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John Bruce Sternlight

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Sumitomo Shoji America, Inc. v. Avagliano: Does Title VII Trump the Treaty?

In Sumitomo Shoji America, Inc. v. Avagliano the Supreme Court was presented with the issue whether article VIII(1) of the United States-Japan Treaty of Friendship, Commerce and Navigation (FCN Treaty) provides a defense to a Title VII employment discrimination suit against a United States subsidiary of a Japanese corporation. The Court avoided the question, however, holding instead that Sumitomo (America), a New York corporation, is not a company of Japan and thus is not covered by article VIII(1) of the Treaty. Effectively, the Court evaded the weightier question that had been resolved differently in the Second and Fifth Circuits: whether a

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1 457 U.S. 176 (1982).
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
4 457 U.S. at 189.
5 The Second Circuit in Sumitomo concluded that, while the Treaty parties intended to cover locally incorporated subsidiaries of foreign companies such as Sumitomo, the Treaty does not protect Sumitomo's executive employment practices from Title VII responsibilities. 638 F.2d 552 (2d Cir. 1981).
6 The Fifth Circuit disposed of a strikingly similar case in a different manner. In Spiess v. C. Itoh & Co., 643 F.2d 353 (5th Cir. 1981), cert. denied, 454 U.S. 1130 (1982), the
foreign corporation may avoid compliance with United States employment discrimination laws by using as a defense the FCN Treaty provision guaranteeing freedom of choice in hiring. Thus, the Sumitomo Court missed the opportunity to resolve the tension between Title VII employment discrimination laws and article VIII(1) Treaty provisions. Despite a timely opportunity to hold that civil rights laws cannot be abrogated by a commercial treaty, the Court merely increased the confusion in an already unclear area of the law.

Petitioner Sumitomo is a New York corporation and a wholly owned subsidiary of a Japanese general trading company. Respondents, past and present female secretarial employees of Sumitomo in New York, filed a class action suit against Sumitomo, alleging that their employer violated Title VII of the Civil Rights Act of 1964 by hiring only male Japanese citizens for executive, managerial, and sales positions. Sumitomo moved to dismiss in district court, claiming that article VIII(1) of the FCN Treaty protects its practices. The district court denied the motion to dismiss and certified for interlocutory appeal to the Second Circuit Court of Appeals the question whether the Treaty's provisions exempt Sumitomo from Title VII's obligations.

The Second Circuit held that although article VIII(1) of the Treaty is intended to cover locally incorporated subsidiaries of foreign corporations, the language of the Treaty does not exempt Sumitomo from compliance with Title VII. The court stated that to differentiate between Japanese corporations, local branches, and locally incorporated subsidiaries in applying the Treaty provisions would disregard substance for form, a practice previously rejected in treaty construction, would contradict the purpose of protecting all foreign investments, and would create an illogical, "crazy-quilt pat-
tern" of rights and privileges.\textsuperscript{14}

The Second Circuit found that despite its applicability to locally incorporated subsidiaries, the Treaty does not shield Sumitomo from Title VII claims. The freedom of choice language in article VIII originally sought to circumvent laws in many United States jurisdictions and foreign countries that severely limited the employment of noncitizens.\textsuperscript{15} Interpreting the words "of their choice" so broadly as to license employers to evade Title VII laws also might immunize employers from labor laws that protect unions, children, and all employees.\textsuperscript{16} Adherence to Title VII still would enable Sumitomo to employ Japanese nationals in positions where such persons are "reasonably necessary to the successful operation of its business."\textsuperscript{17}

The Supreme Court granted certiorari to decide whether article VIII(1) provides a defense to a Title VII suit against a United States subsidiary of a Japanese company. The Court found it unnecessary to reach that question, however, deciding that, as a United States corporation, Sumitomo could not claim protection under the Treaty. The Court based its decision on the literal language of article XXII(3) which states that the place of incorporation defines corporate nationality, a definition with which both parties agreed.\textsuperscript{18}

Furthermore, the Court maintained that the Treaty's purpose is to give corporations of each party legal status in the territory of the other party comparable to that accorded domestic firms.\textsuperscript{19} The sig-

\textsuperscript{14} 4 U.S.T. at 2066, T.I.A.S. No. 2863. "The effect of the Treaty is to assure that nationals of one party are not discriminated against within the territory of the other party." 473 F. Supp. at 509.
\textsuperscript{15} Id. at 558-59. See Note, Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers, 31 STAN. L. REV. 947, 952-53 & n.28 (1979).
\textsuperscript{16} 638 F.2d at 559.
\textsuperscript{17} Id. Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e)(1982), states that: it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .
\textsuperscript{18} 457 U.S. at 180-85. See infra note 25 and accompanying text.
\textsuperscript{19} Id. at 186. Of course, domestic firms must obey federal antidiscrimination laws.
natories intended to assure foreign corporations of "the right to conduct business on an equal basis without suffering discrimination based on their alienage."

Sumitomo's original motion for dismissal urged that discrimination on the basis of Japanese citizenship does not violate Title VII, and in any event, its practices are protected under article VIII(1) of the Treaty. Only the second question was certified to the court of appeals. In the appeal to the Supreme Court Sumitomo asserted that despite the literal interpretation of the Treaty's language, both Japan and the United States intended that the Treaty cover all Japanese subsidiaries regardless of their place of incorporation. Sumitomo further claimed that to adhere rigidly to the Treaty's language would contradict its purpose.

Like Sumitomo, the plaintiff in Spiess v. C. Itoh & Co. (America), Inc. asserted that United States subsidiaries, as domestic corporations, must comply with federal laws prohibiting employment discrimination. Although the district courts in Spiess and Sumitomo agreed with the plaintiffs, the Second and Fifth Circuits reversed, holding that the subsidiaries are foreign corporations and may invoke the Treaty provisions.

The two courts of appeals split, however, on the issue whether

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20 Id. at 188.
21 The district court refused to certify two questions of law that plaintiffs had advanced: whether an allegation of sex and nationality discrimination constitutes a valid claim under 42 U.S.C. § 1981, and whether Sumitomo's common-law tort counterclaims of abuse of process should have been dismissed. The court granted Sumitomo's request for reconsideration of the denial of defendant's motion to dismiss. The court again denied the motion on the ground that the specific Treaty provision on which Sumitomo relied does not apply to subsidiaries. See Avigliano [sic] v. Sumitomo Shoji America, Inc., No. 77 Civ. 5641 (CHT) (Nov. 29, 1979) (unreported); 638 F.2d at 553-54 n.2.
22 457 U.S. at 185.
23 643 F.2d at 353.
24 Spiess, 469 F. Supp. 1, 3 (S.D. Tex. 1979), rev'd, 643 F.2d 353 (5th Cir. 1981), cert. denied, 454 U.S. 1130 (1982). The district court in Sumitomo did not rule on whether the language of article VIII, allowing freedom of choice in executive hiring, is sufficiently broad to exempt United States subsidiaries of Japanese companies from the antidiscrimination provisions of Title VII. In its first opinion, the district court held that a subsidiary incorporated in the United States cannot invoke the Treaty to shield its employment practices, because article XXII(3) of the Treaty defines corporate nationality as place of incorporation. 473 F. Supp. at 509.
25 See supra notes 5 & 6 and accompanying text.
the discriminatory practices are protected under the Treaty. The Fifth Circuit held in *Spiess* that the Treaty absolutely protects defendant's practice of hiring only Japanese citizens for executive and technical positions. The court found no evidence in Title VII of congressional intent to depart from the Treaty, thus eliminating the only situation in which inconsistent federal legislation would govern.\(^{26}\) The court also examined the Treaty's Senate history, which showed concern for the right of United States companies to use their own personnel to control company investments in Japan.\(^{27}\) Interpreting such concern as an intent in article VIII(1) "to create an absolute rule permitting foreign nationals to control their overseas investments,"\(^{28}\) the Fifth Circuit concluded that C. Itoh's hiring policies are not affected by Title VII requirements.\(^{29}\)

Interpreting the plain language of the Treaty, the Supreme Court held that the language consistently indicates that the place of incorporation governs corporate nationality.\(^{30}\) The Court also gave significant weight to the Japanese and United States governments' acquiescence to that construction.\(^{31}\) Furthermore, the Court rejected Sumitomo's assertion that adherence to the Treaty's language would frustrate the signatories' intent,\(^{32}\) based on the history and purpose of FCN Treaties in general, and of Japan's Treaty in particular.\(^{33}\) The Court did not find any inconsistencies in applying the same restrictions and obligations to foreign and domestic corporations alike.\(^{34}\)

Finally, the *Sumitomo* Court disagreed with the Second Circuit's assessment that literal adherence to the Treaty's language would create a "crazy-quilt pattern" imposing fewer limitations on branches of Japanese companies operating in the United States than on locally incorporated subsidiaries.\(^{35}\) The Court believed that treating locally incorporated subsidiaries as United States entities would accord

\(^{26}\) 643 F.2d at 356, 362. The FCN Treaty is self-executing; it requires no implementing legislation. *Id.* As the supreme law of the land, the Treaty supersedes inconsistent state law under art. VI, § 2 of the United States Constitution, which states that the Laws of the United States . . . and all Treaties made, or which shall be made, . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.

*Id.* See also Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation"); Missouri v. Holland, 252 U.S. 416, 433 (1920).

\(^{27}\) 643 F.2d at 361-62.

\(^{28}\) *Id.* at 360.

\(^{29}\) Cf. *supra* notes 15-17 and accompanying text.

\(^{30}\) 457 U.S. at 180-83.

\(^{31}\) *Id.* at 183-84.

\(^{32}\) *Id.* at 185-86.

\(^{33}\) *Id.* at 186-88.

\(^{34}\) *Id.* at 187-88.

\(^{35}\) 638 F.2d at 556.
them even greater rights and status than a branch of a foreign company.\textsuperscript{36} The sole advantage of operating a branch rather than a locally incorporated subsidiary arises from the article VIII(1) freedom of choice in hiring provision,\textsuperscript{37} the scope of which has not yet been determined.

In sum, the Court rejected the Second and Fifth Circuits' opinions that locally incorporated subsidiaries have the nationality of the parent company, because regarding these subsidiaries as citizens of the state of incorporation follows the plain language of the Treaty and does not frustrate its purpose. In so doing, however, the Court failed to address the only issue on which the Second and Fifth Circuits did not agree: whether the article VIII(1) freedom of choice in hiring provision protects absolutely a foreign employer operating in the United States. The Court should have expanded its decision to resolve the conflict between the Treaty and Title VII, by harmonizing the apparent purposes and case law dealing with each.

To evaluate the conflict between the FCN Treaty provisions and Title VII's prohibition of employment discrimination, it is necessary to examine the Treaty's purpose and provisions that relate to \textit{Sumitomo} and to review principles of treaty interpretation. It also is useful to examine Title VII, the obligations it places on employers, and the possible defenses it affords them. Finally, the relation between the Treaty and Title VII must be addressed to provide a framework for balancing the aims of the two apparently conflicting authorities.

The FCN Treaty between the United States and Japan,\textsuperscript{38} concluded on April 2, 1953, purports to “provide a legal framework within which economic relations between the two countries can be developed to their mutual advantage.”\textsuperscript{39} This typifies the aims of many FCN treaties the United States has concluded.\textsuperscript{40}

\textsuperscript{36} 457 U.S. at 189. The Court rejected the Second Circuit's assertion that if locally incorporated subsidiaries were not considered Japanese companies under the Treaty, they "would be denied access to the legal system, would be left unprotected against unlawful entry and molestation, and would be unable to dispose of property, obtain patents, engage in importation and exportation, or make payments, remittances, and transfers of funds.” \textit{Id.} Obviously, a New York corporation enjoys all these rights and more, according to the Court. \textit{Id.}

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} 4 U.S.T. 2063, T.I.A.S. No. 2863.

\textsuperscript{39} Commercial Treaties: \textit{Hearing on Treaties of Friendship, Commerce, and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan Before the Subcomm. of the Senate Comm. on Foreign Relations, 83d Cong., 1st Sess. 27 (1953)} (statement of Alexis Johnson, Deputy Assistant Secretary for Far Eastern Affairs).

The current treaty belongs to the third phase of the development of FCN Treaties. The first phase commenced with the independence of the United States and continued until the early twentieth century. Commercial treaties of this period concentrated mainly on trade and shipping rights of individuals. As corporations gradually took over international trade after the turn of the century, the need arose for them to obtain legal status and rights while operating abroad. The pre-World War II phase of FCN Treaties granted corporations limited legal status and access to foreign courts. Only in the current postwar phase did United States corporations obtain the right to do business in other countries, with rights equal to individuals in various areas, including forming and controlling local subsidiaries.

As the Sumitomo Court noted, the FCN Treaties served "to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms." Furthermore, "[t]he purpose of the treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."

The Treaties accomplished that purpose by granting foreign corporations "national treatment" and allowing foreign persons to form locally incorporated subsidiaries. Article VII(1) of the Treaty sets forth the "national treatment" principle, which states that a national of the other party is treated like a national of the host country. This provision creates a framework for national treatment with

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41 457 U.S. at 186.
42 Id. After the Supreme Court held in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839), that corporations can have no legal existence outside the boundaries of the sovereignty in which they were created, treaties were needed to grant corporations legal status abroad.
43 457 U.S. at 187 n.17.
44 Id. at 185-86.
45 Id. at 187-88.
46 Id. at 188.
47 Article XXII(1) of the Treaty more precisely defines the term "national treatment" set forth in article VII(1):

The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

Treaty, supra note 2, art. XXII(1). "National treatment" thus ordinarily denotes the highest level of protection afforded by commercial treaties, because it provides treatment equal to that given domestic corporations. Parties often wish to grant somewhat less hospitable terms. "Most-favored-nation" treatment is the next step in that direction, as set forth in article VII(4). Such treatment is no less favorable than that accorded nationals or companies of any third country, according to article XXII(2) of the Treaty. See Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 MINN. L. REV. 805, 811 (1958).
respect to commercial, industrial, financial, and other business activities within the territories of the other party. Article VII(1) states:

Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.48

Thus, the right of citizens of one country to form local subsidiaries under the other country's corporate laws equates the alien corporation with an out-of-state corporation for purposes of national treatment.49 An essential purpose of the Treaty—to ensure that one party's right to conduct business within the other party's territory is not hampered by discrimination against alien entities—therefore is fulfilled.50

Article VIII, the primary source of tension between the Treaty and Title VII, provides in part: "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."51 The scope of the "of their choice" provision and its application according to corporate nationality are unclear. Article XXII(3) further clouds the application issue, establishing that: "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."52 Although this language on its face indicates that the situs of incorporation determines corporate nationality, it permits two conflicting interpretations. The first interpretation is that foreign corporations and their subsidiaries, including those incorporated in the United States, may employ management personnel of their choice. The second interpretation is that a locally incorporated subsidiary of a foreign corporation is a United States corporation subject to all domestic laws, including those prohibiting employment discrimination. The scope of the freedom of choice provisions and the applica-

48 Treaty, supra note 2, art. VII(1).
49 See Commercial Treaties: Hearing on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece Before a Subcomm. of the Senate Comm. on Foreign Relations, 82d Cong., 2d Sess. 5 (1952).
50 457 U.S. at 188.
51 Treaty, supra note 2, art. VIII(1).
52 Treaty, supra note 2, art. XXII(3).
tion according to corporate nationality must be addressed before this conflict is settled.

Addressing the scope of the freedom of choice provisions in article VIII(1), one commentator\(^{53}\) proposed that the Treaty parties intended to permit employers to hire their own citizens as needed in key positions, regardless of conflicting quotas or licensing restrictions on hiring aliens.\(^{54}\) Another commentator suggested that, viewed in its entirety, the Treaty merely seeks to establish or confirm in the potential host country a governmental policy of equity and hospitality to the foreign investor. This means, above all, assurance that the enterprise and property of the alien will be respected and that he will be accorded equal protection of the laws alike with citizens of the country.\(^{55}\)

The definition and determination of corporate nationality also figure prominently in this analysis. Six criteria for determining corporate nationality are: (1) jurisdiction of incorporation; (2) principal place of business; (3) voting control nationality; (4) dominant shareholders' nationality; (5) management nationality; and (6) nationality of control.\(^{56}\) These factors have been categorized in three doctrines for determining corporate nationality: center of administration, center of exploitation, and place of incorporation.\(^{57}\)

Under each doctrine, a Japanese company's wholly owned subsidiary, incorporated in the United States, would be deemed a United States corporation. The Spiess defendants had proposed an alternative theory of corporate nationality, the "treaty trader" test, which the district court rejected.\(^{58}\) Under the "treaty trader" test, dominant ownership of stock determines corporate nationality. Ac-

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\(^{53}\) Note, Commercial Treaties, supra note 15, at 947.

\(^{54}\) Id. at 953-54 & nn.28-33. The author claims the freedom of choice provision promotes foreign investment "by assuring foreign employers the right to choose their own citizens for important positions." Id. at 975. He also observes tension between encouraging foreign investment and harmonizing domestic civil rights laws with conflicting values of other cultures. Id.

\(^{55}\) Walker, Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229, 230 (1956). The author of the above article and others on treaties protecting foreign investments, see supra note 47, Herman Walker, Jr., served as Adviser on Commercial Treaties at the State Department at the time this Treaty was drafted. "According to the State Department, Mr. Walker was responsible for formulation of the postwar type of Friendship, Commerce and Navigation treaty and negotiated several of the treaties for the United States." 457 U.S. at 181 & n.6. Mr. Walker's articles provide useful insights into the United States Government's intent and purpose in negotiating this Treaty. See also Walker, Provisions on Companies in United States Commercial Treaties, 50 Am. J. Int'l L. 373, 385-86 (1956). See infra text accompanying notes 70 & 71.


\(^{57}\) M. Wolff, Private International Law 297-301 (2d ed. 1950). The place of incorporation doctrine is used widely in Europe under the term "sieg social." Center of administration denotes that nationality is determined "at the place where the commercial business is carried on . . . ." Id. at 297. Center of exploitation refers to "the main place where the legal person executes its purpose." Id. at 298.

\(^{58}\) 643 F.2d at 356.
According to the Sumitomo Court, this theory conflicts with the Treaty's express selection in article XXII(3) of place of incorporation as the determining factor.59 Established principles of law also echo the literal interpretation of article XXII(3).60 Finally, United States v. R.P. Oldham Co., widely recognized as expressing settled corporate nationality law, holds that the place of incorporation determines corporate nationality.61

Established rules of treaty interpretation help form the framework for evaluating the effect of the FCN Treaty on Japanese companies' subsidiaries operating in the United States. In Maximov v. United States,62 a case on which the Sumitomo Court heavily relied, the Supreme Court held that the interpretation that is "more consonant with [the Treaty's] language, purpose, and intent" should prevail.63 Thus, the treaty language controls unless that interpretation clearly conflicts with the parties' intent. A court must therefore examine contemporaneous or current government statements of intent by negotiators or by those currently responsible for treaty enforcement. Article XXII(3) indicates that the parties expected that the place of incorporation would control in determining corporate nationality.64 The Maximov Court resolved the tension between the corporate jurisdiction laws and the provision giving subsidiaries freedom in hiring in favor of the former.

More than fifty years ago in Asakura v. City of Seattle65 the Court held that "[t]reaties are to be construed in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is preferred."66 Two factors support this conclusion: (1) United States courts should not engage in foreign policy-making; and (2) treaty beneficiaries must be granted all possible rights under a treaty.

A secondary source for treaty interpretation is the opinion of the parties' responsible government agencies. The Court in Sumitomo re-
lied on its decision in *Kolovrat v. Oregon* in which it evaluated an alien's right to inherit by intestacy both realty and personalty in light of a government agency's treaty interpretation. The *Sumitomo* Court opined that "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." In 1982 the Governments of Japan and the United States agreed that a Japanese company's subsidiary, incorporated in the United States, is not protected by the Treaty, and thus should comply with United States civil rights statutes.

Furthermore, the Court considered the extensive writings of one of the Treaty's negotiators, in which article VIII(1) of the Treaty was construed as seeking to counter employment discrimination against foreign nationals working in the United States and against United States citizens working abroad. No evidence indicates that the negotiators included article VIII(1) to protect foreign companies located in the United States from discrimination charges by local employees.

Examining the background of Title VII is essential to evaluate the employment discrimination claims involved in *Sumitomo*. Title VII is the most comprehensive federal scheme enacted to combat employment discrimination. Under Title VII, employers cannot refuse to hire or otherwise discriminate against an individual because of race, color, religion, sex, or national origin. *McDonnell Douglas Corp. v. Green* sets out the four essential elements of a plaintiff's claim. The plaintiff must (1) belong to a racial minority; (2) apply and be qualified for the job for which the employer sought applicants; (3) be rejected despite his or her qualifications; and (4) show

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68 457 U.S. at 184-85.
69 *Id.* at 183-84 & n.9, citing Department of State Cable No. 03300, from the United States Embassy in Tokyo to the Secretary of State, dated Feb. 26, 1982; Diplomatic Communication from the Embassy of Japan in Washington, D.C. to the United States Department of State, Apr. 21, 1982.
70 See supra note 55 and accompanying text.
71 See supra note 55 and accompanying text. See also 457 U.S. at 181 n.6.
73 Title VII applies to the protected groups against discrimination by any employer, which is defined as any person engaged in an industry affecting commerce who employs more than fifteen people. The Act excludes as employers the United States or corporations wholly owned by its government. 42 U.S.C. § 2000e(b) (1982). The Act also does not apply to religious organizations (but only for religion-based discrimination), or to the employment of aliens outside the territorial United States. 42 U.S.C. § 2000e-1 (1982).
that after this rejection the position remained open, and the employer continued to seek similarly qualified applicants.\textsuperscript{75} Although North Americans (or nonJapanese) do not constitute a racial minority, plaintiffs in \textit{Sumitomo} fall under either or both protected categories of national origin or sex.\textsuperscript{76}

In the seminal case in national origin discrimination, \textit{Espinoza v. Farah Manufacturing Co.},\textsuperscript{77} plaintiff, a Mexican citizen with legal residence in the United States, was denied employment because company policy prohibited hiring aliens. The Court defined national origin as the "country where a person was born, or more broadly, the country from which his or her ancestors came."\textsuperscript{78} The Court interpreted this definition literally, holding that Title VII protects against discrimination based on nationality, but not against discrimination based on citizenship,\textsuperscript{79} unless it is merely pretextual for the former.

The Court in \textit{McDonnell Douglas} developed a three-step process for dealing with Title VII violations. First, the plaintiff must make a prima facie showing of discrimination. The burden then shifts to the defendant employer to articulate why the characteristic sought or avoided is job-related or is a business necessity.\textsuperscript{80} If the defendant succeeds, the plaintiff must show that a less discriminatory, equally effective alternative exists that is not excessively burdensome on the defendant. This would tend to show that the employer's requirement is merely pretextual, and not a bona fide occupational qualification (BFOQ).\textsuperscript{81}

The concept of a BFOQ acts as a mitigating factor in legiti-
mately distinguishing between job applicants' characteristics and qualifications. On rare occasions one of the characteristics required for a job incumbent legitimately may include sex, race, religion, or national origin. In the theater, for example, parts written for black men ordinarily must be filled by black men. Or, it is easy to imagine that skin or hair care products produced especially for black people should be modeled and advertised by black people to illustrate properly the desired effect. Religious groups can require allegiance to the faith for related positions. On the other hand, a teacher need not be of French origin to teach properly the French language and culture.  

To restrict this escape hatch, the Supreme Court and the Equal Employment Opportunity Commission (EEOC) have declared that the BFOQ exemption is meant to be construed narrowly.  

In *Dothard v. Rawlinson* the Supreme Court held that an employer may not stereotype a group's abilities and apply that stereotype to one member. In the context of *Sumitomo*, some non-Japanese and/or female applicants might fit the qualifications desired by a Japanese company. For an import company operating in the United States and dealing with local businesses, these qualifications could include familiarity with the languages, customs, cultures, and business practices of both the United States and Japan. This conclusion necessarily would limit the scope of the Treaty's freedom of choice provisions in light of Title VII's requirements.  

Another permutation of the Treaty's freedom of choice provisions permits that hiring decisions made pursuant to customers' preferences should be protected. In fact, the Second Circuit's opinion in *Sumitomo* contains dicta suggesting that "acceptability to those persons with whom the company or branch does business" could constitute a BFOQ. Such an interpretation "will signify a major departure from the traditional construction of the [BFOQ] exception." It also would conflict with, among others, Fifth Circuit and EEOC decisions that reject customer preference as a BFOQ.  

The Ninth Circuit followed suit in condemning the use of cus-
customer preference as a BFOQ. In Fernandez v. Wynn Oil Co., the court decided that foreign customer preference does not justify sex discrimination in employment. The court reasoned that if other nations could exercise such preferences, they could dictate discrimination in the United States, and no foreign nation can be permitted to compel the nonenforcement of Title VII on United States soil. Furthermore, the Framers of the Constitution would not have wanted the United States to bow to a foreign sovereign’s demands. The United States is one of Japan’s most important trading partners. Although every government wants to attract foreign trade, the United States is loath to sacrifice adherence to its laws to appease foreign investors and likely would not be forced to in this situation.

The tension between the Treaty and Title VII leaves two questions. First, the public policy question remains whether antidiscrimination laws are more important than attracting foreign investors who want to exercise control over their investments. The high cost of domestic unemployment and society’s responsibility in

90 658 F.2d 1273 (9th Cir. 1981).
94 See, e.g., American Jewish Congress, 23 Misc.2d at 448-49, 190 N.Y.S.2d at 221-22. The court rejected the defenses of business necessity and customer’s religious preference as a BFOQ for Aramco’s refusal to hire Jewish applicants to satisfy Saudi Arabia, in the State of New York, in violation of local statutes. “New York State is not a province of Saudi Arabia, nor is the constitution and statute of New York State to be cast aside to protect the oil profits of Aramco.” Id. at 448-49, 190 N.Y.S.2d at 222. The court also cited Senate Resolution 323, adopted by the Senate of the United States on July 26, 1956, which reads in part:

Whereas it is a primary principle of our Nation that there shall be no distinction among United States citizens based on their individual religious affiliations and since any attempt by foreign nations to create such distinction among our citizens in the granting of personal or commercial access or any other rights otherwise available to United States citizens generally is inconsistent with our principles; Now, therefore, be it

Resolved, that it is the sense of the Senate that it regards any such distinctions directed against United States citizens as incompatible with the relations that should exist among friendly nations, and that in all negotiations between the United States and any foreign state every reasonable effort should be made to maintain this principle.

Id. at 448-49, 190 N.Y.S.2d at 222.
95 Authors have expressed concern that increased regulation will drive away foreign investors. See supra note 95 and accompanying text. See also Kirschner, The Extraterritorial Application of Title VII of the Civil Rights Act, 34 Lab. L.J. 394, 402-03 (1983). Kirschner argued that the harmful effects of the extraterritorial application of Title VII on United States foreign relations will be exacerbated only by Sumitomo’s application of Title VII to foreign enterprises operating in the United States and may elicit the retaliatory application of foreign laws, as well as a decline in foreign investment in the United States. Id.
equal employment opportunity indicate that such laws are more important. Moreover, merely requiring employers' job qualifications to meet the BFOQ test would hardly prove so burdensome as to discourage most foreign investors.\textsuperscript{96}

The second question is whether the Treaty supplants domestic federal civil rights laws. \textit{Sumitomo} settles the issue of corporate nationality, by resolving the question of a Japanese parent's United States subsidiary's standing to invoke rights under the Treaty. Unfortunately, the Court left unresolved the paramount issue of the level of adherence to Title VII required of foreign companies operating in the United States through domestic corporations.

The Court also refused to address the questions whether Sumitomo may assert any article VIII(1) rights of its parent,\textsuperscript{97} and whether Japanese citizenship or nationality may be a BFOQ for certain positions at Sumitomo.\textsuperscript{98} The Court avoided deciding whether a foreign corporation may, under the Treaty, discriminate in employment in the United States and thus violate federal laws. Therefore, \textit{Sumitomo} fails to resolve the conflict between the Second and Fifth Circuits.\textsuperscript{99} Although consistent in its logic, the Court did not take needed action to clarify the relation between United States employment laws and foreign corporations.

The United States has concluded FCN treaties with dozens of nations. Furthermore, rising foreign direct investment has increased the number of foreign corporations that operate in the United States and employ many of their own citizens as well as those of the host country.\textsuperscript{100} \textit{Sumitomo} presented an ideal opportunity for the Court to establish ground rules for the relatively new contest between foreign companies and United States employment laws. As this important issue remains unresolved, more plaintiffs doubtless will step forward to question their employers' rights and responsibilities under United States laws. The Court should have foreseen such a consequence

\textsuperscript{96} The National Labor Relations Act of 1935 (NLRA), \textit{supra} note 72, has been interpreted to cover foreign employers. \textit{See} Delta Match Corp., 102 N.L.R.B. 1400 (1953) (NLRA applies to foreign corporation's wholly owned subsidiary incorporated in the United States); \textit{In re} The Royal Bank of Canada (San Juan Branch), 67 N.L.R.B. 403 (1946) (NLRA applies to the United States branch of a foreign corporation).


\textsuperscript{97} 457 U.S. at 189-90 n.19.

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{See supra} notes 5 & 6 and accompanying text.

\textsuperscript{100} Japanese direct investment in the United States totaled $6.5 billion at the end of 1981. \textit{N.Y. Times}, Apr. 8, 1982, at D1, col. 3.
and made a greater effort to flesh out the meaning and scope of the freedom of choice provision in article VIII(1) of the Treaty.

Rules of treaty interpretation indicate that departure from the plain reading of a treaty provision requires contrary evidence of intent from the negotiating history and other supporting materials. Apparently, the freedom of choice provision initially served to circumvent stringent state laws restricting the employment of aliens in the United States, both by numbers and by occupation. The Japanese especially desired protection from these laws; thus, the Treaty's purpose is to circumvent or eliminate discriminatory employment laws, not employment discrimination laws, in the United States. The Treaty seeks to protect foreign employers from ultranationalism and percentile limitations in the host country.

An essential factor in harmonizing the Treaty and Title VII is the effect of legislation upon conflicting treaty stipulations. "[S]o far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." Accordingly, an act of Congress can negate the provisions of a treaty under the concept of "last expression of sovereign will." The later manifestation of will controls, because a treaty and congressional legislation are supreme and equal.

The treaty parties in Sumitomo did not contemplate the effect of United States employment discrimination laws when concluding the 1953 FCN Treaty, because no such laws were in effect at the time. Title VII was not enacted until 1964. The other federal law prohibiting employment discrimination, section 1981, was not applied to private employers until 1976. Under Whitney v. Robertson when a

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101 Walker, supra note 55, at 986 & n.62.
102 457 U.S. 181 n.6. Other commentators agree that the provision sought to ensure that Japanese employers could hire key or specialized employees from among their own citizens. See, e.g., Note, Commercial Treaties, supra note 15, at 953; Comment, Japanese Employers, supra note 82, at 684.
104 See The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 600 (1899).
105 See Fong Yue Ting v. United States, 149 U.S. 698, 721 (1893) (Chinese subjects deported pursuant to 1892 Act prohibiting Chinese immigration, which directly contradicted 1868 Treaty between United States and China).

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

107 124 U.S. at 190.
treaty and a statute affect the same issue, "courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either . . . ."108 Nevertheless, the Court held in Baker v. Carr109 that when treaty provisions conflict with a valid subsequent federal statute, "a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute . . . ."110

The Fifth Circuit's resolution of the conflict between Title VII and the FCN Treaty as expressed in Spiess remains intact after Sumitomo, and therefore, allows Japanese companies total freedom in the preferential hiring of their own citizens. Rather than harmonizing the statute and the treaty, as required by such decisions as Whitney and Baker, the Court disregarded Title VII. The Treaty and Title VII could coexist if foreign firms were to hire their own nationals for positions qualifying for the BFOQ exemption, and hire the remainder of their workforce in compliance with federal civil rights laws. In view of Japan's immense trade surplus with the United States,111 it seems unlikely that this restriction would be very harmful to the United States economy. In the meantime, it would continue to promote much needed dedication to, and enforcement of, equal employment opportunity in the United States.

—JOHN BRUCE STERNLICHT

108 Id. at 194.
110 Id. at 212. This result can be distinguished from the result in Asakura v. City of Seattle, 265 U.S. at 332. See supra notes 65-66 and accompanying text. Asakura involved a conflict between a local ordinance prohibiting aliens from pawnbroking, and the following treaty provisions on which plaintiff relied:

The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established


The distinction involves article VI, § 2 of the United States Constitution, under which all states' judges are bound to subjugate any contrary thing in the state constitution or laws to a treaty made under the authority of the United States. See supra note 26. Asakura involves a law of a state's political subdivision, but Sumitomo involves an act of Congress. See supra note 105 and accompanying text.

111 See supra notes 93 & 95 and accompanying text.