the signatories, and to protect citizens and their property while in the other's country.¹⁹ As a result, several provisions were inserted to safeguard the investor from the "nonbusiness hazards" of operating in a foreign country, namely, rigid employment controls.²⁰ Congress noted that these hazards were legal, not economic, and could be eliminated by treaty provisions establishing standards of treatment for citizens and enterprises of one country within the territories of the other.²¹

Although the United States was intensely interested in protecting American interests abroad,²² treaty rights and privileges were not reserved solely for the United States. All rights afforded to American businesses operating abroad were also afforded to foreign businesses operating in the United States.²³

B. *The Employer Choice Provision*

The employer choice provisions offered protection to one aspect of international investment by awarding foreign companies the freedom to hire the executive personnel of their choosing "without legal interference from 'percentile' restrictions and the like" while operating in the host country.²⁴ This provision takes several different forms in the various FCN treaties.²⁵ The most common provision is the one found in the Japanese and Korean treaties.²⁶ These treaties allow companies to en-

18. See Walker, *supra* note 16, at 806.

19. See 1952 Hearings, *supra* note 2, at 3 (statement of Harold F. Linder, Deputy Assistant Secretary of State For Economic Affairs); *Hearings Before a Subcomm. of the Comm. on Foreign Relations on Treaties of Friendship, Commerce, and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany, and Japan*, 83d Cong., 1st Sess. 2 (1953) [hereinafter 1953 Hearings] (statement of Samuel C. Waugh, Assistant Secretary of State for Economic Affairs).

20. See 1952 Hearings, *supra* note 2, at 4.

21. See *id.*

22. See *id.*

23. See *id.* at 6; see also *id.* at 15 (statement of Sen. Hickenlooper, Chairman of the Subcommittee of the Committee on Foreign Relations) (treaties involve reciprocal obligations between the United States and the foreign signatory in order to uphold standards of the treaty); *id.* at 40 (statement of Jack B. Tate, Acting Legal Advisor) (any rights granted to American citizens operating businesses abroad apply to foreign citizens operating businesses in the United States); 1953 Hearings, *supra* note 19, at 27 (statement of Samuel C. Waugh, Assistant Secretary of State for Economic Affairs, reading statement by U. Alexis Johnson, Deputy Assistant Secretary of State for Far Eastern Affairs) ("[o]bligations in the treaty are stated in reciprocal terms [because] the treaty rests on a foundation of mutual respect and trust").

24. See *U.S. Practice*, *supra* note 1, at 234.

25. See 1953 Hearings, *supra* note 19, at 2.

26. This provision provides:

Nationals and Companies of either Party shall be permitted to engage, within

gauge executives²⁷ "of their choice," and this right is not restricted by any other language in the provision.²⁸ Other treaties use the phrase "of their choice, regardless of nationality" in the provision.²⁹ The third variety of employer choice provision grants foreign companies the right to engage executives "of their choice," but only "in accordance with applicable laws."³⁰ The fourth type allows foreign companies to hire the executives "of their choice," but only if the employment of that executive is necessary to the success of the business.³¹

the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents, and other specialists of their choice.

Japanese Treaty, *supra* note 2, art. VIII, para. 1, 4 U.S.T. at 2070; Korean Treaty, *supra* note 13, art. VIII, para. 1, 8 U.S.T. at 2223 (emphasis added).

27. For purposes of this Note, executives include accountants, technical experts, attorneys, agents, specialists, and all other executive personnel. See, e.g., Japanese Treaty, *supra* note 2, art. VIII, para. 1, 4 U.S.T. at 2070.

28. See, e.g., Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, art. VIII, para. 1, 14 U.S.T. 251, 257, T.I.A.S. No. 5306; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, art. 8, para. 1, 14 U.S.T. 1284, 1296, T.I.A.S. No. 5432; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. VIII, para. 1, 8 U.S.T. 2043, 2055, T.I.A.S. No. 3942; Korean Treaty, *supra* note 13, art. VIII, para. 1, 8 U.S.T. at 2223; Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, art. IV, para. 4, 8 U.S.T. 899, 903-04, T.I.A.S. No. 3853; Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, United States-West Germany, art. VIII, para. 1, 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593; Japanese Treaty, *supra* note 2, art. VIII, para. 1, 4 U.S.T. at 2070; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, art. VIII, para. 1, 5 U.S.T. 550, 558, T.I.A.S. No. 2948;

29. See, e.g., Treaty of Amity and Economic Relations, Feb. 8, 1966, United States-Togo, art. V, para. 3, 18 U.S.T. 1, 5, T.I.A.S. No. 6193; Treaty of Amity and Economic Relations, Apr. 3, 1961, United States-Vietnam, art. V, para. 2, 12 U.S.T. 1703, 1708, T.I.A.S. No. 4890; Treaty of Amity, Economic Relations and Consular Rights, Dec. 20, 1958, United States-Muscat-Oman, art. V, para. 3, 11 U.S.T. 1835, 1838, T.I.A.S. No. 4530; Greek Treaty, *supra* note 2, art. XII, para. 4, 5 U.S.T. at 1829; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. VII, para. 4, 12 U.S.T. 908, 915 T.I.A.S. No. 4797; Treaty of Friendship, Commerce and Economic Development, United States-Uruguay, art. V(4), 96 Cong. Rec. 12,082, 12,083 (1950) [hereinafter Uruguay Treaty]; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, art. I, para. 2(c), 63 Stat. 2255, 2258, T.I.A.S. No. 1965;

There has been debate as to whether the insertion of this phrase has relevance. Compare *Wickes v. Olympic Airways*, 745 F.2d 363, 367 (6th Cir. 1984) (the words "regardless of nationality" limit the application of the employer choice provision strictly to citizenship) with Brief for the United States as Amicus Curiae at 11-17, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741) (the words "regardless of nationality" do not change the meaning of the employer choice provision).

30. See Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, art. IV, para. 6, 19 U.S.T. 5843, 5849, T.I.A.S. No. 6540; Pakistan Treaty, *supra* note 2, art. VIII, para. 1, 12 U.S.T. at 114; Treaty of Amity and Economic Relations, Sept. 7, 1951, United States-Ethiopia, art. VIII, para. 5, 4 U.S.T. 2134, 2141, T.I.A.S. No. 2864;

31. See, e.g., Convention of Establishment, Nov. 25, 1959, United States-France, art. VI, para. 1, 11 U.S.T. 2398, 2405, T.I.A.S. No. 4625 [hereinafter French Treaty]; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, art. VIII, para. 1, 9 U.S.T. 449, 456, T.I.A.S. No. 4024.

A basic aim of the FCN treaties was to provide the foreign investor with a governmen-

C. Title VII

Title VII of the Civil Rights Act of 1964 makes it an illegal employment practice for an employer to discriminate against any individual on the basis of race, color, religion, sex or national origin.³² It was enacted several years after most of the FCN treaties were ratified. This raises the question of whether Title VII supersedes the FCN treaties.³³ Generally, if a treaty and a statute conflict, the more recent prevails.³⁴ The Supreme Court, however, has held that treaties will not be considered repealed or

tal policy of equity and hospitality. *See U.S. Practice, supra* note 1, at 230. Consequently, the majority of FCN treaty provisions provide foreign companies with treatment that is equal to that received by domestic companies. This type of treatment is referred to as national treatment, and gives foreign companies rights equal to those accorded domestic companies. *See id.* at 232. Where a signatory had previously adopted a preferential policy towards foreign investors, the FCN treaty provides for "most-favored-nation" treatment rather than national treatment. *See 1952 Hearings, supra* note 2, at 7. Most-favored-nation treatment provides rights that are equal to the rights received by the most privileged foreign country. *See id.* Thus, each signatory receives the greater of the rights granted to the citizens of the home country or the rights given to the most favored foreign investors.

In certain instances, the foreign investor receives not only protection equal to that enjoyed by domestic companies, but an irreducible, or absolute, minimum degree of protection. *See U.S. Practice, supra* note 1, at 232. Several courts have determined that the employer choice provision grants a right that goes beyond national treatment; it accords an absolute right unaffected by domestic law. *See MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1143 n.8 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741); *Wickes v. Olympic Airways*, 745 F.2d 363, 367 (6th Cir. 1984); *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 360-61 (5th Cir. Unit A Apr. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984).

Herman Walker, Jr., one of the negotiators of the FCN treaties, used the employer choice provision as an example of an absolute right. Walker stated that the employer choice provision, in both the Uruguayan and Japanese FCN treaties, provides an absolute right necessary to prevent the imposition of ultranationalistic policies with respect to executive personnel. *See Walker, Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 385-386 (1956).

There is little doubt that the employer choice provision was intended to exceed the rights accorded citizens of the host country. *See MacNamara*, 863 F.2d at 1143 n.8; *Wickes*, 745 F.2d at 367; *Spiess*, 643 F.2d at 360-61; *Walker, supra*, at 386. The provision, therefore, is certainly immune from some domestic law, but the scope of this immunity is still in question.

32. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1982). In addition to prohibiting employment decisions that have discriminatory motives, Title VII also prohibits those practices which are facially neutral but discriminatory in impact. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

33. Treaties, along with federal statutes, are the supreme law of the land, *see* U.S. Const. art. VI, cl. 2, and supersede inconsistent state law. *See United States v. Pink*, 315 U.S. 203, 230 (1942). Even federal statutes should not be construed in a manner inconsistent with treaty law if another construction is possible. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (citing *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

The FCN treaties were self-executory, and constituted domestic law immediately upon ratification. *See Spiess*, 643 F.2d at 356; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). A treaty is self-executory if it operates without the aid of a legislative provision. *See Spiess*, 643 F.2d at 356.

34. *See Whitney*, 124 U.S. at 190.

amended by subsequent federal law unless Congress clearly expresses this intent.³⁵ There is no evidence that Congress intended to abrogate the employer choice provision when it enacted Title VII,³⁶ and legislative silence is insufficient to repeal a treaty.³⁷

An attempt should always be made to reconcile a treaty with a potentially conflicting federal statute without sacrificing the terms of either.³⁸ Courts adhering to a narrow interpretation of the employer choice provision argue that there is no conflict between Title VII and the employer choice provision.³⁹ The provision merely allows foreign companies to discriminate on the basis of citizenship,⁴⁰ and because Title VII does not forbid discrimination based on citizenship no conflict exists.⁴¹

Under the broad view, however, the FCN treaties and Title VII do conflict, but the treaty prevails, allowing foreign companies the right to favor their own citizens, unhindered by domestic law.⁴²

II. THE DIFFERING VIEWS OF THE EMPLOYER CHOICE PROVISION

A. A Broad Construction

In *Spieß v. C. Itoh & Co. (Am.)*, the Fifth Circuit held that the employer choice provision gives foreign companies operating in the United States the right to favor their own citizens without being subjected to the scrutiny of domestic law.⁴³ The court reasoned that the purpose of the

35. See *Cook v. United States*, 288 U.S. 102, 120 (1933); see also *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (only when Congress intends to depart from treaty obligations will inconsistent federal legislation govern).

36. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1146 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741).

37. See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

38. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

39. See *MacNamara*, 863 F.2d at 1146; see also *Wickes v. Olympic Airways*, 745 F.2d 363, 368 (6th Cir. 1984) (no conflict between the treaties and state discrimination law). It should be noted that the Third Circuit in *MacNamara* stated that if a conflict did exist, the treaty would prevail. See *id.* at 1146.

40. See *MacNamara*, 863 F.2d at 1144-45.

41. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973).

42. See *Spieß v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 362 (5th Cir. Unit A Apr. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984).

43. See *id.* In *Spieß*, several American employees of C. Itoh, a New York corporation wholly owned by C. Itoh & Co., Ltd., a Japanese corporation, brought an action alleging that they had been discriminated against on the basis of national origin. See *id.* at 355. They claimed that the company promoted only Japanese citizens to executive positions, in violation of Title VII. See *id.*

C. Itoh argued that the employer choice provision of the Japanese FCN treaty exempted Japanese companies operating in the United States from domestic discrimination laws when the companies favor their own citizens for managerial or executive positions. See *id.* at 359. C. Itoh referred to the portion of the treaty that stated:

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*.

Japanese Treaty, *supra* note 2, art. VIII, para. 1, 4 U.S.T. at 2070 (emphasis added). C. Itoh claimed that the employer choice provision gave it an absolute right to employ its

employer choice provision was to ensure that a foreign company's investment in the host country would remain within that company's control by giving it the right to freely choose executive personnel.⁴⁴ The court concluded that the employer choice provision gives foreign employers the right to favor their own nationals without the impediment of domestic law. Thus, foreign companies are free from all domestic laws that potentially restrict this right, regardless of the primary purpose of the legislation.⁴⁵

B. *A Narrow Interpretation*

In *Wickes v. Olympic Airways*,⁴⁶ the Sixth Circuit held that the employer choice provision in the FCN treaty between the United States and Greece allows foreign companies to favor their own citizens only when the decision is based solely on citizenship.⁴⁷ The FCN treaty provides that foreign companies can hire the employees "of their choice . . . regardless of nationality."⁴⁸

The Sixth Circuit held that the words "regardless of nationality" limited this otherwise broad right.⁴⁹ The court explained that the employer choice provision gives foreign companies the right to favor their own citi-

own citizens without interference by domestic law. See *Spiess*, 643 F.2d at 359. The Fifth Circuit held that C. Itoh was a Japanese company and could assert FCN treaty rights, despite the fact that it was incorporated in the United States. See *id.* at 358-59. This portion of the holding was subsequently reversed by the Supreme Court in *Sumitomo*, as the Supreme Court held that domestically incorporated subsidiaries may not assert FCN treaty rights. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 182-88 (1982).

44. See *Spiess*, 643 F.2d at 360-62.

45. See *id.* at 362.

46. 745 F.2d 363 (6th Cir. 1984).

47. In *Wickes*, a 61 year old American male claimed that Olympic Airways, a foreign corporation owned by the Greek government, discriminated against him on the basis of age and national origin when they dismissed him from the company. See *id.* at 364. The plaintiff was barred by the statute of limitations from making a claim under federal law, so he brought his action under the Elliott Larsen Civil Rights Act of 1976, Mich. Comp. Laws Ann. § 37.2202(1)(a) (West Supp. 1984), which states that an employer may not "[f]ail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight or marital status." *Id.* at 368. Olympic Airways argued that it was exempt from the scrutiny of domestic discrimination law based on the employer choice provision of the 1951 FCN treaty between the United States and Greece. See *id.* at 364-65.

48. The relevant provision provides:

Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other employees of their choice . . . regardless of nationality.

Greek Treaty, *supra* note 2, art. XII, para. 4, 5 U.S.T. at 1857-59 (emphasis added).

49. See *Wickes*, 745 F.2d at 367. Thus, the Sixth Circuit implied that absent the phrase "regardless of nationality," the employer choice provision gives foreign companies the right to hire the employees of their choice, free from the scrutiny of domestic law. See *infra* notes 94-97 and accompanying text.

zens, and that citizenship is the only permissible basis for discrimination under the FCN treaty.⁵⁰ Under this analysis, the personnel decisions of foreign companies are vulnerable to the scrutiny of domestic discrimination law.⁵¹

The Third Circuit recently addressed the issue in *MacNamara v. Korean Air Lines*,⁵² and similarly held that the personnel decisions of foreign companies operating in the United States are subject to the scrutiny of domestic law.⁵³ The court reasoned that the employer choice provision was intended solely to prevent percentile legislation which would restrict the ability of a company to hire its own citizens.⁵⁴ The court based this holding on correspondence between negotiators of the FCN treaties, which mentioned percentile legislation as a particular concern.⁵⁵

In *Avigliano v. Sumitomo Shoji Am., Inc.*,⁵⁶ the Second Circuit also interpreted the employer choice provision narrowly. The court's reasoning, however, differed from that of the Third and Sixth Circuits by holding that foreign companies may favor their own citizens only when the employment of these citizens is necessary in order for the business to be successful.⁵⁷ The Second Circuit reasoned that the employer choice pro-

50. See *Wickes*, 745 F.2d at 369.

51. See *id.* at 367.

52. 863 F.2d 1135 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741).

53. See *id.* at 1147. This holding was based upon the Korean FCN treaty, which contains an unrestricted employer choice provision that does not include the phrase "regardless of nationality." See Korean Treaty, *supra* note 13, art. VIII, para. 1, 8 U.S.T. at 2223.

In *MacNamara*, a 57 year old American citizen was replaced with a 42 year old Korean citizen. *MacNamara* brought an action against Korean Air Lines ("KAL") alleging that his discharge violated United States discrimination laws, as he was discriminated against because of his race, national origin, and age. See *MacNamara*, 863 F.2d at 1137-38. KAL claimed that the employer choice provision of the FCN treaty between the United States and Korea immunized KAL from the scrutiny of domestic discrimination laws in this instance. See *id.* at 1138.

54. See *id.* at 1144.

55. See *id.* at 1144 n.10.

56. 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). The respondent's name in the lower court opinion is misspelled. The Supreme Court opinion uses "Avagliano" while the Second Circuit uses "Avigliano." See Note, *Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 Mich. L. Rev. 237, 237 n.1 (1984).

In *Sumitomo*, female secretarial employees of Sumitomo, a New York-incorporated wholly-owned subsidiary of a Japanese company, brought a class action suit against the company. See *Sumitomo*, 638 F.2d at 553. They claimed that Sumitomo's practice of hiring only male Japanese citizens for managerial positions discriminated against them on the basis of sex and national origin in violation of Title VII. Sumitomo's defense was identical to that of C. Itoh, Olympic Airways and Korean Air Lines: The employer choice provision of the FCN treaty gives them a right to favor Japanese citizens, unhampered by domestic laws. See *id.*

57. See *Sumitomo*, 638 F.2d at 559. In reconciling the FCN treaty with Title VII, the court broadly construed the bona fide occupational qualification ("BFOQ") exception of Title VII, 42 U.S.C. § 2000e-2(e) (1982), and held that a foreign company may favor its citizens for executive positions without violating Title VII as long as the employment of

vision was inserted in the treaty merely to immunize foreign companies operating in the host country from laws restricting employment of their own citizens.⁵⁸ This provision, however, did not broadly exempt companies from domestic discrimination laws.⁵⁹

III. THE SCOPE OF THE EMPLOYER CHOICE PROVISION

A. *The Method of Treaty Interpretation*

The Supreme Court uses a three-step analysis to interpret treaty provi-

citizens is "reasonably necessary to the successful operation of its business." See *Sumitomo*, 638 F.2d at 559. The BFOQ exception provides 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 bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ." 42 U.S.C. § 2000e-2(e) (1982).

The court enumerated several factors to be considered in determining whether the company's decision to favor fellow citizens is justified, including the potential executive's:

- (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 enterprise in Japan, and
- (4) acceptability to those persons with whom the company or branch does business.

Sumitomo, 638 F.2d at 559.

The BFOQ exception has not been adopted by the other circuits, either because it is ordinarily narrowly construed, see *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1139 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741), and thus a liberal interpretation is improper, or because interpreting the employer choice provision to be subject to the BFOQ requirement would weaken the provision in a manner not intended by the signatories. See *Spieß v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 361-62 (5th Cir. Unit A Apr. 1981) *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984). The Third Circuit held that FCN treaties give foreign companies the right to discriminate on the basis of citizenship; thus, it can be inferred that the Third Circuit would be opposed to the BFOQ exception because it would restrict the companies' right to discriminate on that basis. See *MacNamara*, 863 F.2d at 1144.

The Supreme Court alluded to the BFOQ exception advocated in *Sumitomo*, but expressly refrained from adopting its view. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 189 n.19 (1982). The Court added that "[t]here can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country." *Id.* Thus, the Court acknowledged the importance of foreign companies possessing the right to employ their own citizens, but was unwilling to limit this right by forcing foreign companies to comply with the BFOQ requirement.

58. See *Sumitomo*, 638 F.2d at 559.

59. If the signatories had intended to confine the right to favor fellow citizens to situations where doing so is necessary to the success of the business, they would have incorporated this into the employer choice provision. For example, in the FCN treaty between the United States and France, the signatories included a provision that allows companies to engage the executives of their choice who, by reason of their special capacities, are essential to the functioning of the enterprise. See *French Treaty*, *supra* note 31, art. VI, para. 1, 11 U.S.T. at 2405. Because the clause was not included in the provisions in question, it is reasonable to conclude that the signatories did not wish to limit the right of companies to hire their own citizens, and therefore the BFOQ exception should not be read into the FCN treaties.

sions.⁶⁰ First, the Court examines the plain language of the treaty, which controls unless the resulting interpretation is inconsistent with the intent or expectations of the signatories.⁶¹

Next, the Court examines the intent of the signatories at the time the treaty was written⁶² to determine whether the intent is consistent with the plain language of the treaty.⁶³ Finally, the Court analyzes the interpretations attributed to the treaties by the current representatives of the signatories.⁶⁴ The meaning attributed to the treaty provision by the departments of government responsible for negotiating and enforcing the treaty, although not conclusive, is entitled to great weight.⁶⁵ This Note will examine employer choice provisions using this three-step analysis, and then discuss the relevant policy considerations.

1. The Literal Meaning of the Employer Choice Provision

On its face, the employer choice provision seems to allow foreign companies to hire any executive personnel they desire while operating in the host country. However, absolute reliance on the express language is not possible because, taken literally, the employer choice provision seems to allow foreign companies to discriminate among the host country's citizens on the basis of race, color, religion, sex or national origin, and this was not the intention of the signatories.⁶⁶ Nevertheless, courts should follow the plain language as closely as possible. Since the drafters could have written the provision in a restrictive sense, but, instead, wrote the provision broadly,⁶⁷ the broad language takes on greater significance because it gives companies a seemingly unfettered right to hire.

According to the Supreme Court, a treaty should be construed liberally.⁶⁸ When interpretations of a treaty provision differ, courts should

60. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180-185 (1982). International law of treaty interpretation, based on the Vienna Convention, sets forth a method of treaty interpretation; first, examine the plain language of the document, and second, if this language is ambiguous, look to the subsequent practices of the signatories. See *Restatement of Foreign Relations Law of the United States*, § 325, at 325-3 (Tent. Draft No. 6 1985). The Supreme Court, in addition to these two steps, examines the intent of the parties. See *id.* The Vienna Convention has not been adopted in the United States, see *id.* at comment a, and therefore the Supreme Court's analysis is applicable.

61. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (citing *Maximov v. United States*, 373 U.S. 49, 54 (1963)).

62. See *id.* at 185-86.

63. See *Sumitomo*, 457 U.S. at 180.

64. See *id.* (citing *Maximov v. United States*, 373 U.S. 49, 54 (1963)).

65. See *id.* at 184-85; *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

66. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1143 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741).

67. See *infra* notes 86-87 and accompanying text.

68. See *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940); see also *Jordan v. Tashiro*, 278 U.S. 123, 129 (1928) (liberally construed meaning of the word "commerce" in treaty to include operation of a hospital); *Asakura v. City of Seattle*, 265 U.S. 332, 342-43 (1924) (liberally construed meaning of the word "trade" in treaty to include pawnbroking). Courts should adopt the liberal interpretation in order to best effectuate the purpose of the treaty. See *Bacardi*, 311 U.S. at 163.

adopt the interpretation that grants the signatories the greatest rights.⁶⁹ Accordingly, the liberal view of the employer choice provision should be adopted.

2. The Intent of the Signatories at the Time of Negotiations of the FCN Treaty

The purpose of a treaty is important in determining the intent of the signatories.⁷⁰ The basic objective of the FCN treaties is to protect the personal security, rights, and property of foreigners in the host country, and, as a result, to promote foreign investment.⁷¹ The treaties, therefore, contain several provisions intended to protect investors and their interests.⁷² The employer choice provision was intended to safeguard the investor from the "nonbusiness hazards" of foreign operations, mainly, rigid employment controls.⁷³ The provision assures companies operating abroad the right to secure entry for, and employ, their citizens as executive personnel,⁷⁴ and allows foreign companies to control and manage their enterprise. The negotiators, therefore, deemed the right to utilize the services of their own citizens as executive personnel to be critical.⁷⁵

a. *The Liberal View*

The liberal view is preferable, not only because the Supreme Court favors a liberal interpretation of treaty provisions,⁷⁶ but also because it best reflects the intent of the signatories. First, the United States drafted the employer choice provision in broad terms to allow American investment abroad to flourish.⁷⁷ For example, at the time the Japanese treaty was negotiated and ratified, the United States had a particular interest in the business potential of Japan and this interest had an effect on the language of the employer choice provision.⁷⁸ The treaty was designed to reduce the uncertainties and risks surrounding this investment, and set out to prevent any domestic legislation that could infiltrate these profitable operations. Congress wished to avoid all impediments of domestic law that could endanger American investment abroad,⁷⁹ and intended that the provision give foreign companies a broad right to hire without subjecting their decisions to the scrutiny of domestic law.⁸⁰

69. *See id.*

70. *See Wright v. Henkel*, 190 U.S. 40, 57 (1903).

71. *See U.S. Practice, supra* note 1, at 232-33.

72. *See 1953 Hearings, supra* note 19, at 2-3.

73. *See id.* at 2.

74. *See 1952 Hearings, supra* note 2, at 26.

75. *See id.*

76. *See supra* notes 68-69 and accompanying text.

77. *See supra* notes 70-75 and accompanying text.

78. *See 1953 Hearings, supra* note 19, at 27. At that time, private American investment in Japan was \$245 million. *See id.*

79. *See supra* notes 71-76 and accompanying text.

80. *See infra* notes 82-87 and accompanying text.

Second, an examination of the articles and correspondence of those charged with negotiating and ratifying the treaty indicates an intent that the provision immunize foreign companies from all domestic laws, not just percentile legislation. Herman Walker, Jr.,⁸¹ who drafted and negotiated several of the treaties,⁸² wrote that the right to employ one's own citizens as executives "is to an extent provided for, in that management is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from 'percentile' restrictions *and the like*."⁸³ The words "and the like" imply that the employer choice provision was meant to address legal interference of any domestic law.

Secretary of State Acheson expressed a similar view. During negotiations of the Ethiopian commercial treaty, he expressed concern that subjecting the employer choice provision to domestic legislation would create serious problems, since the treaty could be superseded by local law at any time.⁸⁴ Thus, the negotiators attempted to protect against this by drafting a broad employer choice provision.

Third, during negotiations of the Uruguayan FCN treaty, the United States declined the opportunity to word the provision in a manner clearly expressing an intent to address only percentile legislation. During negotiations, Uruguay proposed that the provision be modified with the words "discrimination against nationals of the other party shall be avoided, and without prejudice to laws designed to protect their employment."⁸⁵ The United States rejected this proposal and the clause "of their choice regardless of nationality" was subsequently inserted, indicating that the signatories did not intend to focus the operation of the provision solely at percentile legislation.⁸⁶

81. Herman Walker, Jr. was the Advisor on Commercial Treaties at the State Department at the time the treaties were drafted. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 181 n.6 (1982).

82. See *id.* (citing Department of State Airgram A-105 (Jan. 9, 1976)).

83. *U.S. Practice, supra* note 1, at 234 (emphasis added).

84. See Telegram from Secretary of State Acheson to the American Embassy in Addis Ababa (Mar. 13, 1951).

85. See Brief for Appellee at 18, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (citing Department of State Airgram No. 385 from U.S. Embassy, Montevideo, to the Department of State (Nov. 8, 1949)).

86. See *Uruguay Treaty, supra* note 29, art. V, para. 4, 96 Cong. Rec. at 12,083. The United States could have written the provision so that it would clearly apply solely to percentile legislation. This clause would have been written in restrictive terms:

Nationals and companies of either Party shall *not be prevented from engaging*, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, and other specialists *because of such individual's nationality*.

This language was suggested by KAL in their appellate brief in *MacNamara*. See Brief for Appellee at 22, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741). The Third Circuit made no reference to this suggestion in its opinion.

If this language had been employed, then the *MacNamara* view would be meritorious. However, the provision was not written in such restrictive terms. The actual language is

b. *The Narrow View*

The Third Circuit maintains that the goal of the employer choice provision is to prevent percentile legislation.⁸⁷ In *MacNamara*, the court stated that the legislative history of the treaty indicates that the parties were solely concerned with percentile legislation.⁸⁸ The court also reasoned that the language of the provision supports this conclusion.⁸⁹ In analyzing the language of the provision, the court noted that the first sentence, the employer choice provision, gives companies the right to engage executive personnel of their choice. The next sentence of the provision, however, guarantees companies the right to engage their own citizens as accountants and other technical personnel, even if they are not qualified under domestic law.⁹⁰ The court concluded that if the employer choice provision had been intended to give a foreign company the right to favor their citizens without regard to domestic law, the second sentence would have been unnecessary.⁹¹ The negotiators intended to free foreign companies from the scrutiny of domestic law which required executives to possess certain qualifications and did so expressly; the absence of such express language in the employer choice provision indicates that the signatories did not intend to exempt companies from other domestic laws relating to employment.⁹²

exceedingly broad, granting companies both incentive and insurance as a reward for pursuing overseas investment.

87. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1144 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741).

88. See *MacNamara*, 863 F.2d at 1144 n.10. The court cited several documents in which the negotiators expressed concerns that "the big problem . . . was so called percentile legislation." See *id.* (citing Foreign Service Despatch No. 144 from the U.S. Embassy, The Hague, to the Department of State (Aug. 16, 1954)), which would restrict the ability of a company to hire its own citizens, and that "the abuse [the employer choice provision] was designed to correct [was] namely 'percentile' laws . . ." See *id.* (citing Foreign Service Despatch No. 914 from the U.S. Embassy, Brussels, to the Department of State (Mar. 11, 1955)); see also *id.* (citing Foreign Service Despatch No. 2075 from the U.S. Embassy, Paris, to the Department of State (May 7, 1959) ("U.S. negotiators worried about French percentile laws")).

89. See *MacNamara*, 863 F.2d at 1145.

90. The second sentence of the employer choice provision provides:

Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party

Korean Treaty, *supra* note 13, art. VIII, para. 1, 8 U.S.T. at 2223.

91. See *MacNamara*, 863 F.2d at 1145.

92. The Third Circuit based its holding largely on the Supreme Court's statement in *Sumitomo* that the purpose of the treaties is not to give foreign corporations greater rights than domestic companies, but to allow them to conduct business on an equal basis without suffering discrimination based on their alienage. See *id.* at 1146. The Third Circuit reasoned that if foreign companies operating in the United States have the right to be free from the scrutiny of domestic law when favoring their fellow citizens, then these companies would have greater rights than those possessed by domestic companies. See *id.* Companies, therefore, would not be conducting business on an equal basis. The Third Circuit concluded that the Supreme Court's statement must mean that foreign companies

Contrary to the Third Circuit's view, it is arguable that the presence of this second sentence means that the employer choice provision was intended to deal with more than percentile legislation. The employer choice provision allows for free choice of executive personnel "generally," while the second sentence deals specifically with freedom from professional licensing requirements.⁹³ Thus, the second sentence may simply be an example, not a limitation, of the many laws the employer choice provision was designed to address.

Although the Sixth Circuit, in *Wickes*, came to a similar conclusion as the Third Circuit, its reasoning undermines the Third Circuit's argument. In *Wickes*, the employer choice provision in the treaty with Greece contained the phrase "of their choice . . . regardless of nationality."⁹⁴ The court reasoned that the words "regardless of nationality" were intended to restrict the employer choice provision and limit its application to percentile legislation.⁹⁵

are not immune from the scrutiny of domestic law when favoring their own citizens. *See id.*

The Third Circuit, however, misconstrued the Supreme Court dictum. The Supreme Court never considered the scope of the employer choice provision. The Court merely ruled that Sumitomo was an American company and could not assert FCN treaty rights. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 183-84 (1982). The Supreme Court's statement specifically referred to the portion of the treaty that defines a company's nationality. *See id.* at 182-83. In the statement above, the Court was speaking in general terms about the national treatment accorded to corporations under the treaty. *See id.* at 187-88. The Court did not address the absolute treatment provided for in the employer choice provision. The Supreme Court stated that although foreign subsidiaries incorporated in the host country are equal to domestic companies, the employer choice provision may give branches of foreign companies operating in the host country a significant advantage over those subsidiaries and, thus, over domestic companies. *See id.* at 189.

Moreover, foreign companies currently receive treatment that is unequal to that received by domestic companies due to anti-foreigner sentiment in the United States. *See, e.g.,* Burstein, *A Yen For New York: What the Japanese Own—What They're After*, *New York Mag.*, Jan. 16, 1989 at 29, 36 (foreign investment in United States may lower the standard of living and threatens the United States' status as a world power). Thus, a liberal interpretation of the employer choice provision is necessary to place foreign companies on an equal basis with domestic companies.

The Third Circuit claims that the narrow interpretation of the provision is proper because it reconciles the treaty with Title VII in accordance with the Supreme Court standard enunciated in *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). By interpreting the provision to apply strictly to citizenship, Title VII applies to foreign companies because Title VII does not prohibit discrimination based on citizenship, *see Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973), and, therefore, the treaty and Title VII are not in conflict.

93. *See Walker, supra* note 31, at 386 n.62.

94. *See Greek Treaty, supra* note 2, art. XII, para. 4, 5 U.S.T. at 1857-59.

95. *See Wickes v. Olympic Airways*, 745 F.2d 363, 367 (6th Cir. 1984) (citing *1953 Hearings, supra* note 19, at 9).

Some feel that the insertion of the phrase "regardless of nationality" does not change the meaning of the provision. The United States government argued this position in its brief as amicus curiae in *MacNamara*. *See* Brief for the United States as Amicus Curiae at 12-13, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741). The government relied on a tabular comparison of the treaties contained in the 1953

Although both courts agree that the purpose of the provision is to prevent percentile legislation, an element in the Sixth Circuit's analysis was the presence of the words "regardless of nationality."⁹⁶ This phrase does not appear in the Japanese treaty, which was the agreement in question in *MacNamara*. The reliance, in *Wickes*, on the use of this phrase indicates that, without the words "regardless of nationality," the employer choice provision would apply to more than simply percentile legislation. Thus, the use of the *Wickes* analysis on the provision found in the Japanese treaty would arguably result in a finding that the provision applies to more than just percentile legislation.⁹⁷

3. Current Interpretations by the Signatories

The current views of the governmental departments that negotiated the treaties, although not controlling, are given great weight by courts

Hearings, which depicted the treaty with Uruguay (which used the words "regardless of nationality") as containing the same employer choice provision as the treaties with Denmark, Israel, and Japan (which do not contain the words "regardless of nationality"). See *1953 Hearings*, *supra* note 19, at 9. The government argued that Congress considered the employer choice provision to have the same meaning whether the phrase "regardless of nationality" was included or not, so the inclusion of the phrase does not restrict the provision. However, the Sixth Circuit did not agree with this argument. See *supra* notes 46-51 and accompanying text.

96. See *Wickes*, 745 F.2d at 367. The Sixth Circuit supported this interpretation by noting that at the time the treaty was being considered for ratification, nine states had enacted laws prohibiting private employment discrimination. See *id.* at 368 (citing Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan. L. Rev. 947, 951 n.23 (1979)). The court stated that there is no evidence in the legislative hearings to suggest that the Greek treaty was intended to override these laws. The court relied on a statement by a State Department legal advisor that the treaty would only affect those state laws concerning the practice of certain professions by noncitizens. See *Wickes*, 745 F.2d at 368 (citing *1953 Hearings*, *supra* note 19, at 4-5). The court concluded that because Congress did not intend the treaty to supersede state law, foreign companies are therefore subject to all state discrimination law. The court focused on state law because the case was brought under state law. See *id.* at 364.

97. Although the Third Circuit avowedly grants foreign companies greater than national treatment, the court exempted foreign companies only from the disparate impact analysis under Title VII. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1148 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 2382 (U.S. Jan. 10, 1989) (No. 87-1741) (plaintiffs attempting to prove disparate impact liability generally rely exclusively on statistical evidence to prove discriminatory effect on protected group). Thus, foreign companies are effectively limited to national treatment, which gives them rights equal to those accorded to domestic companies. See *U.S. Practice*, *supra* note 1, at 232. Examination of other employer choice provisions indicates that greater than national treatment was intended in the provisions in question. The FCN treaty between the United States and Ireland provides:

Nationals and companies of either Party shall be accorded, within the territories of the other Party, *national treatment* with respect to . . . employing attorneys, interpreters and other agents and employees of their choice.

Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. VI, para. 1, 1 U.S.T. 785, 790-91, T.I.A.S. No. 2155 (emphasis added). This provision shows that the United States provided for national treatment when it wished to do so. Its absence, therefore, is evidence that no such treatment was intended.

interpreting a treaty.⁹⁸ The State Department of the United States filed a brief as amicus curiae in *MacNamara*, claiming that the employer choice provision was only intended to exempt foreign companies from percentile legislation, and not from any other domestic laws.⁹⁹

The South Korean government, however, interprets the employer choice provision as giving foreign companies discretion in hiring and firing employees.¹⁰⁰ Thus, an American company operating in South Korea, or a Korean company operating in the United States, is immune from domestic discrimination law when favoring fellow citizens.¹⁰¹

Although the current interpretations by the United States and South Korea differ, the interpretation that most closely reflects the clear language of the treaty should be given more weight.¹⁰² Since the employer choice provision grants companies a manifestly broad right to hire fellow citizens to fill executive positions, the South Korean interpretation is most consistent with this language and, therefore, should be adopted.

B. Policy Considerations

The employer choice provision is still valuable to both the United States and the foreign countries that are parties to the FCN treaties because of its effect on foreign investment.¹⁰³ Although the signatories

98. See *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

99. See Brief for the United States as Amicus Curiae at 6-7, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741). The State Department arrived at this conclusion using the same analysis employed in *MacNamara*.

This view represents a change in opinion by the government. At the time of the negotiations, it was the United States that had insisted on the provision, to Japan's dismay, see *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 181 n.6 (1982), because it wanted to promote American businesses in Japan, see *1953 Hearings, supra* note 19, at 27. Moreover, in the State Department's brief as Amicus Curiae in *Sumitomo*, the government conceded that, arguably, the principal goal of the employer choice provision is to effectuate a foreign company's right to control and manage its enterprises. A necessary component of that right is unhampered discretion to select executives without having to justify each decision on a case-by-case basis. See Brief for Appellee at 32-33, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741) (citing Brief for the United States as Amicus Curiae at 26 n.16, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982) (No. 87-1741)).

100. See Brief for Appellee appendix at 789A-790A, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741).

101. See *id.*

102. See *Caltagirone v. Grant*, 629 F.2d 739, 746-47 (2d Cir. 1980); *Galanis v. Palanck*, 568 F.2d 234, 239 (2d Cir. 1977); *Greci v. Birknes*, 527 F.2d 956, 960 (1st Cir. 1976).

103. Although much of the increase in foreign investment is attributable to the weak dollar, see Hicks, *The Takeover of American Industries*, N. Y. Times, May 28, 1989, § 3, at 1, col. 2, the employer choice provision is a factor as well. Japanese businesses consider the right to send executives from Japan to the United States to manage and control their operations overseas a basic prerequisite for the successful management of these operations. See Brief for Appellee at 34-35, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741) (citing Brief of the Ministry of International Trade and Industry of the Government of Japan as Amicus Curiae, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982)). Japanese businessmen send their citizens to the United

probably did not foresee the recent increase of foreign investment in the United States, they correctly predicted that American investment abroad would increase.¹⁰⁴ The employer choice provision fosters the growth of American investment abroad by allowing American investors to hire their fellow citizens as executives and thus control their investments abroad.¹⁰⁵

In addition, the increase of foreign investment in the United States has had a positive impact on the American economy.¹⁰⁶ The United States has always encouraged private foreign investment, believing that it re-

States to manage their operations and to train their citizens for future advancement in the corporation. These executives are considered part of the home country staff who are on temporary assignment in a foreign country. *See id.* at 35. These assignments are part of a training program designed to develop an executive's skills so that he may be promoted when he returns to the home country. *See id.* Most foreigners who manage operations in the United States intend to return home or to third countries to assume higher management positions. *See id.* at 35-36.

The United States government recognizes the importance of these intercompany transfers and acknowledges that they have contributed immeasurably to the growth of American business abroad and the international trade of the United States. Allowing foreign businesses to control and manage their overseas operations, therefore, is beneficial to international business in general.

The Air Transport Association ("ATA"), realizing this benefit, supported a broad interpretation of the employer choice provision in their brief as Amicus Curiae in *MacNamara*. *See* Brief for the Air Transport Association of America as Amicus Curiae at 3, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741). Twenty-three airlines belong to the ATA, and these airlines employ more than 300,000 employees in the United States and abroad. *See id.* at 2. These airlines provide services in several countries that are parties to FCN treaties with the United States, including Japan, Korea, and Greece. *See id.*

The ATA expressed concern over the potential restrictive interpretation of the employer choice provision. It contends that it is important that "American businesses operating in foreign countries be unfettered by local regulations in choosing key personnel—individuals who will project the company's philosophy abroad, who are attuned to the fundamental objectives of headquarters and, where appropriate, conversant with local languages, customs, and law." *See id.* The ATA interprets the employer choice provision more broadly than did the Fifth Circuit in *Spieß v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. Unit A Apr. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984), stating that the right to select personnel of their choice allows employers to favor citizens from any country they choose, so long as they do not discriminate among citizens of the host country. A restrictive interpretation of the employer choice provision would allow governments to enact local regulation, whether restrictive or progressive, that would inhibit the ability of their airlines to control and manage their investment abroad. *See id.*

104. As of March of 1988, American private investment in Japan totaled \$938 million. *See Kanabayashi, Foreign Investment in Japan is Growing, Helped by Nation's Economic Expansion*, Wall St. J., June 14, 1988, at 31, col. 2. Several companies have recently begun operations in Japan. These companies include, among others, Michelin, Dupont, Digital Equipment Corp., and Phillips Petroleum. *See id.* An adoption of the liberal interpretation of the provision would allow these companies to control their investment abroad by hiring Americans as executives.

105. *See* Brief for the Air Transport Association of America as Amicus Curiae at 6, *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741).

106. Foreign investment has transformed troubled operations into newly formidable companies. *See Hicks, supra* note 103, at 1, col. 2.

sults in a more productive environment than would otherwise exist.¹⁰⁷ For example, Japanese investment in the United States has created 208,000 extra jobs with a payroll of close to \$6 billion.¹⁰⁸ In addition, it can be argued that the influx of Japanese business and products in the United States has pushed American companies to produce a better product.¹⁰⁹ Thus, although foreign investment in the United States is sometimes viewed as detrimental,¹¹⁰ it has led to identifiable improvements in the economy.

Adopting the narrow view might discourage foreign investment in the United States. Foreign investors often begin their overseas enterprises in the form of affiliates or branches. Foreign companies test the waters before incorporating a separate operation. Once these ventures are successful, they are incorporated, and become a separate entity in the foreign country. Adopting the narrow view might discourage foreign businesses from investing in a new industry in the United States, depriving Americans of the benefit of innovative foreign investment.¹¹¹ The liberal view will enable foreign investors to begin their businesses utilizing fellow citizens in executive positions, while being free from the scrutiny of domestic laws at that initial stage. Once these businesses are established, many investors choose to incorporate their foreign branches and become subject to the host country's discrimination laws.

Congress considers the United States discrimination law to be of highest priority.¹¹² This law may take a back seat if the *Spiess* view is adopted,¹¹³ because foreign affiliates may actually be favoring fellow citi-

107. See *U.S. Practice*, *supra* note 1, at 229 n.2.

108. See Johnson, *supra* note 2, at 34-35.

109. To keep up with their foreign owned competitors, American companies have increased expenditures on research and development and plant modernization. See Hicks, *Foreign Owners are Shaking Up the Competition*, N.Y. Times, May 28, 1989, § 3, p. 9, col. 1.

110. See Burstein, *supra* note 92, at 36.

111. It is conceivable that adoption of the narrow view will not discourage foreign investment in the United States. In *Sumitomo*, the Supreme Court took away the right of foreign companies incorporated in the United States to assert FCN treaty rights and, thus to engage executives of their choice. The majority of Japanese companies are now unable to assert FCN treaty rights because most of the Japanese investment in the United States is conducted through United States subsidiaries. See generally National Register Publishing Co., International Directory of Corporate Affiliations § 2 (1988/89) (listing foreign parent companies and their United States subsidiaries).

Since *Sumitomo*, Japanese investment in the United States has increased as Japan is among the top foreign investors in the United States. See Johnson, *supra* note 2, at 34. Japanese companies have continued to incorporate within the United States with regularity. Thus, the *Sumitomo* decision did not visibly halt foreign investment in the form of subsidiaries, so a valid argument can be made that the adoption of the narrow view will not thwart foreign investment.

112. See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

113. Although the adoption of the liberal view could encourage private international investment, discrimination by Japanese companies operating in the United States has become a real problem. There has been commentary that the Japanese look disdainfully upon Americans, considering them lazy and untrustworthy. See Treece, *What the Japanese Must Learn About Racial Tolerance*, Bus. Wk., Sept. 5, 1988, at 41. Japanese auto-

zens on the basis of sex, for example, and the wronged employee will have no recourse.

This scenario, however, is conceivable in only limited circumstances. First, the opportunities for discrimination are limited because affiliates and branches of foreign companies may favor their citizens solely for managerial positions. Foreign companies are not immune from domestic law when filling non-executive positions. Second, many branches of foreign companies eventually incorporate in the United States once they are established, and therefore forfeit their treaty rights.¹¹⁴

CONCLUSION

The employer choice provision of the FCN treaties gives foreign companies operating in the United States the right to favor their own citizens for managerial positions, without being subjected to the scrutiny of domestic employment discrimination laws. An examination of the broad treaty language, the intent of the signatories, and the current interpretation of the respective governments supports this conclusion.

This liberal interpretation should be adopted. This view encourages foreign investment in the United States, which provides the country with additional jobs, products and capital. Most importantly, it allows the United States to honor the FCN treaty, thus encouraging countries to engage in similar treaties in the future.

Gerald D. Silver

mobile manufacturers have given a proportionally low number of dealerships to blacks. *See id.* The Japanese lack programs recruiting minority managers and dealers that General Motors, Ford and Chrysler have had for years. *See id.* In addition, the media has alleged that the Japanese have discriminated against women and older workers. *See id.* There is evidence, however, that the situation is improving. For example, Toyota has recently launched an affirmative action program and a Bank of Tokyo, Ltd. subsidiary has boosted lending to minority groups. *See id.* Although discrimination is always a concern, courts will immunize signatories from United States discrimination laws if these laws conflict with a treaty right. *See EEOC v. The Cherokee Nation*, 871 F.2d 937, 938-39 (10th Cir. 1989).

114. The Supreme Court has held that domestically incorporated subsidiaries may not assert FCN treaty rights. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 189. Although the Supreme Court left open the possibility of whether these subsidiaries may assert their parents' FCN treaty rights, *see id.* at 189 n.19, this capability will only be available, at most, in rare circumstances, *see Note, Foreign Parent Corporation Rights, supra* note 10 at 167. Therefore, the right of foreign companies to favor their own citizens for executive positions without being subjected to the scrutiny of domestic law is an extremely limited one.