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Dushica D. Babich*

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Abstract

This Note will first examine the language of Title VII and the "of their choice" provision. It will then discuss the Second and Fifth Circuits' resolutions of the two issues faced by these courts. This Note will analyze the courts of appeals decisions of the two issues in light of Supreme Court interpretations of treaties. Finally, this Note will discuss whether the treaty's "of their choice" provision grants an absolute right or whether it accords a limited right which allows foreign employers to discriminate only on the basis of national origin when hiring personnel essential for the management and control of their investment.

NOTES

DISCRIMINATORY HIRING PRACTICES BY FOREIGN CORPORATIONS IN THE UNITED STATES— A LIMITED RIGHT

INTRODUCTION

According to the United States Constitution, treaties as well as acts of Congress are the supreme law of the land.[1] This well-settled principle, however, has recently provided a source of conflict for the United States Courts of Appeals for the Second Circuit, in *Avigliano v. Sumitomo Shoji America, Inc.*,[2] and the Fifth Circuit, in *Spiess v. C. Itoh & Co. (America)*.[3] The conflict is between Title VII of the Civil Rights Act of 1964[4] (Title VII), which proscribes employment discrimination, and the provisions in Friendship, Commerce and Navigation (FCN) treaties,[5] which allow foreign companies operating in the United States to hire management and technical personnel "of their choice."[6] The United States

1. U.S. CONST. art. VI, § 2. The United States Constitution declares 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.").

2. 638 F.2d 552 (2d Cir. 1981), *aff'g on other grounds* 473 F. Supp. 506 (S.D.N.Y. 1979), *cert. granted*, 102 S. Ct. 501 (1981) (No. 80-2070; No. 81-24).

3. 643 F.2d 353 (5th Cir. 1981), *rev'g* 469 F. Supp. 1 (S.D. Tex. 1979), *petition for cert. filed*, 50 U.S.L.W. 3635 (U.S. Feb. 10, 1982) (No. 81-1496).

4. 42 U.S.C. § 2000e-2(a) (1976).

5. For a list of United States FCN treaties with other countries, see *infra* note 29.

6. The following are examples of "of their choice" provisions in the United States treaties with France, Denmark and Argentina:

"Nationals and companies of either High Contracting Party shall be permitted to engage, at their choice, within the territories of the other High Contracting Party, accountants and other technical experts, lawyers, and personnel who by reason of their special capacities are essential to the functioning of the enterprise." Convention of Establishment, Nov. 25, 1959, United States-France, art. VI, para. 1, 11 U.S.T. 2398, 2405, T.I.A.S. No. 4625.

"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 specialized employees of their choice, regardless of nationality." Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. VII, para. 4, 12 U.S.T. 908, 915, T.I.A.S. No. 4797.

[C]itizens of the United States, shall have full liberty, in all the territories of the Argentine Confederation, to manage their own affairs themselves, or to commit

Courts of Appeals for the Second and Fifth Circuits have reached conflicting results when faced with the novel question of whether the United States FCN treaty with Japan[7] exempts Japanese companies and their wholly-owned subsidiaries operating in the United States from Title VII.[8] The United States Supreme Court has granted the petition for certiorari in the *Avigliano* case.[9] Petition for certiorari has also been filed in the *Spiess* case.[10] The Court's decision may have an impact on the efficacy of United States civil rights laws and the vitality of United States FCN treaties with approximately forty-seven nations.

In resolving the conflict between Title VII and the FCN "of their choice" provision, the Supreme Court will address two major issues: first, whether a wholly-owned subsidiary of a foreign corporation may claim its parent's treaty right; and second, whether a foreign corporation and its subsidiary have a treaty exemption from Title VII.

On the first issue the Second and Fifth Circuits were in accord that a wholly-owned subsidiary of a foreign corporation may claim the parent's right.[11] The courts' opinions diverge on the second issue. The Second Circuit, in *Avigliano,* ruled that the United States-Japan FCN treaty does not provide an immunity from Title VII. Rather, foreign employers may discriminate in favor of their own nationals only if they can justify their hiring practices as "reasonably necessary to the normal operation of that particular business or enterprise."[12] The Fifth Circuit, on the other hand, in *Spiess* held that foreign corporations and their United States-incorporated subsidiaries have a right under the United States-Japan

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> them to the management of whomsoever they please, as broker, factor, agent, or interpreter . . . . The same rights and privileges, in all respects, shall be enjoyed in the territories of the United States, by the citizens of the Argentine Confederation.

Treaty of Friendship, Commerce, and Navigation, July 27, 1853, United States-Argentina, art. VIII, 10 Stat. 1005, 1008, T.S. No. 4.

7. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Japan Treaty].

8. *Compare* 638 F.2d at 558 *with* 643 F.2d at 359.

9. 50 U.S.L.W. 3334.

10. 50 U.S.L.W. 3635.

11. 638 F.2d at 557-58; 643 F.2d at 358-59.

12. 638 F.2d at 559 (quoting 42 U.S.C. § 2000e-2(e) (1976)).

treaty to hire managerial and technical personnel "of their choice" irrespective of Title VII.[13]

This Note will first examine the language of Title VII and the "of their choice" provision. It will then discuss the Second and Fifth Circuits' resolutions of the two issues faced by these courts. This Note will analyze the courts of appeals decisions of the two issues in light of Supreme Court interpretations of treaties. Finally, this Note will discuss whether the treaty's "of their choice" provision grants an absolute right or whether it accords a limited right which allows foreign employers to discriminate only on the basis of national origin when hiring personnel essential for the management and control of their investment.

I. *THE CONFLICT BETWEEN TITLE VII AND THE FCN TREATIES*

Foreign employers operating in the United States have been hiring their own nationals for certain positions under the FCN treaties between their countries and the United States.[14] Japanese companies have especially been active in hiring their own nationals.[15] United States citizens working for foreign corporations in the United States have charged discrimination on the basis of sex and national origin because they are precluded from advancing into management positions which are filled by foreign nationals.[16] Foreign employers have had two options in defending their position: first, that the FCN treaty "of their choice" provision grants them a right to choose technical and managerial personnel of their choosing irrespective of Title VII; and second, that Title VII, itself, provides them with an exemption if the discriminatory hiring practice is a bona fide occupational qualification (BFOQ).[17]

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13. 643 F.2d at 363.

14. *See* 643 F.2d at 355; 638 F.2d at 553; Linskey v. Heidelberg E., Inc., 470 F. Supp. 1181, 1184-85 (E.D.N.Y. 1979).

15. JAPAN SOCIETY, INC., THE ECONOMIC IMPACT OF THE JAPANESE BUSINESS COMMUNITY IN THE UNITED STATES 1 (1979). "By 1978, at least 1,177 business entities had been established in the United States by Japanese interests and approximately 10,500 Japanese businessmen had been assigned to manage these firms." *Id.* Japanese foreign employers employ one Japanese employee for every 2.1 local employees. Sethi & Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?*, 4 EMPLOYEE REL. L.J. 485, 501 (1979).

16. *See* 643 F.2d at 355; 638 F.2d at 553; 470 F. Supp. at 1184-85.

17. *See* 643 F.2d at 355; 638 F.2d at 559; 470 F. Supp. at 1184-85.

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

Title VII prohibits discrimination by employers[18] in hiring, promotions, benefits, terms, conditions, privileges, or termination on the basis of race, sex, religion or national origin.[19] However, Title VII provides the following exception:

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex, or national origin in those certain instances where . . . sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .[20]

Courts have traditionally construed the BFOQ provision narrowly to safeguard the integrity of Title VII.[21] Discrimination in hiring

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18. " '[E]mployer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . . " 42 U.S.C. § 2000e (b) (1976).

19. 42 U.S.C. § 2000e-2(a) (1976). The legislative history of the Act is silent on whether Title VII of the Civil Rights Act of 1964 (Title VII) applies to hiring practices of foreign corporations and their subsidiaries in the United States. The legislative history indicates only that Congress was primarily concerned with discrimination between blacks and whites in the United States by United States employers. H.R. Rep. No. 914, 88th Cong., 1st Sess. 2018 (1963).

20. 42 U.S.C. § 2000e-2(e) (1976).

21. The leading case interpreting the bona fide occupational qualification (BFOQ) provision is Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). Plaintiff, a male, charged Pan American with sexual discrimination because of its policy of hiring only female stewardesses. The airline argued that sex qualified as a BFOQ for hiring flight attendants because of customer preferences and the superior ability of women to perform the "non-mechanical aspects of the job." *Id.* at 388. The court held for the plaintiff.

> In construing [the BFOQ] provision, we feel . . . that it would be totally anomalous to do so in a manner that would, in effect, permit the exception to swallow the rule. Thus, we adopt the EEOC guidelines which state that "the Commission believes that the bona fide occupational qualification as to sex should be interpreted narrowly."

Id. at 387 (quoting 29 C.F.R. 1604.1 (a)). The court reasoned that even though "a male steward . . . is perhaps not as soothing on a flight as a female stewardess," a BFOQ could be found only if discrimination was a fulfillment of a "business *necessity*," not a mere "business *convenience*." *Id.* at 388. *See also* Dothard v. Rawlinson, 433 U.S. 321 (1977) (female rejected for corrections officer position); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) (race and sex discrimination); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (switchman position denied to female); Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972) (state regulation requiring rest breaks for women, not a valid BFOQ); Doe v. Osteopathic Hosp., Inc., 333 F. Supp. 1357 (D. Kan. 1971) (pregnant employee discharged); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd*, 480 F.2d 240 (3d Cir. 1973) (promotion denied to female computer operator); Local 246 Util. Workers Union v. Southern Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970) (female denied promotion to junior clerk position). *See generally* Recent Development, *Foreign Corpora-*

on the basis of sex or national origin has been held valid only "when the essence of the business operation would be undermined" by not engaging in such a discriminatory hiring practice.[22] The Equal Employment Opportunity Commission has also issued a regulation stating that "[t]he exception . . . that national origin may be a bona fide occupational qualification, shall be strictly construed."[23] For this reason, foreign employers have chosen to argue that FCN treaties between their countries and the United States grant them an absolute right to hire nationals over qualified United States citizens, rather than relying on the BFOQ provision.[24]

B. *The Friendship, Commerce and Navigation Treaties*

The main purpose of FCN treaties[25] is to establish legal conditions which will encourage trade and private investment.[26] FCN treaties provide for "national treatment"[27] and for "most-favored-nation treatment."[28]

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tions: Applicability of United States Civil Rights Statutes, 22 HARV. INT'L L.J. 418 (1981); Recent Development, *The Impact of Title VII Protection on FCN Treaties: Conflicts and Interpretation*, 10 DEN. J. INT'L L. & POL'Y 373 (1981).

22. 442 F.2d at 388.

23. 29 C.F.R. § 1606.4 (1981).

24. *See* 643 F.2d at 355; 638 F.2d at 553; 470 F.Supp at 1184-85.

25. The United States has FCN treaties in force with at least 47 nations. *See* TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISER, DEP'T OF STATE, PUB. NO. 9136, TREATIES IN FORCE (1981); 8 U.S.C.A. § 1101 historical note, at 73 (1970). All the FCN treaties have similar provisions. For a subject-matter index of FCN treaty provisions, see COMM. ON COMMERCIAL TREATIES, A.B.A. SEC. INT'L L., COMMERCIAL TREATY INDEX (2d ed. 1974 & Supp. 1976). For a comparison of the provisions of the Japan treaty with other treaties, see *Commercial Treaties-Treaties of Friendship, Commerce and Navigation, with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan: Hearings before the Subcomm. of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 7-17 (1953) [hereinafter cited as *1953 Hearings*].

26. Japan Treaty, *supra* note 7, preamble, at 2066. *See* Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 231 (1956). The preamble to the Japanese treaty states that the United States and Japan desire "arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges." Japan Treaty, *supra* note 7, preamble, at 2066.

27. "National treatment" means that foreign companies will receive the same treatment accorded domestic companies. The Japanese treaty itself defines "[t]he term 'national treatment' [to mean] 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." Japan Treaty, *supra* note 7, art. XXII, para. 1, at 2079.

28. "The term 'most-favored-nation treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like

Many of the treaties, including the United States-Japan treaty contain "of their choice" provisions which state that: "[n]ationals 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."[29]

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situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country." Japan Treaty, *supra* note 7, art. XXII, para. 2, at 2079.

29. *E.g.*, Japan Treaty, *supra* note 7, art. VIII, para. 1, at 2070. The focal point of the controversy discussed in this Note is whether "companies of either party" in art. VIII, para. 1, first, includes United States-incorporated subsidiaries, wholly-owned by foreign nationals; and second, whether the language "of their choice" exempts foreign employers from Title VII.

The following treaties do not have a comparable "of their choice" provision: Treaty of Friendship, Commerce and Consular Rights, June 19, 1928, United States-Austria, 47 Stat. 1876, T.S. No. 838; Treaty of Peace, Friendship, Commerce and Navigation, May 13, 1858, United States-Bolivia, 12 Stat. 1003, T.S. No. 32; Treaty of Amity, Commerce and Navigation between the United States and Great Britain, Nov. 19, 1794, United States-Canada, arts. III, IX, X, 8 Stat. 116, T.S. No. 105; Treaty of Peace, Amity, Navigation and Commerce, Dec. 12, 1846, United States-Colombia, 9 Stat. 881, T.S. No. 54; Treaty of Friendship, Commerce and Navigation, July 10, 1851, United States-Costa Rica, 10 Stat. 916, T.S. No. 62; Treaty of Friendship, Commerce and Consular Rights, Dec. 23, 1925, United States-Estonia, 44 Stat. 2379, T.S. No. 736; Treaty of Friendship, Commerce and Consular Rights, Feb. 13, 1934, United States-Finland, 49 Stat. 2659, T.S. No. 868; Convention to Regulate Commerce between the United States and the United Kingdom, July 3, 1815, United States-India, 8 Stat. 228, T.S. No. 110 (applied to India Aug. 15, 1947); Treaty of Commerce and Navigation, Dec. 3, 1938, United States-Iraq, 54 Stat. 1790, T.S. No. 960; Treaty of Friendship, Commerce and Consular Rights, Apr. 20, 1928, United States-Latvia, 45 Stat. 2641, T.S. No. 765; Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, 54 Stat. 1739, T.S. No. 956; Convention of Navigation and Commerce between the United States and France, June 24, 1822, United States-Madagascar, 8 Stat. 278, T.S. No. 87 (extended to Madagascar 1896); Convention to Regulate Commerce between the United States and the United Kingdom, July 3, 1815, United States-Malta, 8 Stat. 228, T.S. No. 110 (applied to Malta Sept. 21, 1964); Treaty of Peace, Sept. 16, 1836, United States-Morocco, 8 Stat. 484, T.S. No. 244-2; Treaty of Friendship, Commerce and Consular Rights, June 5, 1928, United States-Norway, 47 Stat. 2135, T.S. No. 852; Treaty of Friendship, Commerce and Navigation, Feb. 4, 1859, United States-Paraguay, 12 Stat. 1091, T.S. No. 272; Treaty of Friendship and General Relations, July 3, 1902, United States-Spain, 33 Stat. 2105, T.S. No. 422; Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Taiwan, 63 Stat. 1299, T.I.A.S. No. 1871; Treaty of Commerce and Navigation, Oct. 1, 1929, United States-Turkey, 46 Stat. 2743, T.S. No. 813; Convention to Regulate Commerce, July 3, 1815, United States-United Kingdom, 8 Stat. 228, T.S. No. 110; Treaty of Commerce, Oct. 2-14, 1881, United States-Yugoslavia, 22 Stat. 963, T.S. No. 319.

The following FCN treaties grant a right to foreign nationals to manage and control their investments: Treaty of Friendship, Commerce and Navigation, July 27, 1853, United States-Argentina, art. VIII, 10 Stat. 1005, 1008, T.S. No. 4 (right to manage with "whomsoever they please"); Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, art. VIII, para. 1, 14 U.S.T. 1284, 1296, T.I.A.S. No. 5432 ("of their choice" provision); Treaty of Peace, Friendship, Commerce and Navigation, June 23, 1850, United States-Bruni, art. II, 10 Stat. 909, 909 T.S. No. 33 (nationals allowed to enter and

reside in the host country); Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. VII, para. 4, 12 U.S.T. 908, 915, T.I.A.S. No. 4749 (of their choice, regardless of nationality); Treaty of Amity and Economic Relations, Sept. 7, 1951, United States-Ethiopia, art. VIII, para. 5, 4 U.S.T. 2134, 2141 T.I.A.S. No. 2864 ("of their choice . . . in conformity with the applicable laws"); Convention of Establishment, Nov. 25, 1959, United States-France, art. VI, para. 1, 11 U.S.T. 2398, 2405, T.I.A.S. No. 4625 ("at their choice . . . who . . . are essential to the functioning of the enterprise"); Treaty of Friendship, Commerce and Consular Rights, Dec. 8, 1923, United States-German Democratic Republic, art. I, 44 Stat. 2132, 2133, T.S. No. 725 (nationals can enter, travel and reside in the host country and employ agents of their choice); Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. VIII, para. 1, 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593 ("of their choice" provision); Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, art. XII, para. 4, 5 U.S.T. 1829, 1857-59, T.I.A.S. No. 3057 (of their choice among those legally in the country and eligible to work, can employ accountants and other technical experts regardless of nationality); Treaty of Friendship, Commerce and Consular Rights, Dec. 7, 1927, United States-Honduras, art. I, para. 1, 45 Stat. 2618, 2618-19, T.S. No. 764 (nationals of each party permitted to travel and reside in the territories of the other, submitting themselves to all local regulations duly established); Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, art. II, para. 2, 8 U.S.T. 899, 902, T.I.A.S. No. 3853 (nationals permitted to engage in profession for which they have qualified under the applicable legal provisions); Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. VI, para. 1(d), 1 U.S.T. 785, 790-91, T.I.A.S. No. 2155 (national treatment accorded with respect to employing attorneys, interpreters and other agents and employees of their choice); Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, art. VIII, para. 1, 5 U.S.T. 550, 558, T.I.A.S. No. 2948 ("of their choice" provision); Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, art. I, para. 2(a), 63 Stat. 2255, 2256, T.I.A.S. No. 1965 (allowed to enter and engage in commercial, manufacturing, processing, financial, scientific, educational, religious, philanthropic and professional activities); Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VIII, para. 1, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863 ("of their choice" provision); Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Korea, art. VIII, para. 1, 8 U.S.T. 2217, 2223, T.I.A.S. No. 3947 ("of their choice" provision); Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, art. VIII, 14 U.S.T. 251, 257, T.I.A.S. No. 5306 ("of their choice" provision); Treaty of Amity, Economic Relations and Consular Rights, Dec. 20, 1958, United States-Muscat and Oman, art. V, para. 3, 11 U.S.T. 1835, 1838, T.I.A.S. No. 4530 ("of their choice, regardless of nationality"); Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. VIII, para. 1, 8 U.S.T. 2043, 2055, T.I.A.S. No. 3942 ("of their choice" provision); Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, art. VIII, para. 1, 9 U.S.T. 449, 456, T.I.A.S. No. 4024 ("of their choice" regardless of nationality, if essential to the conduct of their affairs); Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, art. VII, para. 1, 12 U.S.T. 110, 114, T.I.A.S. No. 4683 ("rights to continued control and management of such enterprises, and to do all other things necessary or incidental to the effective conduct of their affairs"); Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands, Mar. 7, 1956, United States-Surinam, art. VIII, para. 1, 8 U.S.T. 2043, 2055, T.I.A.S. No. 3942 (applied to Surinam Nov. 25, 1975) ("of their choice" provision); Convention of Friendship, Commerce and Extradition, Nov. 25, 1850, United States-Switzerland, art. I, 11 Stat. 587-588, T.S. No. 353 (nationals will be admitted where such admission does not conflict with the constitutional or legal provisions of the contracting parties); Treaty of Amity and Economic Relations, May 29, 1966, United States-

II. THE SECOND CIRCUIT AND FIFTH CIRCUIT CASES

The Second and Fifth Circuits decided that subsidiaries may, under the Japanese treaty, assert their parents' treaty rights.[30] This decision was necessary in order for the courts to address the second issue whether the treaty provides those subsidiaries an exemption from Title VII.[31] It is on the second issue that the courts disagree.[32]

A. Avigliano v. Sumitomo Shoji America, Inc.

In *Avigliano,* eleven female employees of Sumitomo, a subsidiary incorporated in the United States, and wholly-owned by a Japanese corporation, brought a class action suit against the company claiming that its practice of hiring only male Japanese citizens to fill executive, managerial and sales positions discriminated against the employees on the basis of sex and national origin in violation of Title VII.[33]

The district court had held that under the treaty Sumitomo lacked standing to invoke the treaty provision as a defense.[34] The court examined article XXII(3), the definitional section of the treaty, which states that "companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof.*"[35] The district court interpreted this language to mean that foreign subsidiaries incorporated in the United States are companies of the United States,[36] and therefore

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Thailand, art. IV, para. 6, 19 U.S.T. 5843, 5849, T.I.A.S. No. 6540 ("of their choice," in accordance with the applicable laws); Treaty of Amity and Economic Relations, Feb. 8, 1966, United States-Togo, art. V, para. 3, 18 U.S.T. 1, 5, T.I.A.S. No. 6193 ("of their choice," regardless of nationality); Treaty of Amity and Economic Relations, Apr. 3, 1961, United States-Viet Nam, art. V, para. 2, 12 U.S.T. 1703, 1708, T.I.A.S. No. 4890 ("of their choice," regardless of nationality).

30. 638 F.2d at 557-58; 643 F.2d at 358-59.

31. 638 F.2d at 558; 643 F.2d at 359.

32. 638 F.2d at 558-59; 643 F.2d at 363.

33. 638 F.2d at 553.

34. 473 F. Supp. at 513. For a discussion of the district courts' decisions in *Spiess* and *Avigliano,* see Note, Spiess v. C. Itoh & Co. (America): *Do U.S. Commercial Treaties Provide Foreign Corporations with an Immunity from U.S. Civil Rights Laws?,* 6 N.C.J. INT'L L. & COM. REG. 111 (1980); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 STAN. L. REV. 947 (1979); Recent Development, *Amenability of Foreign Corporations to United States Employment Discrimination Laws,* 14 VAND. J. TRANSNAT'L L. 197 (1981).

35. 473 F. Supp. at 509 (quoting Japan Treaty, *supra* note 7, art. XXII, para. 3, at 2080) (emphasis omitted in part).

36. 473 F. Supp. at 512 (quoting Spiess, 469 F. Supp. at 6).

could not invoke the "of their choice" provision in a treaty between the United States and Japan.[37]

The Second Circuit found that the subsidiary was entitled to invoke the employment provision of the FCN treaty.[38] The circuit court reasoned that the purpose of the treaty was to protect foreign investments generally, including those obtained through wholly-owned subsidiaries; it was not intended exclusively to protect investments made through branch offices.[39] The court explained that a contrary decision would lead to a "crazy-quilt pattern" where branches of foreign corporations would be afforded protection under the treaty artricles, but subsidiaries wholly-owned by such corporations would not. Japanese enterprises would probably transform their wholly-owned subsidiaries into branches.[40]

The court proceeded to examine the language of the treaty.[41] The Second Circuit, unlike the district court, looked beyond the language of article XXII(3) to State Department opinions[42] and

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37. *Id.*

38. 638 F.2d at 554.

39. *Id.* at 556.

> *Japanese branches* in the United States would be guaranteed "access to the courts of justice" (Article IV(1)), protected against "unlawful entry or molestation" (Article VI(2)), . . . permitted to make "payments, remittances and transfers of funds or financial instruments" (Article XII(1)), and allowed to engage in "importation and exportation" (Article XIV (5)). *Japanese subsidiaries,* on the other hand, would not be guaranteed any of the rights conferred on Japanese branches . . . but would instead have to be content with national treatment in such areas as "the taking of privately owned enterprises into public ownership" . . . (Article VI (4)). It is illogical to infer that the drafters of the Treaty intended to make such a dramatic distinction between forms of business operation or to act in such a haphazard way.

Id. (emphasis in original) (quoting Japan Treaty, *supra* note 7).

40. *Id.*

41. *Id.* at 555.

42. *Id.* at 557 (citing Despatch No. 13 from Office of the United States Political Adviser for Japan, United States Department of State (Apr. 8, 1952); Walker, *Provisions on Companies in United States Commercial Treaties,* 50 AM. J. INT'L L. 373, 383 (1956); Airgram No. A-105 from Secretary of State Henry Kissinger, United States Department of State, to United States Embassy, Tokyo (Jan. 9, 1976)).

The court noted that "the State Department has recently reached a conclusion on this issue which is at variance with ours." 638 F.2d at 558 n.5 (citing Letter from James R. Atwood, Deputy Legal Adviser, United States Department of State to Lutz Alexander Prager, Esq., Assistant General Counsel, Equal Employment Opportunity Commission (Sept. 11, 1979) ("it was not the intent of the negotiators to cover locally-incorporated subsidiaries"), *reprinted in* 74 AM. J. INT'L L. 158, 158-59 (1980). This letter directly contradicted a previous letter written by the United States Department of State less than a year earlier. *See* Letter from Lee R. Marks, Deputy Legal Adviser, United States Department of State to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission (Oct. 17, 1978) ("In determining the scope of Article VIII [of the Japanese treaty], we see no

decided that "[a]rticle XXII(3) defines a company's nationality for the purpose of recognizing its status as a legal entity but not for the purpose of restricting substantive rights granted elsewhere in the Treaty."[43]

The second problem the court of appeals faced was reconciling the "of their choice" provision, which grants only "nationals and . . . companies of either Party" the right to hire employees of their choosing for technical and managerial positions,[44] with three other provisions in the treaty which specifically grant rights to subsidiaries. Article VI(4),[45] article VII(1),[46] and article VII(4)[47] specifi-

grounds for distinguishing between subsidiaries incorporated in the United States . . . and those operating as unincorporated branches . . . . "), *reprinted in* 73 AM. J. INT'L L. 281, 283 (1979). Because neither the 1978 nor the 1979 letter explained how the State Department reached its position or referred to any documentary evidence, and because the 1979 letter did not explain why the 1978 letter was in error, the court decided to ignore both letters. 638 F.2d at 558 n.5.

43. 638 F.2d at 557. The court also referred to negotiations preceding the ratification of an FCN treaty between the United States and the Netherlands. The court stated that the Dutch negotiators were particularly concerned that the language of article XXIII, paragraph 3, of the Dutch treaty "would exclude locally-incorporated subsidiaries from [invoking] all substantive benefits accorded to 'companies of either Party.' " *Id.* The court continued that there were extensive negotiations during which the State Department made it clear that "controlled companies" have the same substantive rights under the treaty as do other Dutch corporations and firms operating in the United States. The court noted that only then did the Dutch agree that there was no need to include a provision explicitly conferring parent company rights on subsidiaries. *Id.*

44. Japan Treaty, *supra* note 7, art. VIII, para. 1, at 2070.

45. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth. . . . Moreover, *enterprises in which nationals and companies of either Party have a substantial interest* shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

Id. art. VI, para. 4, at 2069 (emphasis added).

46. [S]uch 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.

Id. art. VII, para. 1, at 2069 (emphasis added).

47. "Nationals and companies of either Party, as well as *enterprises controlled by such nationals and companies*, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article." *Id.* art. VII, para. 4, at 2070 (emphasis added).

cally give rights to "enterprises controlled by such nationals and companies of either party." The court of appeals decided that "the three provisions in the Treaty which specifically mention subsidiaries were not intended to define the outer limits of the rights to be accorded to them, but were instead designed to add to the rights which parties were to enjoy in their capacity as 'companies of either Party.'"[48] The court concluded that Sumitomo was "properly classified as a Japanese company for the purpose of invoking the substantive provisions of the treaty."[49]

The court further held that the treaty did not exempt defendant from Title VII;[50] rather, defendant would have to justify its hiring practices under the BFOQ provision of Title VII.[51] The Second Circuit expressed its fear that a broad interpretation of the "of their choice" provision would immunize a party "from laws prohibiting employment of children, § 12 of the Fair Labor Standards Act, 29 U.S.C. § 212, laws granting rights to unions and employees, Labor Management Relations Act, 29 U.S.C. §§ 141-87, and the like."[52] The court based its decision on a finding that the objective of the "of their choice" provision was to exempt companies operating abroad from local legislation restricting the employment of non-citizens and to insure operational success in the host country.[53] The court reasoned that this objective could be attained without exempting foreign corporations from the strictures of Title VII because there is no conflict between Title VII and article VIII(1) of the treaty.[54] According to the court, Title VII does not preclude a foreign subsidiary from employing its own nationals; rather, Title VII only requires foreign nationals to justify their employment practices under the BFOQ exemption.[55]

The court, however, construed the BFOQ exemption more liberally for foreign employers than for domestic employers. According to the court:

> [The BFOQ provision] as applied to a Japanese company enjoying rights under Article VIII of the Treaty . . . must be construed in a manner that will give due weight to the Treaty rights

48. 638 F.2d at 556.
49. *Id.* at 558.
50. *Id.* at 554.
51. *Id.* at 559.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

> 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]

The court of appeals then remanded to the district court to determine whether Sumitomo could justify its hiring practices according to the court of appeals' interpretation of the BFOQ provision.[57] Prior to reconsideration by the district court, both plaintiff and defendant petitioned the United States Supreme Court which granted certiorari to both parties.[58]

B. Spiess v. C. Itoh & Co. (America)

In *Spiess*, the Fifth Circuit agreed with the Second Circuit that a United States subsidiary, wholly-owned by a Japanese corporation, may invoke the article VIII(1) provision of the FCN treaty.[59] Contrary to the decision in *Avigliano*, however, the *Spiess* court held that the treaty exempts foreign corporations and their wholly-owned subsidiaries from domestic employment discrimination laws in the hiring of Japanese nationals for certain technical and managerial positions.[60]

In *Spiess*, three middle level male employees filed a class action suit under Title VII charging that the company had discriminated against its United States employees by making managerial promo-

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56. *Id.*

57. *Id.*

58. 50 U.S.L.W. 3334. The defendant presented the following question for the Supreme Court's review: "Is right provided by Article VIII(1) of Treaty of Friendship, Commerce and Navigation between United States and Japan, to fill management-level positions with Japanese nationals, limited by Title VII?" *Id.* The plaintiff presented the following questions:

> (1) Is provision of Japanese-American trade treaty that permits nationals and companies of either party to engage executive personnel of their own choice, applicable to domestic corporation that is wholly owned subsidiary of Japanese corporation? (2) Should 'bona fide occupational qualification' exception to Title VII be relaxed when applied to American subsidiary of Japanese corporation in deference to Japanese-American trade treaty?

Id.

59. See 643 F.2d at 358. The *Spiess* court, however, explicitly stated that it did "not reach or decide whether a corporate subsidiary in which a Japanese trader owns less than a 100 percent interest should be considered a company of Japan under the Treaty." *Id.* at 359 n.5.

60. *Id.* at 355.

tions and other benefits available only to Japanese citizens.[61] The Fifth Circuit reversed the district court's decision[62] which had held that the nationality of a corporation is determined by the place of incorporation, and that Itoh was a United States company unable to use the treaty "of their choice" provision as a defense.[63] While the district court concluded that State Department opinions were irrelevant due to the plain language of article XXII(3) of the treaty,[64] the circuit court deferred to State Department opinions on this issue.[65] First, the court of appeals looked at the negotiating history of the treaty, and relied on a State Department memorandum, contemporaneous with the preparation of the treaty, which stated that article XXII(3) "was intended, not to determine which forms of corporate organization were entitled to assert Treaty rights, but to ensure that unfamiliar organizations would be recognized as 'companies' by the legal institutions of the respective countries."[66] The court also found persuasive the State Department's position that United States subsidiaries of Japanese corporations are entitled to the full protection of the treaty.[67] Finally the court,

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61. *Id.*

62. *Id.* at 363.

63. 469 F. Supp. at 6.

64. *See id.*

65. 643 F.2d at 356-57.

66. *Id.* at 356 (citing Despatch No. 13 from Office of the United States Political Adviser for Japan, United States Department of State (Apr. 8, 1952)).

67. *Id.* at 357-58 (citing a 1976 cable from United States Secretary of State Henry Kissinger to the United States Embassy in Tokyo). The cable, which proved decisive, expressly stated:

> [A]ll that para 3 [of article XXII] is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

Airgram No. A-105 from Secretary of State Henry Kissinger to United States Embassy, Tokyo (Jan. 9, 1976). The court also relied on the letter from State Department legal adviser Lee R. Marks which reached the same conclusion. Letter from Lee R. Marks, Deputy Legal Adviser, United States Department of State, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission (Oct. 17, 1978), *reprinted in* 73 AM. J. INT'L L. at 282-84 (1979). The court noted the State Department's inconsistent interpretation in the Atwood letter, but rejected this interpretation as an aberration because it was the first time that the State Department had departed from its earlier view that United States-incorporated subsidiaries of foreign corporations are accorded all the rights under the treaty. 643 F.2d at 358 n.3 (noting Letter from James R. Atwood, Deputy Legal Adviser, United States Department of State, to Lutz Alexander Prager, Esq., Assistant General Counsel, Equal Opportunity Commission (Sept. 11, 1979), *reprinted in* 74 AM. J. INT'L L. at 158-59 (1980)).

citing *Avigliano*, held that "the district court's interpretation of article XXII(3) would create an unreasonable distinction between treatment of American subsidiaries of Japanese corporations on the one hand, and branches of Japanese corporations on the other."[68]

The *Spiess* decision is most important for its unprecedented ruling on the second issue that article VIII(1) exempts a foreign employer "from domestic employment discrimination laws to the extent of permitting discrimination in favor of [foreign] citizens in employment for executive and technical positions."[69] The Fifth Circuit held that the right of Japanese companies to choose essential personnel is not subject to Title VII's BFOQ requirements.[70] The court concluded that to make the article VIII(1) right subject to Title VII's BFOQ requirement would render that right's inclusion in the treaty "virtually meaningless."[71]

Furthermore, the court noted that several absolute rights were granted under other articles of the treaty.[72] The court explained that even though the overall emphasis of the treaty is national treatment, several articles, including article VIII(1), were not intended to guarantee national treatment. Rather, they were intended to permit foreign nationals an absolute right to control their overseas investments even if the host country did not provide those rights to its own population.[73]

The court relied on articles written by Herman Walker[74] who formulated the modern concept of FCN treaties[75] and served as State Department adviser on commercial treaties.[76] Walker explained that article VIII(1) was intended to go beyond national

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68. 643 F.2d at 358 (citing with approval Avigliano, 638 F.2d at 556).

69. *Id.* at 359.

70. *Id.* at 362.

71. *Id.*

72. *Id.* at 360. The court gave the following examples of absolute rights:

> [A]rticle I permits foreign nationals to enter and leave the host country, and provides for rights of free travel, liberty of conscience, religious freedom, and other personal rights. . . . [A]rticle II (2) provides for notification of an alien's consulate in the event he is arrested, article VI (3) guarantees the payment of just compensation for expropriated property, and article XX (a) allows nationals of one party freedom of transit by the most convenient route through the territory of the other party.

Id.

73. *Id.*

74. *Id.* at 361 (citing Walker, *supra* note 26; Walker, *supra* note 42.

75. Airgram No. A-105 from Secretary of State Henry Kissinger to United States Embassy, Tokyo (Jan. 9, 1976).

76. Walker, *supra* note 26, at 229.

treatment. It assures management "freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from 'percentile' restrictions and the like."[77]

The court also examined the legislative history of the treaty and found that the Senate, in consenting to ratification of the treaty, was concerned about the right of United States companies to use United States personnel to control their investments in Japan. The court found that because the United States-Japan treaty is a bilateral treaty, the Japanese employers presumably had the same concern.[78]

This evidence of congressional intent, as well as the language and structure of the treaty, convinced the Fifth Circuit that foreign corporations and their subsidiaries have the right to hire technical and managerial personnel "of their choice" even if their hiring practices discriminated against qualified United States citizens.[79]

The court also noted that "federal statutes 'ought never to be construed to violate the law of nations if any other possible construction remains.' . . . Only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern."[80] Therefore, "[i]n the absence of congressional guidance," the court refused to abrogate the United States' commitment under the treaties to foreign nations.[81]

III. *ANALYSIS*

A. *Subsidiary's Entitlement To Assert Parent Company's Treaty Right*

The United States Supreme Court has formulated several rules for the interpretation of treaty provisions. First, under the rule of *Asakura v. City of Seattle*,[82] a treaty must be construed broadly and

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77. *Id.* at 234.

78. 643 F.2d at 361-62 (citing *1953 Hearings*, *supra* note 25, at 2, 3, 6-9).

79. The court, however, did not decide in *Spiess* "whether the article VIII(1) right extends beyond discrimination in favor of Japanese nationals in executive and technical positions, supervisory jobs which would hardly be filled by union members, minors or exploited workers." 643 F.2d at 362 n.8. Therefore, the court refused to deal with whether other United States labor laws apply to foreign employers.

80. 643 F.2d at 356 (citing The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

81. *Id.* at 362.

82. 265 U.S. 332 (1924).

liberally to give effect to its purpose.[83] The purpose of the Japanese treaty, as stated in its preamble, is to protect foreign investment in the two respective countries.[84] Because ownership of subsidiaries is an investment, a liberal reading of article VIII(1) should include subsidiaries if the purpose stated in the treaty is to be given effect.

Second, the Court has held in *Asakura* that when two constructions are possible, the Court prefers the construction of the treaty that is least restrictive of the rights that may be claimed under it.[85] The Second and Fifth Circuits, in looking beyond the language of the treaty, were in effect complying with this rule. As the circuit courts illustrated, there are two possible constructions of article XXII(3). The language could mean that subsidiaries incorporated in the host country are companies of the host country. It could also be interpreted as a definition of a company's nationality for the purpose of recognizing its status as a legal entity, but not for the purpose of restricting substantive rights granted under the treaty.[86] The Second and Fifth Circuits' interpretation that wholly-owned subsidiaries have the nationality of their owners is a more favorable interpretation of the rights that can be claimed under the treaty and is in accord with the Supreme Court's interpretation of treaties.

Third, the Supreme Court has stated that "all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole."[87] The Japanese treaty read in its entirety supports the interpretation that foreign subsidiaries have the right to employ managerial and technical personnel "of their choice." Article VII(1)(b) allows nationals and their companies "to acquire majority interests in companies of such other Party."[88] Article

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83. *Id.* at 342. *See also* Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163 (1940); Factor v. Laubenheimer, 290 U.S. 276, 293 (1933); Cerritos Gun Club v. Hall, 96 F.2d 620, 628 (9th Cir. 1938); Makah Indian Tribe v. McCauly, 39 F. Supp. 75, 79 (W.D. Wash. 1941), *rev'd on other grounds*, 128 F.2d 867 (9th Cir. 1942).

84. *See supra* note 26.

85. 265 U.S. at 342. *See also* Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163 (1940); Valentine v. United States, 299 U.S. 5, 10 (1936); Factor v. Laubenheimer, 290 U.S. 276, 293 (1933); Nielsen v. Johnson, 279 U.S. 47, 52 (1929).

86. 638 F.2d at 557; 643 F.2d at 356.

87. Sullivan v. Kidd, 254 U.S. 433, 439 (1921). *See also* Missouri v. Holland, 252 U.S. 416, 423 (1920); United States v. Karnuth, 24 F.2d 649, 652 (2d Cir. 1928), *rev'd on other grounds*, 279 U.S. 231 (1929); Makah Indian Tribe v. McCauly, 39 F. Supp. 75, 79 (W.D. Wash. 1941), *rev'd on other grounds*, 128 F.2d 867 (9th Cir. 1942).

88. Japan Treaty, *supra* note 7, art. VII, para. 1(b), at 2069.

VII(1)(c) then grants nationals the right to "control and manage enterprises which they have established or acquired."[89] Read in the context of the two preceeding articles, article VIII(1),[90] the "of their choice" provision, gives nationals and companies of either party the right to manage and control those enterprises which they have established or acquired with technical and managerial personnel of their choice.

In order to give a reasonable construction to the treaty terms, the Court allows an examination of the purpose, history, practice and circumstances of the treaty.[91] In addition, the Court stated in *Kolovrat v. Oregon*[92] that the courts must accord great weight to definitions of treaty terms by the State Department if the language of the treaty is ambiguous.[93] Therefore, in determining that subsidiaries of foreign corporations, incorporated in the United States, are entitled to assert their parents' article VIII(1) treaty rights,[94] the courts of appeals were correct in looking beyond the treaty provision and relying on State Department opinions, the treaty's purpose, negotiation and history.

B. *Reconciling Treaty And Statute Conflicts*

On several occasions the Supreme Court has addressed the issue of how courts should resolve conflicts between treaties and

89. *Id.* art. VII, para. 1(c), at 2069.

90. *Id.* art. VIII, para. 1, at 2070.

91. 254 U.S. at 439-42.

92. 366 U.S. 187 (1961).

93. *Id.* at 194. "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Id.* (citing Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933)). *See also*, United States v.Reid, 73 F.2d 153, 156 (9th Cir. 1934), *cert. denied*, 299 U.S. 544 (1936); The Yulu v. United States, 71 F.2d 635, 636 (5th Cir.), *cert. denied*, 293 U.S. 589 (1934).

94. The Second and Fifth Circuits ruled that wholly-owned subsidiaries may assert their parents' treaty rights. The courts left open the question whether a subsidiary which is not one hundred percent owned by foreign investors can assert treaty rights. The State Department made it clear that "controlled companies" have the same substantive rights under the treaty as the parent corporation but did not give any guidelines to what extent the companies have to be "controlled" in order to assert those rights. However, Department of State immigration guidelines and regulations, adopted in connection with article I of the treaty, authorize an employee of a company having the nationality of a treaty country to enter the United States under "treaty trader" status. 22 C.F.R. § 41.40 (1980). For these purposes, the nationality of the employing firm is determined by the nationality of the majority of stockholders. 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL PART II, *quoted in* 469 F. Supp. at 6. In future decisions which involve foreign subsidiaries which are not wholly-owned, the courts may defer to these State Department guidelines.

congressional acts which are both the "supreme Law of the Land."[95] As a result, the Court has developed rules to guide courts in deciding such conflicts.

The Supreme Court has held that if a conflict exists between an act and a treaty, "a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[96] Furthermore, the legislative history of the conflicting act makes no reference to the treaty the presumption is that the treaty remains in force.[97] The legislative history of Title VII is silent on whether Title VII and the BFOQ exemption apply to foreign employers.[98] Thus, Congress has not "clearly expressed" an intent to modify or abrogate the "of their choice" provision.[99] Following this Supreme Court rule, congressional silence should be interpreted to mean that Congress had no intention of modifying the treaty and subjecting foreign employers to Title VII when it enacted the Civil Rights Act.

The legislative history of the United States treaty with Japan, moreover, is not silent and indicates clearly that "[o]f special concern to investors are such assurances as . . . the right of the owner to manage his own affairs and employ personnel of his choice."[100]

C. *"Of Their Choice"—A Limited Right*

By looking at the treaty in its entirety, it is evident that the "of their choice" provision was intended to accord foreign employers

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95. U.S. CONST. art. VI, § 2.

96. Cook v. United States, 288 U.S. 102, 120 (1933). *See also* United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902) ("purpose by statute to abrogate a treaty or any designated part of a treaty . . . must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute").

97. 288 U.S. at 120.

98. *See supra* note 14.

99. Congress had the opportunity to express clearly whether foreign employers are subject to Title VII when it adopted the treaties with Thailand and Togo after it enacted Title VII. Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, art. IV, para. 6, 19 U.S.T. 5843, 5849, T.I.A.S. No. 6540 (of their choice, in accordance with the applicable laws); Treaty of Amity and Economic Relations, Feb. 8, 1966, United States-Togo, art. V, para. 3, 18 U.S.T. 1, 5, T.I.A.S. No. 6193 (of their choice, regardless of nationality). However, again, Congress did not clearly express its intent. It has been argued that since the Thailand treaty was adopted after Title VII and the provision "in accordance with the applicable laws" was inserted, this shows congressional intent to subject all foreign employers to Title VII. *See, e.g.*, Linskey v. Heidelberg E., Inc., 470 F. Supp. 1181, 1186-87 (E.D.N.Y. 1979). However, the treaty with Togo was also adopted after the enactment of Title VII and does not contain such a provision. Therefore, congressional intent is not clearly expressed.

100. *1953 Hearings*, *supra* note 25, at 2.

better than national treatment. Even though the general emphasis of the treaty is on national treatment,[101] some provisions accord less than national treatment,[102] while others accord better than national treatment.[103] In addition, because Congress has not clearly expressed that it is abrogating the "of their choice" treaty right,[104] the Fifth Circuit correctly held that foreign employers are not subject to Title VII. However, the Fifth Circuit did not clearly define the extent of the right to be accorded foreign employers under the "of their choice" provision.[105]

1. Essential Personnel

The Fifth Circuit has held that the "right of Japanese companies to choose *essential personnel* is a right to maintain Japanese control of the overseas investment."[106] However, the court does not define "essential personnel." It is questionable whether all the Japanese nationals are "essential personnel."[107] Because the district courts in *Avigliano* and *Spiess* decided that subsidiaries of foreign corporations are United States corporations and subject to Title VII,[108] the courts did not determine whether the foreign employers were complying with the treaty provision by hiring only specialized executive and technical personnel. This would have been an appropriate ground for remand to the district courts.

If the Supreme Court decides that the "of their choice" provision grants an exemption to foreign employers, it will hopefully provide guidelines for other courts to use when determining which employees fall under this exemption.

The "of their choice" language in the treaty allows foreign employers to engage "accountants and other technical experts, exec-

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101. Japan Treaty, *supra* note 7, preamble, at 2066.

102. One provision of the treaty permits each party to prescribe "special formalities in connection with the establishment of alien-controlled enterprises within its territories." *Id.* art. VII, para. 3, at 2070. Another provision gives the parties the right to limit the extent of alien interests in specific sensitive enterprises such as public utilities, banking and shipbuilding. *Id.* art. VII, para. 2, at 2069-70.

103. *See supra* note 72 and accompanying text.

104. *See supra* note 99 and accompanying text.

105. 643 F.2d at 359.

106. *Id.* at 362 (emphasis added).

107. A 1978 study of the economic impact of Japanese companies in New York shows that these companies have a ratio of one Japanese employee for every 2.1 local employees. JAPAN SOCIETY, INC., THE ECONOMIC IMPACT OF THE JAPANESE BUSINESS COMMUNITY IN NEW YORK 18-19 (1978).

108. 473 F. Supp. at 509; 469 F. Supp. at 2.

utive personnel, attorneys, agents and other specialists of their choice."[109] It does not specifically require that the personnel be essential to the operation of the corporation.[110] However, the purpose of the "of their choice" provision is to allow foreign employers the right to control and manage their investment.[111] This purpose can be accomplished by allowing foreign employers to hire their own nationals for only essential technical and managerial positions.

The holdings in the Second and Fifth Circuits seem contradictory. However, if the Fifth Circuit had set guidelines to determine which employees constitute "essential personnel," and had thereby restricted the scope of the exemption, the practical effect of its decision would have been similar to that of the Second Circuit. In addition, if foreign employers hire their own nationals only for executive and specialized positions, they would be complying with the treaty and minimizing violations of Title VII.

2. Discrimination Limited to National Origin

In ruling that Japanese companies are exempt from Title VII, the Fifth Circuit did not address the second issue whether the treaty provides an exemption only on the basis of national origin. The

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109. Japan Treaty, *supra* note 7, art. VIII, para. 1, at 2070.

110. While the Japanese treaty does not state that the employees have to be essential, two other treaties specifically mention that the employees have to be "essential." However, in both instances there was a specific reason for insisting that the word "essential" be included in the "of their choice" provision. Nicaragua refused to modify its laws requiring all employers to hire Nicaraguan citizens for a certain proportion of their jobs. *See* S. EXEC. DOC. G, 84th Cong., 2d Sess. 3 (1956). Therefore, the final treaty with Nicaragua repeated the "of their choice" provision of the Japanese treaty, but then added that the employees chosen by foreign employers must be "essential to the conduct of their affairs." Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, art. VIII, para. 1, 9 U.S.T. 449, 456, T.I.A.S. No. 4024. France had a work permit system for aliens that, if applied restrictively, might have limited the ability of foreign employers to hire their own nationals. *See* S. EXEC. DOC. G, 86th Cong., 2d Sess. 3 (1963). The treaty with France consequently modified the usual treaty language to impose an obligation on France to issue work permits liberally to United States employees "who by reason of their special capacities are essential to the functioning of the enterprise." Convention of Establishment, Nov. 25, 1959, United States-France, art. VI, para. 1, 11 U.S.T. 2398, 2405, T.I.A.S. No. 4625. Because neither the United States nor Japan had such permit systems or percentile restrictions, it was not necessary to emphasize in the Japanese treaty that "essential personnel" be allowed to manage the overseas investments.

111. The treaty states that "[n]ationals and companies shall be permitted within such territories . . . to control and manage enterprises which they have established or acquired." Japan Treaty, *supra* note 7, art. VII, para. 1(c), at 2069. *See also 1953 Hearings*, *supra* note 25, at 2.

Fifth Circuit used broad language,[112] but the holding of the court applied only to discrimination in favor of Japanese nationals.[113] Title VII proscribes discrimination on the basis of race, sex and religion, as well as national origin.[114] The Senate hearings on the Japanese treaty,[115] and other treaties,[116] suggest that foreign employers may only discriminate on the basis of national origin.

Because the plaintiffs in *Avigliano* charged Sumitomo with sexual discrimination,[117] the Supreme Court must decide whether foreign employers may discriminate on the basis of sex as well as national origin. As a practical matter, if Sumitomo may discriminate on the basis of national origin, plaintiffs who are United States citizens cannot succeed on the basis of sexual discrimination. The other proscriptions of Title VII can become an issue when foreign employers hire United States citizens for specialized positions and discriminate in their selection. For example, an Iraqi corporation might hire United States citizens as key personnel but refuse to hire United States citizens who are Jewish for those positions. If the treaty permits discrimination only on the basis of national origin, then the Iraqi employers could not discriminate against Jewish United States citizens for those positions. In addition, the language of the "of their choice" provision does not grant an exemption when foreign employers are hiring United States citizens for non-executive and non-technical positions.[118]

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112. 643 F.2d at 361. The Fifth Circuit stated very broadly that "article VIII(1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws." *Id.* (paraphrasing Japan Treaty, *supra* note 7, art. VIII, para. 1, at 2070).

113. *Id.* at 362 n.8. The court stated in a footnote that "[t]he extent to which [the 'of their choice' provision] applies outside the context of national origin discrimination is unclear. . . . We need not decide in today's case whether the article VIII(1) right extends beyond discrimination in favor of Japanese nationals in executive and technical positions. . . ." *Id.*

114. 42 U.S.C. § 2000e-2(a) (1976).

115. There is evidence in the legislative history that Congress intended the treaty to give foreign employers the right to engage specialized personnel "regardless of nationality." *1953 Hearings*, *supra* note 25, at 9.

116. The United States treaty with Denmark, adopted two years before the Japanese treaty, and the treaty with Togo, adopted thirteen years after the Japanese treaty, allow foreign companies to hire employees "of their choice" "regardless of nationality." Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. VII, para. 4, 12 U.S.T. 908, 915, T.I.A.S. No. 4797; Treaty of Amity and Economic Relations, Feb. 8, 1966, United States-Togo, art. V, para. 3, 18 U.S.T. 1, 5, T.I.A.S. No. 6193.

117. 638 F.2d at 553.

118. *See supra* note 29 and accompanying text.

The *Spiess* court limited its holding to Title VII and refused to decide the application of other employment legislation,[119] such as the Fair Labor Standards Act[120] or the Labor Management Relations Act.[121] Even if the court had not limited its holding, a violation of other employment laws would have been unlikely because, as the Fifth Circuit pointed out, "supervisory jobs . . . would hardly be filled by union members, minors or exploited workers."[122] Secondly, subjecting foreign employers to the Fair Labor Standards Act,[123] or similar acts, would not deprive them of their right to control and manage their investments. Because this right to control is the purpose of the treaty, requiring foreign companies to comply with such acts would not undermine the treaty.

CONCLUSION

The language and underlying purpose of the treaty, the relevant State Department opinions and policy considerations dictate that United States-incorporated subsidiaries which are wholly-owned by foreign corporations may assert the treaty rights accorded to the parent companies in article VIII(1).

Secondly, the "of their choice" provision may be interpreted as providing foreign employers the right to hire their own nationals instead of qualified United States citizens for essential positions. Because the purpose of the "of their choice" provision is to allow foreign nationals the right to manage and control their investment, foreign employers should be allowed to discriminate only on the basis of national origin and only in those employment positions essential for the control and management of their investment.

Finally, in the absence of congressional guidance, the Supreme Court may decide not to impose the BFOQ provision on foreign employers, and should only define those "essential positions" which may be filled by foreign employees.

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119. 643 F.2d at 362 n.8.

120. 29 U.S.C. §§ 201-19 (1976).

121. 29 U.S.C. §§ 141-87 (1976).

122. 643 F.2d 362 n.8. Whether other United States employment laws apply to foreign employers will not be at issue before the Supreme Court in *Avigliano* and *Spiess*. The Court may rely on this issue, however, as a policy consideration, as the Second Circuit did in *Avigliano*.

123. 29 U.S.C. §§ 201-19 (1976).

Because there are over forty-seven FCN treaties[124] and many of them contain a variety of "of their choice" provisions,[125] only Congress may change these treaties to give all of them uniform application. In recent years there has been a surge of foreign investment in the United States[126] and a large number of United States citizens are now employed by foreign companies operating in the United States.[127] Therefore, the ultimate resolution of whether foreign employers are subject to Title VII involves policy considerations which Congress should weigh in resolving this issue.

Dushica D. Babich

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124. *See supra* note 25.

125. *See supra* note 29.

126. "[Foreign direct investments] in the U.S. increased rapidly in the last ten years, climbing to over $34 billion in 1977." Sethi & Swanson, *supra* note 15, at 489 (footnote omitted).

127. At the end of 1974, United States companies with foreign parents employed over 1.08 million workers. *Id.* at 490.