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EMPLOYMENT DISCRIMINATION CHARGES IN TREATIES OF
FRIENDSHIP, COMMERCE, AND NAVIGATION

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Foreign Multinational Enterprises Operating in the United States Seek Sanctuary from Title VII Employment Discrimination Charges in Treaties of Friendship, Commerce, and Navigation

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"Now our generation of Americans has been called on to continue the unending search for justice within our own borders."

President Lyndon B. Johnson¹

I. INTRODUCTION

International commercial treaties create rights for businesses of signatory countries to select upper-level employees primarily from among their own citizens for their subsidiaries abroad. This freedom of selection is an exemption granted in bilateral Treaties of Friendship, Commerce and Navigation (FCN treaties) on the theory that such latitude encourages foreign investment by ensuring that companies can better protect their businesses and investment in other countries by selecting their own key managers from their home office. However, the breadth of latitude embedded in these free choice exemptions (FCEs) contained in the numerous FCN treaties is currently being questioned in light of the potential conflicts that may arise between the FCEs and the Title VII employment rights of United States nationals who compete for equal opportunities within U.S.-incorporated subsidiaries of foreign multinational enterprises (MNEs).

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1. Address to the Nation (July 2, 1964), *in* Wash. Post, July 3, 1964, at A1.

A typical charge arises when a U.S.-incorporated subsidiary of a foreign company fires U.S. citizens or nationals and replaces them with citizens or nationals from the country of the foreign parent company. The U.S. citizens then file suit alleging discrimination. The subsidiary will defend its practice by asserting that under the FCN Treaty, the FCE clause allows it to give employment priority to citizens from the country of its parent company, and that Title VII does not prohibit citizenship discrimination (even while acknowledging that Title VII prohibits national origin discrimination). To a great extent, this defense relies upon a fiction that citizenship discrimination is different from national origin discrimination, when in fact, the two characteristics are virtually interchangeable in homogenous countries such as Japan. Thus, by allowing the subsidiary to favor its own citizens for key positions, FCEs allow foreign companies to prefer their own nationals, in violation of Title VII.

Foreign employers operating U.S.-incorporated subsidiaries should not be able to use FCEs to mask national origin or other forms of employment discrimination that are deemed unlawful under United States law. The scope of the right to employ one's own citizens under FCN treaties must be carefully delineated so that employment practices of domestically incorporated subsidiaries do not unnecessarily trammel the equal employment rights of United States nationals. This is particularly true in light of the accommodating nature of United States equal employment statutes, which specifically defer to the law of a host foreign country when laws conflict. If no conflict existed, United States law would govern the rights of United States citizens employed extraterritorially by U.S.-controlled businesses.²

This Article focuses on employment practices in the United States where the exercise of FCE rights collides with Title VII of the Civil Rights Act of 1964. How broad the discretion to select employees under FCEs is, or should be, will remain a matter of some debate

2. EEOC Enforcement Guidance on Seniority Systems, Extraterritoriality, and Coverage of Federal Reserve Banks, EEOC Notice No. 915.002 (Oct. 20, 1993), 203 DAILY LAB. REP. (BNA) D-01, D-11 (Oct. 22, 1993) [hereinafter EEOC Enforcement Guidance]. Under Section 109 of the Civil Rights Act of 1991, Title VII only protects United States citizens employed by United States companies operating abroad if such protection does not violate the law of the host country. Even in this regard, the United States takes implicit notice of the long-held concept that the country where a person is employed has a special interest in the terms and conditions of the employment carried on therein. It seems a reciprocal expectation that foreign employers operating in the United States should abide by equal employment opportunity principles embodied in our federal law, absent clear immunity under FCN treaty. 42 U.S.C. § 1981 (Supp.V 1993).

pending explicit clarification by the Supreme Court or Congress. In the interim, this Article reviews the weight of FCN treaties relative to federal statutes, as well as judicial precedent, much of which focuses on the U.S.-Japan FCN treaty,³ and the recent Equal Employment Opportunity Commission's enforcement guidance on this topic.⁴ Ultimately, an interpretation of FCEs that reconciles the important purposes underlying both FCN treaties and United States equal employment opportunity laws is recommended.

II. THE BALANCE BETWEEN FCN TREATIES AND TITLE VII

A. *The Purposes of FCN Treaties and Title VII*

The FCN treaties under consideration here are commercial agreements between countries that were designed to encourage international investment after World War II. They are primarily investment treaties that seek to create a favorable climate for foreign investors,⁵ as well as provide for "equality of treatment as between the alien and the citizen of the country."⁶ FCN treaties are "fundamentally economic and legal," as distinguished from political in nature.⁷ They are "concerned with the protection of persons . . . and property," having an objective of securing "nondiscrimination, or equality of treatment."⁸ They set out ground rules for mutual respect between nations and their reciprocal interests abroad.

With respect to employment, FCN treaties typically contain a provision, known as a free choice exemption (FCE) clause, which allows the foreign-owned subsidiary to choose its own "accountants and other technical experts, executive personnel, attorneys, agents and

3. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982). Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063, 2070. Article VIII, paragraph 1 provides: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." See *infra* notes 36-47 and accompanying text (discussing *Sumitomo*).

4. EEOC Enforcement Guidance, *supra* note 2, at D-1.

5. Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 244 (1956).

6. *Id.* at 232.

7. Herman Walker, Jr., *Modern Treaties of Friendship, Commerce & Navigation*, 42 MINN. L. REV. 805, 806 (1958).

8. *Id.* at 806, 811. There are two principal standards of treatment: national treatment, and most favored nation treatment. *Id.* at 811. The latter assures nondiscrimination as compared with other aliens. *Id.* The former, which affords greater protections, assures nondiscrimination as compared with foreign nationals and domestic citizens. *Id.*

other specialists," to work in the host country.⁹ The United States insisted upon such FCE clauses in order to ensure that American-owned or controlled companies operating abroad would not be forced to hire certain percentages of host country citizens pursuant to local laws. These provisions reciprocally provide a grant of immunity to foreign-owned or controlled companies operating within the United States to select citizens of the foreign country to operate their U.S.-based facilities.

Foreign-owned companies seek a broad interpretation of FCE clauses, which would allow them to engage in employment practices with these specialist employees without interference from the antidiscrimination laws of the host country (the United States). On the other hand, domestic employees seek a more restrictive reading such that employment practices will be subject to the host country's laws even for these specialist personnel. Courts are called upon to construe the meaning of FCE clauses despite the lack of negotiating or legislative history available, and the fact that a uniform or model treaty does not exist. Although many of the FCN treaties "show close kinship, . . . no two of them of course are identical."¹⁰ One treaty that is referred to when construing the history of FCEs is the U.S.-Uruguay Treaty which provides that employers may choose the specialist employees "of their choice . . . regardless of nationality."¹¹ Typically, treaties do not have the emphatic language "regardless of nationality" written into the FCE clauses.¹² It is clear that the Uruguay treaty allows for discrimination on the basis of citizenship and even national origin (without specifically providing similar exemptions for age, sex, race, color, or religion). Thus, while some treaties, such as the Uruguay version, allow for discrimination beyond citizenship to include national origin, treaties without national origin language should be construed narrowly to limit the citizenship preference to just that, and disallow discrimination on the basis of national origin.

9. Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 386 n.62 (1956). A similar provision was first included in the treaty from Uruguay. *Id.* This type of clause seeks to avoid the imposition of host country "ultranationalistic policies" on foreign-owned companies. *Id.* at 386.

10. Walker, *supra* note 7, at 807.

11. Treaty of Friendship, Commerce and Economic Development, Nov. 23, 1949, U.S.-Uruguay, Art. V, sec. 4, *reprinted in* 96 Cong. Rec. 12082, 12083 (1950).

12. See Eric Grasberger, Note, *MacNamara v. Korean Air Lines: The Best Solution to Foreign Employer Job Discrimination Under FCN Treaty Rights*, 16 N.C. J. INT'L L. & COM. REG., 141, 155-56 (1991).

Title VII of the Civil Rights Act of 1964 was enacted to eradicate discriminatory employment practices based on race, color, religion, sex, or national origin. The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for enforcing Title VII and other equal employment opportunity laws.¹³ The Civil Rights Act of 1991 amended Title VII in several respects. Most notably it clarified a plaintiff's burden of proof regarding claims of disparate treatment or disparate impact employment discrimination,¹⁴ and codified Title VII's applicability to U.S. citizens employed abroad by U.S.-owned or controlled businesses, albeit with the proviso that should United States and foreign law conflict regarding the legality of an employment practice, foreign law would control.¹⁵

In terms of Title VII's intersection with FCN treaties, and FCEs in particular, two primary legal issues merit discussion. First, should FCN treaties or Title VII take precedence in the event of a complete conflict between the two? Second, should citizenship preferences (protected under FCEs) be equated with national origin discrimination (actionable under Title VII) where the effect of these preferences would amount to national origin discrimination?

The authority of FCN treaties is equivalent to federal law since each is deemed supreme law of the United States.¹⁶ Critical to interpreting the intent of the treaties and Title VII is the clear language of their legislative histories with regard to national origin discrimination, which unfortunately is minimal. Most FCN treaties were enacted prior to Title VII, and the statute's legislative history does not refer to FCN treaties.¹⁷ Pursuant to principles of international comity, the laws of a host country generally govern treatment of an alien corporation.¹⁸ Locally-incorporated subsidiaries should also conform to the host's laws, although as outlined in *Sumitomo Shoji America, Inc. v. Avagliano*, discussed below, the Supreme Court left unanswered the question of whether a U.S.-incorporated subsidiary could assert its foreign parent's FCN treaty rights.¹⁹ When interpreting two laws of equal status, courts assiduously seek to avoid conflict between the

13. See 42 U.S.C. §§ 2000(e)(4)-2000(e)(5) (1988 & Supp.V 1993).

14. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. §§ 1981-1988 (Supp.V 1993)).

15. See EEOC Enforcement Guidance, *supra* note 2, at D-6.

16. John Scaccia, *Title VII and Treaty Rights Battles: The Verdict is Still Out*, 10 ASS'N STUDENT INT'L L. SOCIETIES INT'L L. J. 77, 83 (1986).

17. *Id.* at 83.

18. *Id.* at 88.

19. See *infra* notes 36-47 and accompanying text (discussing *Sumitomo*).

two, and are reluctant to imply repeal of the former (FCN treaties) due to the enactment of the latter (Title VII).²⁰

FCN treaties were not intended to give foreign-owned companies greater rights than domestically-owned companies. Rather, they were intended to provide a level playing field, with similar privileges and responsibilities as a domestic company.²¹ The threshold interpretation of how the two laws interrelate is set forth below in the *Sumitomo* discussion.²² In general, courts are reluctant to perceive a conflict between the two laws and prefer to construe each law narrowly in order to render each valid.

B. Distinguishing Citizenship and National Origin Discrimination

As far as the definition of the protection from national origin discrimination afforded by Title VII is concerned, the determinative precedent is *Espinoza v. Farah Manufacturing Co.*²³ *Espinoza* involved a United States company that rejected an applicant for employment on the basis that she was not a United States citizen.²⁴ Persons of Mexican ancestry made up more than 96% of the employees at the company's San Antonio division—all of whom met the company's citizenship requirement.²⁵ Thus, Farah's requirement of U.S. citizenship for employees did not create a disparate impact based on national origin or ancestry with respect to *Espinoza*, who was a citizen of Mexico and of Mexican ancestry.²⁶

The Court in *Espinoza* emphasized that Title VII's legislative history regarding the term "national origin" indicated that the phrase was intended to refer to the country of the individual or his or her forebears.²⁷ The national origin protection afforded by the statute, therefore, does not extend to a prohibition on a citizenship requirement for employment, a threshold utilized by the federal government

20. See Scaccia, *supra* note 16, at 89.

21. *Id.* at 78; *Sumitomo*, 457 U.S. at 188 n.18 (discussing national treatment); *cf.* Spiess v. C. Itoh & Co., 643 F.2d 353, 369 (5th Cir. 1981) (Reavley, J., dissenting) *vacated and remanded on other grounds*, 457 U.S. 1128 (1982).

22. See *infra* notes 36-47 and accompanying text (discussing *Sumitomo*).

23. 414 U.S. 86 (1973).

24. *Id.* at 87-88. Mrs. *Espinoza*, who was a citizen of Mexico, was a lawful resident of the U.S. *Id.* at 87.

25. *Id.* at 93.

26. *Id.* at 87, 93.

27. *Id.* at 88-89.

itself.²⁸ Nonetheless, the *Espinoza* Court noted that a citizenship test might serve as "a pretext to disguise . . . national-origin discrimination."²⁹ Relying upon *Griggs v. Duke Power Co.*,³⁰ the *Espinoza* Court stated that "[c]ertainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."³¹ Yet, in its holding, the *Espinoza* Court found that "nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage."³² Meanwhile the Court included legal resident aliens amongst those individuals protected by Title VII, rather than limiting such protection only to citizens.³³ So even a permanent resident is entitled to invoke his or her rights under Title VII and may successfully seek redress for a claim of discrimination based upon national origin where a neutral requirement such as citizenship has "the purpose or effect" of discriminating on the basis of national origin.³⁴

While noncitizens employed in the United States enjoy Title VII protection from discrimination on the basis of their national origin, United States nationals may receive only limited protection under Title VII due to FCEs when they compete for jobs in, or are employed by, foreign MNEs that are protected by an FCN treaty. Just as noncitizens of the United States could state a cause of action upon which relief could be granted if they were discriminated against on numerous protected bases, excluding citizenship (unless the citizenship requirement had the purpose or effect of discriminating on the basis of national origin), U.S. nationals should also be protected under Title VII while employed within the United States by an FCN-privileged foreign MNE, except in limited circumstances where: 1) the position in question truly fits the FCE language and the intent of the parties to the FCN treaty; and 2) the treaty privilege is narrowly interpreted to permit free choice in order to protect the foreign employer's investment, but does not amount to the transport of patent cultural biases.

28. *Id.* at 89-90.

29. *Id.* at 92.

30. 401 U.S. 424, 431 (1971). Congress reinforced the holding of *Griggs* regarding nonintentional or disparate impact discrimination when it passed the Civil Rights Act of 1991.

31. 414 U.S. at 92.

32. *Id.* at 95. A reason why Title VII was not deemed to prevent discrimination on the basis of citizenship was that Congress deleted the word "ancestry" from the final version of the statute, which the Court felt indicated that the terms "national origin" and "ancestry" were synonymous. *Id.* at 89.

33. *Id.* at 95.

34. See *Griggs*, 401 U.S. at 431; *Espinoza*, 414 U.S. at 92, 95.

Discrimination in violation of public policies that are deeply embedded in United States law should not be permitted to flourish pursuant to a broad interpretation of FCEs.³⁵

III. JUDICIAL REVIEW

A. *The United States Supreme Court: The Sumitomo Case Creates a Starting Point*

In *Sumitomo Shoji America, Inc. v. Avagliano*, the Supreme Court unanimously expressed the view that a corporation based and incorporated within the United States is subject to the requirements of Title VII even though the corporation is a wholly-owned subsidiary of a Japanese general trading company.³⁶ The plaintiffs, secretarial employees of a New York corporation, alleged, *inter alia*, that respondents violated Title VII by hiring only male Japanese citizens for executive, managerial, and sales positions.³⁷ In defense, respondents asserted that their employment practices were exempt from Title VII scrutiny because, under Article VIII (1) of the FCN Treaty between the United States and Japan, "companies of either Party . . . [may] engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."³⁸ Companies are defined under Treaty Article XXII(3) as "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party."³⁹ This Article VIII(1) FCE clause defense rested upon the premise that Sumitomo was a Japanese company and thus, could assert the U.S.-Japan FCN treaty rights, but the Court disagreed, holding that Sumitomo was instead a United States company.⁴⁰ Thus, the rights under Article VIII(1) were not applicable because such rights were available only to Japanese companies operating in the United States.⁴¹

35. See generally *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1143 (3rd Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

36. 457 U.S. 176.

37. *Id.* at 178.

38. *Id.* at 181. Interestingly, Japan sought to delete Article VIII (1) from the treaty but the United States insisted on the provision in order "to avoid strict percentile limitations on employment of Americans abroad and 'to prevent the imposition of ultranationalistic policies'" regarding essential personnel. *Id.* at 181 n.6 (quoting Herman Walker, Jr., *supra* note 7, at 386).

39. *Sumitomo*, 457 U.S. at 182.

40. *Id.* This holding was based upon the company's place of incorporation, the state of New York. *Id.*

41. *Id.* at 183.

For a foreign company to successfully invoke the FCN treaty exemption protections, the Court held that the company must be from a foreign country.

Both the United States and Japanese governments supported this interpretation of the FCN Treaty,⁴² an interpretation which essentially permits the location of incorporation to determine national identity for the purpose of invoking the rights provided in Article VIII(1). This reading follows from a literal construction of the legal locus of a business, and from the plain language and purpose of the Treaty. The intent of the Treaty was not to grant greater rights to foreign corporations than to domestic ones. It was merely "to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."⁴³ Thus, the entitlement granted foreign corporations was termed "national treatment" which meant terms "no less favorable" than those afforded to host-country corporations. This "national treatment" is deemed "first-class" and to be preferred even to "most-favored-nation treatment" which the Court considered less advantageous.⁴⁴

The Supreme Court addressed the legal ramifications of the differences between Japanese companies operating branch offices directly in the United States, and U.S.-incorporated subsidiaries of Japanese companies. The Court noted that subsidiaries, "as companies of the United States, would enjoy all of those [rights of Japanese companies operating directly in the United States] and more. The only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)."⁴⁵ Most significantly, the Court set out in a footnote that it expressed "no view as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions or as to whether a business necessity defense may be available" since these questions were not placed before the Court.⁴⁶ The Court also refused to determine whether Sumitomo could assert its parent corporation's FCN treaty rights under Article VIII(1).⁴⁷

42. *Id.*

43. *Id.* at 188.

44. *Id.* at 188 n.18. See Madeline C. Amendola, Note, *American Citizens as Second Class Employees: The Permissible Discrimination*, 5 CONN. J. INT'L L. 651, 654 (1990).

45. *Sumitomo*, 457 U.S. at 189.

46. *Id.* at 189 n.19.

47. *Id.* It is noteworthy that if Sumitomo was to assert its parent's FCN treaty rights, then it would be based on the parent corporation's control of the labor relations matters of the locally incorporated subsidiary. This should mean that liability for labor relations matters should also flow beyond the assets of the subsidiary. See generally Eileen M. Mullen,

B. The Circuit Courts of Appeal and Federal District Courts

Thus far, five circuit courts of appeal have ruled on the relationship between FCN treaties and Title VII.⁴⁸ Additionally, district courts within these circuits have construed the balance between the two laws.⁴⁹ The case discussion that follows begins with the Second Circuit and then proceeds to the Seventh Circuit, whose approach provides the greatest contrast to the Second Circuit. Thereafter, opinions from the Fifth, Third, Sixth, and Eleventh Circuits are addressed.

1. The Second Circuit

*a. Avagliano v. Sumitomo Shoji America, Inc.*⁵⁰

Female secretarial employees brought suit against Sumitomo, a U.S.-incorporated subsidiary of a Japanese commercial firm, claiming that its practice of hiring only male Japanese nationals for management positions discriminated against the plaintiffs in violation of Title VII.⁵¹ Sumitomo sought to dismiss the suit on grounds that the FCN Treaty exempted Japanese trading companies and their wholly-owned subsidiaries from Title VII.⁵² The Second Circuit considered "whether the freedom-of-choice language of Article VIII of the Treaty exempts Sumitomo from Title VII . . . as far as executive personnel are concerned."⁵³ Concluding that the language did not exempt Sumitomo, the court reviewed the Treaty's history and found that it failed to support the "expansive interpretation" offered by Sumitomo.⁵⁴

Note, *Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law*, 45 STAN. L. REV. 725, 760 (1993) (discussing loss of limited liability as a disadvantage of parent corporation's admission of control over policies of the subsidiary).

48. *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991); *MacNamara*, 863 F. 2d 1135; *Wickes v. Olympic Airways*, 745 F. 2d 363 (6th Cir. 1984); *Spiess*, 643 F.2d 353; *Avagliano v. Sumitomo Shoji America, Inc.*, 638 F. 2d 552 (2nd Cir. 1981), *vacated and remanded on other grounds*, 457 U.S. 176 (1982).

49. *Papaila v. Uniden America Corp.*, 840 F. Supp. 440 (N.D. Tex. 1994); *Goyette v. DCA Advertising, Inc.*, 830 F. Supp. 737 (S.D. N.Y. 1993); *Ward v. W & H Voortman, Ltd.*, 685 F. Supp. 231 (M.D. Ala. 1988); *Porto v. Canon, U.S.A., Inc.*, 29 Empl. Prac. Dec. (CCH) 32, 903, at ¶ 26, 278 (N.D. Ill. Sept. 9, 1981); *Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979).

50. 638 F.2d 552 (2nd Cir. 1981), *vacated and remanded on other grounds*, 457 U.S. 176 (1982).

51. *Avagliano*, 638 F.2d at 553.

52. *Id.*

53. *Id.* at 558. The court initially found Sumitomo had standing to assert its parent's treaty rights. *Id.* at 555-57.

54. *Id.* at 558-59.

The court set forth an analysis for the disposition of this issue whereby it subjected the foreign-owned company to Title VII, but allowed the company to present a modified bona fide occupational qualification (BFOQ) defense to explain why it had to employ its own nationals.⁵⁵ Noting that the BFOQ is normally a narrowly construed defense, the court gave a considerable degree of deference to the FCN Treaty and construed the defense:

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, including such factors as a person'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.⁵⁶

Recognizing the high correlation of national origin and citizenship in this instance, the court refused to immunize the company from Title VII's ban on discrimination even with regard to employment of its executive personnel (despite the presence of an FCE clause). The Second Circuit, however, offered the company relief to the extent that the court required only "some evidence of BFOQ status" to successfully defend a discrimination charge, rather than the more exacting proof of BFOQ status normally required of domestic employers.⁵⁷ Thus, under certain conditions, "Japanese citizenship could be a bona fide occupational qualification for high level employment with a Japanese-owned domestic corporation and . . . Sumitomo's practices might thus fit within a statutory exception to Title VII."⁵⁸

55. *Id.* at 559; *cf. Goyette*, 830 F. Supp. at 749.

56. *Avagliano*, 638 F.2d at 559.

57. *Id.* But see *Fortino*, 950 F.2d 389 (discrimination on basis of citizenship not actionable under Title VII); *Spiess*, 643 F.2d 353, 362-63 (company covered by treaty and discrimination on basis of citizenship permitted under treaty since citizenship not a protected category under Title VII).

58. *Sumitomo*, 457 U.S. at 179-80. The Supreme Court vacated that portion of the Second Circuit's opinion regarding whether Sumitomo is a company of Japan. The Court held that it was not a company of Japan, and thus not covered by Article VIII (1) of the Treaty. *Id.* at 189-190, 190 n.19. But *cf. Fortino*, 950 F.2d at 393 (U.S. subsidiary of foreign parent covered by Article VIII(1) of Treaty where parent dictated subsidiary's discriminatory conduct). *Id.*

b. *Goyette v. DCA Advertising, Inc.*⁵⁹

In this recent case controlled by Second Circuit precedent, the plaintiffs, former employees of DCA, filed suit against the company, a U.S.-incorporated subsidiary, and Dentsu, its Japanese parent company.⁶⁰ The defendants asserted that they were not liable under Title VII because the FCN treaty allows it to discriminate on the basis of citizenship.⁶¹ The court first found that there was jurisdiction over the foreign parent company and that it was an employer for purposes of Title VII. The court then stated that an FCN Treaty does not give the parent company the right to discriminate on the basis of national origin. "A Japanese corporation doing business in the United States can only hire according to national origin if the company can show that national origin is a bona fide occupational qualification."⁶² Under the framework established by the Second Circuit, the defendant was not exempted from Title VII, and in order to prevail, the company must demonstrate that national origin is a BFOQ under the *Avagliano* BFOQ standard for foreign companies.

The district court denied the defendants' motion for summary judgment on the Title VII claim, finding no proof that national origin was a BFOQ for the jobs.⁶³ Thus, neither the subsidiary nor the parent company is automatically shielded by the FCN Treaty against charges brought under Title VII.

c. *Linskey v. Heidelberg Eastern, Inc.*⁶⁴

Linskey commenced this action pursuant to Title VII alleging that he was discharged because he was not a Danish citizen.⁶⁵ The employer was a U.S. subsidiary of a foreign business incorporated under the laws of the Republic of Denmark.⁶⁶ The court first considered whether the parent corporation was an employer of the plaintiff and could be held responsible for the practices of its subsidiary. Reasoning that Title VII is remedial in nature and should be granted a liberal

59. 830 F. Supp. 737 (S.D.N.Y. 1993).

60. *Goyette*, 830 F. Supp. at 740-41.

61. *Id.* at 749.

62. *Id.*

63. *Id.* See generally Deborah Pines, *U. S. Employees Allowed to Sue Japanese Company for Job Bias*, N.Y. L.J., Aug. 10, 1993, at 1.

64. 470 F. Supp. 1181 (E.D.N.Y. 1979).

65. *Id.*

66. *Id.* at 1182.

interpretation, the court held that the subsidiary and the parent may be regarded as "one entity for the purposes of this action."⁶⁷

Second, the court considered the then novel question of whether the U.S.-Denmark FCN Treaty exempts a parent company from Title VII.⁶⁸ The court denied the parent company's motion to dismiss the action, concluding that there is no "absolute privilege to hire professional and other specialized employees of their choice irrespective of the American laws prohibiting employment discrimination."⁶⁹ Drawing support for this proposition from the legislative histories of several FCNs, the court reasoned that a "different ruling would provide an unjustified loophole with wide ranging effects for the enforcement of Title VII."⁷⁰ Interestingly, however, the court never discussed the fact that citizenship is not a protected category under Title VII, but seems to have assumed citizenship and national origin are the same. *Avagliano*, the controlling precedent in the Second Circuit, is an extension of the reasoning in *Linskey*.

2. *The Seventh Circuit*

a. *Fortino v. Quasar Company*⁷¹

The Seventh Circuit became the first court to specifically address the question of whether a U.S. corporation may assert the Article VIII(1) rights of its parent, a foreign corporation.⁷² In this case, former managers brought suit against Quasar, a U.S.-incorporated subsidiary of Matsushita Electrical Industrial Company. The court considered "whether a claim of discrimination on the basis of national origin is tenable when, as in this case, the discrimination is in favor of foreign citizens employed temporarily in the United States in accordance with a treaty between the United States and Japan that entitles companies of each nation to employ executives of their own choice in the other one."⁷³ The court ruled that discrimination in favor of Japanese citizens, pursuant to an express FCN treaty right, does not violate Title VII's ban on national origin discrimination.⁷⁴

67. *Id.* at 1183.

68. *Id.* at 1184-85.

69. *Id.* at 1185.

70. *Id.* at 1185-87.

71. 950 F.2d 389 (7th Cir. 1991).

72. *Id.* at 392-93; cf. EEOC Enforcement Guidance, *supra* note 2, at D-8, D-9.

73. 950 F.2d at 391.

74. *Id.* at 392-93. See generally David T. Wilson, Note, *Foreign Owned Subsidiaries and National Origin Discrimination: Can Federal Employment Discrimination Law and Employer Choice Provisions be Reconciled?*, 10 ARIZ. J. INT'L & COMP. L. 507, 535-36

Since Title VII does not ban discrimination on the basis of citizenship and the FCN treaty explicitly allows this, the Seventh Circuit declined to find an actionable Title VII claim.⁷⁵ "This collision [between the U.S.-Japan FCN Treaty and Title VII] is avoided by holding national origin and citizenship separate."⁷⁶ In an effort to foreclose further speculation, the court stated that its conclusion would be true whether the allegations are for intentional discrimination or for disparate impact discrimination.⁷⁷ Even while conceding that because of Japan's homogeneity a disparate impact suit was conceivable, the court remained unwilling to allow that type of suit since the "exercise of a treaty right [to prefer one's own citizens] may not be made the basis for inferring a violation of Title VII."⁷⁸

After passing on the merits, the court next considered whether "Quasar, not being a Japanese company in the technical sense . . . [may] rely on the treaty. . . ."⁷⁹ Earlier, *Sumitomo* had held that a U.S. subsidiary of a foreign parent was not protected by the FCN treaty, but specifically declined to decide whether a subsidiary might assert its parent's treaty rights to the extent that the parent had dictated the discriminatory practices.⁸⁰ Finding that Quasar's parent company, Matsushita, exerted a relatively high level of control over the subsidiary, the court allowed Quasar to assert Matsushita's treaty rights granting them the right to favor their Japanese citizens.⁸¹ This, of course, is a neat and tidy literal construction of the Treaty and Title VII so as to render both valid.⁸² Yet it has the impact and effect of causing the Title VII ban on national origin discrimination to be illusory. While *Fortino* addressed the reality that in Japan, in stark contrast to the United States, citizenship and national origin are highly correlated and in unison, the decision splits the concepts to reconcile the demands of Title VII and the U.S.-Japan FCN treaty.⁸³ While the

(1993); Thomas J. Piskorski, *Fortino v. Quasar Co.: Are Japanese-Owned Companies Immune from Title VII?*, 18 EMPL. REL. L.J. 61, 67-68 (1992).

75. *Fortino*, 950 F.2d at 393.

76. *Id.* at 393.

77. *Id.* at 392-93; cf. *MacNamara*, 863 F.2d at 1148.

78. *Fortino*, 950 F.2d at 393.

79. *Id.*

80. *Sumitomo*, 457 U.S. at 189 n.19.

81. *Fortino*, 950 F.2d at 393. The court rationalized this result "at least to the extent necessary to prevent the treaty from being set at naught." *Id.*

82. *Id.* The court thus avoided what it characterized as a "collision." *Id.*

83. *Id.* at 392-93. "Of course, especially in the case of a homogenous country like Japan, citizenship and national origin are highly correlated; almost all citizens of Japan were born there." *Id.* at 392.

Seventh Circuit's reasoning is technically correct according to a straight and rigorous reading of the two laws, it creates an unfortunate precedent that has a discriminatory impact undermining Title VII. Under *Fortino*, a foreign-controlled U.S. subsidiary of a Japanese company may fire with impunity U.S. nationals and replace them with Japanese nationals or those of Japanese ethnic origin who are also Japanese citizens. It very much looks like what the *Espinoza* Court referred to as "a pretext to disguise what is in fact national-origin discrimination."⁸⁴

b. *Porto v. Canon, Inc.*⁸⁵

William L. Porto filed this action against Canon, a U.S.-incorporated subsidiary of a Japanese company, alleging that Canon established systems which limited the employment opportunities of non-Japanese origin employees.⁸⁶ Canon asserted that "Title VII is inapplicable because it has been superseded by the Treaty."⁸⁷ Since there was no controlling Seventh Circuit precedent at the time, the court looked to the Second Circuit (*Avagliano*) and the Fifth Circuit (*Spiess*).⁸⁸ Concluding that compliance with Title VII is consistent with the language and purpose of the FCN treaty, the court rejected Canon's "broad interpretation" of the FCE clause.⁸⁹

The court cautioned, however, that if a defendant is illegally discriminating in favor of persons of Japanese national origin who are not Japanese citizens, [such as a person born in the United States whose parents were originally from Japan] a cause of action under Title VII may be stated. However, if defendant is discriminating only in favor of Japanese citizens, and not in favor of persons of Japanese national origin, it is doubtful that a cause of action is stated under Title VII.⁹⁰

This was a harbinger for the outcome in *Fortino*.

84. *Espinoza*, 414 U.S. at 92.

85. *Porto*, 29 Empl. Prac. Dec. (CCH) ¶ 32, 903, at 26, 278.

86. *Id.* at 26, 278.

87. *Id.* at 26, 279.

88. *Id.* at 26, 282.

89. *Id.* at 26, 282-83.

90. *Id.* at 26, 283.

3. *The Fifth Circuit*

a. *Spiess v. C. Itoh & Co.*⁹¹

Itoh, a U.S.-incorporated subsidiary wholly owned by a Japanese company, allegedly discriminated against its American employees by making managerial promotions and other benefits available only to Japanese citizens.⁹² Itoh asserted that the FCN treaty and FCE clause "cloaks the company with absolute immunity from American employment discrimination laws as to these positions."⁹³ The court first found that Itoh had standing to assert its parent's treaty rights.⁹⁴ As to the scope of the rights established by the Treaty, the court held that Itoh had a "limited right to discriminate in favor of Japanese nationals in filling [managerial and technical] positions."⁹⁵ Rejecting the Second Circuit's approach, the court wrote: "[t]o make this right [to choose essential personnel] subject to Title VII's 'bfoq' requirements . . . would render . . . the Treaty virtually meaningless."⁹⁶ The court even suggested that all employment practices relating to executive personnel should be completely immune from U.S. antidiscrimination laws, stating that "[c]ompanies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws."⁹⁷

The only dissent in this line of cases was written in *Spiess*. Judge Reavley noted that a company has the nationality of its place of incorporation, and thus, Itoh was a U.S. company.⁹⁸ The company is then responsible for complying with all U.S. laws. Judge Reavley would not have allowed Itoh to assert its foreign parent's treaty rights and thus avoid its responsibility to comply with Title VII.⁹⁹ "If Japanese investors . . . gain all the benefits of our legal system on a basis equal with American corporations, I find it eminently reasonable that they

91. 643 F.2d 353 (5th Cir. 1981), *vacated and remanded on other grounds*, 457 U.S. 1128 (1982).

92. *Id.* at 355.

93. *Id.* This absolute immunity Itoh sought would even have included immunity from discrimination on the basis of age, race, sex, religion, national origin, and color.

94. *Id.* at 357-58; *see also Avagliano*, 638 F.2d at 555-57. The Supreme Court remanded *Spiess* in light of its holding in *Sumitomo*. *See Spiess*, 457 U.S. 1128 (1982).

95. *Spiess*, 643 F.2d at 355. The Fifth Circuit based its decision on its reading of the Treaty's negotiating history in the context of post-World War II policies. *Id.* at 359-63.

96. *Id.* at 362.

97. *Id.* at 361.

98. *Id.* at 363 (Reavley, J., dissenting).

99. *Id.* at 363-67.

accept legal responsibilities and duties on an equal basis as well.”¹⁰⁰ Judge Reavley’s approach is direct and makes the law easy to apply. It has great predictive value in this sense. Such an approach, however, creates an uneven business environment especially at a time when companies are considering investing in countries which offer more protections than U.S. laws.

b. *Papaila v. Uniden America Corp.*¹⁰¹

This is the most recent case construing Title VII and an FCN treaty’s FCE clause. A former employee of a U.S.-incorporated subsidiary of a Japanese corporation brought a Title VII suit for breach of an employment contract and employment discrimination.¹⁰² Agreeing with *Fortino* that a subsidiary may assert the treaty rights of its parent, the court followed the *Spiess* and *Fortino* precedents in upholding the exercise of rights under an FCN treaty to choose citizens of the parent company’s own nation for certain positions.¹⁰³ Recognizing the distinction between citizenship and national origin, the court found no evidence that any of Uniden’s employees of Japanese origin who were not Japanese citizens were in any way favored. The court noted, however, that Uniden does not have license to discriminate on the basis of race, sex, religion, or national origin.¹⁰⁴

4. *The Third Circuit*

a. *MacNamara v. Korean Air Lines*¹⁰⁵

Korean Air Lines (KAL) discharged six American managers and replaced them with four Korean citizens (who were Korean nationals as well), ostensibly as part of a reorganization.¹⁰⁶ MacNamara filed suit alleging that his discharge violated, *inter alia*, Title VII.¹⁰⁷ KAL asserted that its practices were privileged under the terms of the U.S.-

100. *Id.* at 369.

101. 840 F. Supp. 440 (N.D. Tex. 1994)

102. *Id.* at 443.

103. *Id.* at 447.

104. *Id.* at 446-47. See generally, *Federal Judge Upholds Subsidiary’s Right To Discriminate in Favor of Japanese Citizens*, BNA DAILY LAB. REP., Feb. 3, 1994, available in LEXIS, BNA Library, DLABRT File.

105. 863 F.2d 1135 (3rd Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

106. *Id.* at 1137-38. The court held that the employment practices in question were within the protection of Article VIII(1) because the reassignment of job responsibilities involved “engaging” executives of the company’s choice as per the language of the FCE clause. *Id.* at 1142.

107. *Id.* at 1138.

Korea FCN Treaty.¹⁰⁸ The Third Circuit first found that KAL was covered by the Treaty, and thus could invoke the Article VIII(1) FCE clause.¹⁰⁹ One important fact that distinguishes this case from *Fortino* is that KAL was not a U.S.-incorporated subsidiary; it was a branch of the foreign parent, and was clearly entitled to exercise the Treaty's FCE rights. Like the later Seventh Circuit decision in *Fortino*, the *MacNamara* court perceived no theoretical conflict between Title VII's prohibition of intentional discrimination on the basis of race and national origin, and the Treaty's right to select managers solely on the basis of their citizenship.¹¹⁰

The *MacNamara* court delved further and considered whether a potential conflict exists between the exercise of treaty rights and Title VII where a disparate impact could be established. Disparate impact occurs when an employment practice is neutral on its face but works an invidious impact.¹¹¹ Thus, even while attempting to render both laws valid, the court recognized a potential partial conflict between them with regard to disparate impact discrimination.

To establish such liability, parties generally rely on statistical evidence of the disproportionate effect of a facially neutral practice or job requirement. In cases where a company requires its employees to be citizens of a country whose population happens to be racially homogeneous, national origin and citizenship are highly correlated and statistical evidence of a disproportionate effect on U.S. nationals "is likely to be substantial," indicating a Title VII violation.¹¹² Thus "a disparate impact case can result in liability where the employer did nothing more than exercise" its Treaty rights governing selection of personnel.¹¹³ Concluding that disparate impact liability definitely conflicts with Article VIII(1) of the Treaty, the Third Circuit deferred to international law principles and held that Title VII liability may not be imposed.¹¹⁴ Thus, *MacNamara* could proceed with his claims of

108. *Id.* KAL filed a motion to dismiss the suit accordingly. *Id.*

109. *Id.* at 1140.

110. *Id.* at 1140-41, 1146-47, 1147 n.14 (emphasis added). The court was critical of the Second Circuit's approach to this issue. *Id.*

111. *Id.* at 1141. See generally Grasberger, *supra* note 12, at 141-145; *Espinoza*, 414 U.S. at 92. The *MacNamara* court thereby recognized national origin discrimination as prohibited by Title VII, and citizenship discrimination as permitted by the Treaty as separate and distinct phenomena. 863 F.2d at 1145-46. The court found there was no conflict between the laws in mixed-motive cases. *Id.* at 1147 n.15.

112. *Id.* at 1148.

113. *Id.*

114. *Id.*

disparate treatment, but liability based upon disparate impact could not be imposed.¹¹⁵

5. *The Sixth Circuit*

a. *Wickes v. Olympic Airways*¹¹⁶

The plaintiff filed suit under state law alleging that Olympic, a foreign corporation, discriminated against him on the basis of his age and national origin.¹¹⁷ The court noted that the legislative history of the U.S.-Greek FCN Treaty contained evidence that it was "intended to be a narrow privilege to employ Greek citizens for certain high level positions, not a wholesale immunity from compliance with labor laws. . . ."¹¹⁸ In the instant case, the court found that while "[c]itizenship per se is not a classification" in the state anti-discrimination laws, "[t]o the extent that plaintiff may claim on remand that Greek citizenship and national origin are synonymous . . . such a claim would conflict with the Treaty and the Treaty would prevail [over the state law]."¹¹⁹

The court recognized that the "[t]reaty provides Greek companies doing business in the United States, and American companies in Greece some freedom to favor their own citizens for managerial and technical positions within the company so as to ensure their operational success."¹²⁰ National origin discrimination was found to be distinct from discrimination based upon citizenship.¹²¹

6. *The Eleventh Circuit*

a. *Ward v. W & H Voortman, Ltd.*¹²²

Ward brought suit against Voortman, a foreign corporation with a principal place of business in Canada, alleging workplace sex discrimination.¹²³ Without acknowledging any cases directly on point, the fed-

115. *Id.* The court reversed the summary judgment for KAL, and remanded the case for further proceedings. *Id.* at 1149. The disparate treatment charge was most likely dismissed as the appeals court made clear its position that there is no "theoretical or pragmatic" inconsistency between recognizing Title VII rights along with Article VIII(1) rights. *Id.* at 1148.

116. 745 F.2d 363 (6th Cir. 1984).

117. *Id.* at 364-65.

118. *Id.* at 365.

119. *Id.* at 368; cf. *MacNamara*, 863 F.2d at 1148.

120. *Wickes*, 745 F.2d at 368; cf. *MacNamara*, 863 F.2d at 1147.

121. *Wickes*, 745 F.2d at 368; cf. *MacNamara*, 863 F.2d at 1147.

122. 685 F. Supp. 231 (M.D. Ala. 1988).

123. *Id.* at 231.

eral district court concluded that "any company, foreign or domestic, that elects to do business in this country falls within Title VII's reach and should, and must, do business here according to its rules prohibiting discrimination."¹²⁴ The court reasoned that to hold otherwise would be contrary to Title VII's expansive goal, and it would be "illogical" to limit its reach to American employees working for domestic entities and to leave "open for victimization" American employees of foreign-owned businesses.¹²⁵ This is perhaps the strongest judicial language recognizing the inconsistent exemption of foreign-owned businesses from Title VII liability. Since no FCN treaty was mentioned in the case, it may be fair to speculate that this result was reached because there was no treaty or FCE clause.

In sum, courts have taken various approaches in deciding whether U.S.-incorporated subsidiaries may assert their foreign parents' treaty rights, and whether the scope of such rights should extend to exempting these United States subsidiaries from U.S. antidiscrimination laws.

At this point in time, the ultimate result of this conflict is that not all companies are playing by the same rules, and this handicaps those companies who must comply with the most stringent antidiscrimination laws. This outcome was surely not intended, nor does it promote comity and consistency in the global marketplace. A clarifying decision from the Supreme Court is necessary in order to unify the circuit courts of appeal. In the interim, it is of considerable interest to look at the EEOC's guidance on this topic.

IV. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT GUIDANCE STATEMENT

The Equal Employment Opportunity Commission's most recent guidance on the topic of discrimination by foreign employers within the United States sets forth the agency's position regarding the coverage of Title VII and the Americans with Disabilities Act (ADA) to foreign employers who are discriminating within the United States.¹²⁶ The EEOC outlines the judicial interpretation of the interrelationship of equal employment opportunity statutes with the immunity pro-

124. *Id.* at 233.

125. *Id.* at 232. The court thus denied Voortman's motion to dismiss the discrimination charges. *Id.* at 233.

126. EEOC Enforcement Guidance, *supra* note 2, at D-1 to D-13.

vided by FCEs. It also updates the 1988 EEOC Policy Guidance on Title VII Charges Against Foreign Companies and U.S. Employers Overseas, in light of the passage of the Civil Rights Act of 1991 and the ADA.¹²⁷ This recent guidance more explicitly details the assessment of the nationality of employers¹²⁸ and provides an updated framework for reconciling the conflict of FCN treaties with Title VII.¹²⁹

The EEOC uses a straightforward approach in determining the nationality of an employer for the purposes of determining Title VII coverage.¹³⁰ The Commission first looks to the place of incorporation to establish nationality.¹³¹ In some instances, however, the totality of a company's contacts with the United States must be evaluated.¹³² The factors specifically deemed relevant by the EEOC to determine the nationality of business entities include:

- (a) the company's principal place of business, i.e., the place where primary factories, offices, or other facilities are located; (b) the nationality of dominant shareholders and/or those holding voting control; and (c) the nationality and location of management, i.e., of the officers and directors of the company.¹³³

Even where an entity's nationality is determined by the Commission not to be American, the employer should be covered by Title VII if its conduct abroad is "controlled" by an American employer.¹³⁴

127. EEOC Policy Guidance on Title VII Charges Against Foreign Companies and U.S. Employers Overseas, 183 DAILY LAB. REP. (BNA) D-1 (Sept. 2, 1988) [hereinafter 1988 Policy Guidance]. The 1988 Policy Guidance deferred the questions that were raised, but not answered, in *Sumitomo* to the Title VII/EPA Division, Office of Legal Counsel, thus limiting that guidance to Title VII's coverage of a foreign corporation as an employer under Title VII. *Id.* at D-5. The 1988 Policy Guidance also dealt with the application of Title VII to U.S. employers abroad which was substantially revised in the 1993 EEOC Enforcement Guidance, but this is outside the scope of this article.

128. EEOC Enforcement Guidance, *supra* note 2, at D-5.

129. *Id.* at D-7 to D-11. This guidance directs internal personnel when processing charges.

130. *Id.* at D-5.

131. *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 213 (1987)).

132. EEOC Enforcement Guidance, *supra* note 2, at D-5.

133. *Id.*

134. Here the Commission uses four factors discussed in Section 109 of the Civil Rights Act of 1991 to assess control: (a) interrelation of operations; (b) common management; (c) centralized control of labor relations; and (d) common ownership or financial control of the employer and the foreign corporation. These factors are traditional determinants of integrated enterprises or a single employer, originally developed by the National Labor Relations Board but subsequently utilized in Title VII and other employment discrimination cases. See Nobuhisa Ishizuka, *Subsidiary Assertion of Foreign Parent Corporation*

The EEOC has determined that both Title VII and the ADA apply to foreign employers when the discrimination occurs in the United States.¹³⁵ This threshold jurisdictional matter follows from the election to do business and employ individuals within the United States, which subjects foreign employers to United States employment antidiscrimination laws, while it simultaneously entitles them to the "benefits and protections of U.S. law."¹³⁶ The Commission also outlines the appropriate analysis to apply when a foreign employer asserts that an FCN treaty limits the applicability of Title VII to its employment practices.¹³⁷

When analyzing whether a respondent foreign employer is protected by a treaty which permits preference for citizens of that employer's nation, the EEOC considers: 1) whether the offending employer is actually covered by a relevant treaty or agreement; 2) whether the employment practices in question are sheltered by the treaty; and if they are, 3) what impact the treaty has upon Title VII rights.¹³⁸ The Commission looks to the language of the treaty and the intent of the parties to answer the above questions in light of the facts of each case.¹³⁹ The EEOC highlights that the *Sumitomo* holding (that a company's place of incorporation controls the applicability of the FCN treaty) is limited to the U.S.-Japan FCN treaty. Thus, the Commission counsels the automatic use of the place of incorporation test if the treaty is between the United States and Japan, but notes that other FCN treaties must be evaluated based upon both their language and intent as evidenced in their negotiating histories.¹⁴⁰

The EEOC explicitly disagrees with the Seventh Circuit's construction that a wholly-owned U.S. subsidiary may assert its parent's

Rights Under Commercial Treaties to Hire Employees "Of Their Choice, 86 COLUM. L. REV. 139, 153-54 (1986). The Title VII coverage is subject to the foreign laws defense of Section 109 of the Civil Rights Act of 1991. See EEOC Enforcement Guidance, *supra* note 2, at D-6.

135. EEOC Enforcement Guidance, *supra* note 2, at D-7 to D-8.

136. See *id.* at D-7 (citing *Ward v. W & H Voortman, Ltd.*, 685 F. Supp. 231, 233 (M.D. Ala. 1988), and Commission Decision No. 84-2, CCH Employment Practices Guide 6840 (1983)).

137. EEOC Enforcement Guidance, *supra* note 2, at D-8. Our concern here regards Title VII but the EEOC adopts the identical premises for the ADA. The scope of this Article entails private sector enterprises rather than government instrumentalities. The latter enterprises may be exempt from regulation due to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, 1611 (1988 & Supp. III 1991). EEOC Enforcement Guidance, *supra* note 2, at D-12 n.15.

138. EEOC Enforcement Guidance, *supra* note 2, at D-8.

139. See *id.*

140. See *id.*

treaty rights if the parent dictated the discriminatory conduct of the subsidiary.¹⁴¹ While the issue of asserting a parent's FCN treaty rights was acknowledged but left unanswered in *Sumitomo*, the Commission disagrees with *Fortino* and believes that allowing a U.S. subsidiary "to assert its parent's treaty rights enables that subsidiary 'to accomplish indirectly what it cannot accomplish directly'" (under the holding of *Sumitomo*).¹⁴² However, EEOC offices within the jurisdiction of the Seventh Circuit are bound to follow the rule in *Fortino*. Regarding charges alleging discrimination in the United States by Japanese-owned U.S. subsidiaries, the Commission directs its personnel there to investigate the respondent's place of incorporation and whether the conduct was dictated to the U.S. subsidiary by the Japanese parent.¹⁴³ In all other circuits, the EEOC operates under a stricter construction regarding the protections afforded by FCNs.¹⁴⁴

Even when a foreign employer doing business in the United States is clearly operating under the aegis of an FCN, it remains to be determined whether the employment practices in question are shielded from charges of discrimination pursuant to FCEs. What positions and personnel actions are immune from Title VII scrutiny? The EEOC looks to the facts of the charge and to the language and intent of the treaty in question.¹⁴⁵

The EEOC Guidelines include a hypothetical example to illustrate the agency's position on this issue. In the example, the language of an illustrative FCN treaty between the United States and a foreign country states 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."¹⁴⁶ This provision is identical to the FCE "of their choice" provision included in most FCN's. Typically, Xcorp, a company incorporated in the country of X, would attempt to avoid Title VII scrutiny and claim exemption for a wide range of employment practices pursuant to this treaty. However, should an applicant be denied a clerical position in Xcorp's word-processing plant in Georgia on the basis of the applicant's national origin, and an X na-

141. *Id.* (citing *Fortino*, 950 F.2d at 393 (noting that a parent's right may be asserted "at least to the extent necessary to prevent the treaty from being set at naught").

142. EEOC Enforcement Guidance, *supra* note 2, at D-8 (quoting *Spiess*, 725 F.2d at 973).

143. EEOC Enforcement Guidance, *supra* note 2, at D-9.

144. *See id.*

145. *Id.*

146. *Id.*

tional is hired to fill the position, the EEOC suggests that Xcorp will not succeed with a defense based on the FCN treaty.¹⁴⁷

The Commission's reasoning is that "the treaty's protection is limited to the selection of 'accountants and other technical experts, executive personnel, attorneys, agents and other specialists,'" and thus, the treaty would not shield Xcorp from a discrimination charge involving an employment practice relating to a clerical position.¹⁴⁸ Clearly, Xcorp would be attempting to favor its citizens across the board, as opposed to only those within the defined parameters of the FCE clause. Accordingly, the EEOC attempts to prevent foreign employers from playing semantic games with job titles to reserve more positions for their citizens than is permitted by treaty. In this context, the Commission suggests that a job title may not be determinative and that it will look to actual job duties.¹⁴⁹

When determining whether a particular employment practice is protected by a treaty, the EEOC also looks at the practice as it relates to actions permitted by the treaty.¹⁵⁰ For example, the Commission reasons that a treaty which permits a foreign employer to "engage" certain personnel of its choice, "probably also permits this employer to fire these same personnel."¹⁵¹ The EEOC's position is based upon the Third Circuit's finding in *MacNamara*, that the right to "engage" executives under the U.S.-Korean FCN treaty includes the right to terminate current personnel and replace them with executives who share the defendant's citizenship.¹⁵² However, the EEOC makes clear that such a treaty protected right to hire and discharge personnel would not extend to a right to engage in wage discrimination with impunity.¹⁵³ The Commission again urges a narrow reading of treaty rights based on a strict interpretation of a given treaty.¹⁵⁴ The EEOC has emphasized that each case is fact specific and that the extent of coverage of each FCN treaty and the FCE clause within it will vary depend-

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* It should be noted that the citizenship protection does not allow foreign companies operating in the United States "to select among American citizens on the basis of their age, race, sex, religion, or national origin." *Id.* (citing *MacNamara*, 863 F.2d at 1143). The *MacNamara* case is of particular import in that the Supreme Court denied *certiorari*, allowing the Third Circuit's decision to stand. 493 U.S. 944 (1989). See generally Grasberger, *supra* note 12, at 141-150.

151. EEOC Enforcement Guidance, *supra* note 2, at D-8.

152. 863 F.2d at 1141-42.

153. EEOC Enforcement Guidance, *supra* note 2, at D-9.

154. *Id.*

ing on the history, language, and intent of the parties.¹⁵⁵ The circuit courts are not bound by the EEOC's position, yet the agency's guidance is entitled to a measure of deference.

V. CONCLUSION

"America is woven of many strands; I would recognize them and let it so remain. . . . Our fate is to become one, and yet many."

Ralph Ellison¹⁵⁶

Since the passage of the Civil Rights Act of 1991, Title VII has covered discriminatory employment practices against United States citizens abroad by U.S. or U.S.-controlled employers. Moreover, equal employment opportunity statutes regulate discrimination by foreign companies within the United States regardless of whether the charging party is a U.S. citizen. The extent of coverage, however, varies depending on the existence and language of treaties or international agreements and their negotiating histories.

When an FCN treaty exists, a balance must be struck between international concerns of comity and domestic goals of eradicating discrimination in the workplace. The purpose of FCN treaties is to assure foreign corporations the right to conduct business on an equal basis without suffering discrimination based on alienage. Even the courts have acknowledged that the FCE clause in FCN treaties confers a significant advantage. Where the FCE clause is invoked to prefer the citizens of another country, it is also a possible violation of Title VII's ban on national origin discrimination.

Thus far, courts have reached conflicting results regarding the interrelationship of FCN Treaties and Title VII. For example, the Second Circuit has held that treaty language does not insulate a U.S.-incorporated subsidiary's practices from Title VII scrutiny. The Seventh Circuit, however, has ruled that discrimination in favor of one's own citizens, an explicit FCN treaty right under an FCE clause, is not subject to review under a Title VII national origin discrimination theory. The Second Circuit acknowledged and attempted to reconcile the two laws. The Seventh Circuit conceded the potential conflict, yet avoided crafting a solution which would have recognized the reality that national origin discrimination may arise out of an FCE clause allowing companies to prefer citizens of another country.

155. *Id.* at D-11.

156. Ralph Ellison, *The Invisible Man*, epilogue (1952).

The EEOC has taken a position quite similar to the Second Circuit with the intent of limiting the scope of FCEs. While the EEOC does not approve of the result reached by the Seventh Circuit, the Commission will follow the *Fortino* rule within that Circuit. The Commission has warned that foreign employers should reasonably anticipate being subjected to its enforcement process should any charge arise directly from their businesses within the United States. It treats the place of incorporation as determinative when considering the availability of FCE clause rights, and states that U.S. subsidiaries of foreign corporations may not assert their parents' FCN treaty rights.

If a foreign company is covered by an FCN treaty, the EEOC will assess whether the employment practices are covered by the treaty. The EEOC will then consider the scope of protection granted by the treaty. In making both determinations, the EEOC favors a restrictive reading of the treaty rights and attempts to foster a greater awareness of the antidiscrimination laws in light of foreign policy concerns.

The EEOC's recent Enforcement Guidance represents an important step toward clarifying the confusion that surrounds the interrelationship of Title VII and FCN treaty rights. While this guidance is not binding on the courts, it is a strong analysis of the relevant employment law faced by foreign multinational enterprises operating in the United States, and it recognizes the reality that citizenship preferences may really be a mask for national origin discrimination. The EEOC has adopted a well-reasoned approach, one that tempers the theoretical direction of the Seventh Circuit, and balances the economic, legal and political concerns of the parties. As the agency vested with enforcing Title VII, the EEOC is justly concerned with ensuring that U.S. nationals are not unduly prejudiced by employment discrimination within the United States. The policies behind U.S. equal employment laws are being increasingly accepted as basic human rights in the global workplace.