Discriminatory Hiring Practices by Foreign Corporations in the United States—A Limited Right

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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

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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.”).


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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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

¹³. 643 F.2d at 363.
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 in hiring, promotions, benefits, terms, conditions, privileges, or termination on the basis of race, sex, religion or national origin. 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 . . . .

Courts have traditionally construed the BFOQ provision narrowly to safeguard the integrity of Title VII. Discrimination in hiring
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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{24}

B. The Friendship, Commerce and Navigation Treaties

The main purpose of FCN treaties\textsuperscript{25} is to establish legal condi-
tions which will encourage trade and private investment.\textsuperscript{26} FCN
treaties provide for "national treatment"\textsuperscript{27} and for "most-favored-
nation treatment."\textsuperscript{28}

\begin{thebibliography}{9}
\bibitem{22}442 F.2d at 388.
\bibitem{24}See 643 F.2d at 355; 638 F.2d at 553; 470 F.Supp at 1184-85.
\bibitem{25}The United States has FCN treaties in force with at least 47 nations. \textit{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 \textit{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
\textit{Commercial Treaties-Treaties of Friendship, Commerce and Navigation, with Israel, Ethio-
pia, 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].
\bibitem{26}Japan Treaty, \textit{supra} note 7, preamble, at 2066. \textit{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 inter-
course, encouraging mutually beneficial investments, and establishing mutual rights and
privileges." Japan Treaty, \textit{supra} note 7, preamble, at 2066.
\bibitem{27}National treatment" means that foreign companies will receive the same treatment
accorded domestic companies. The Japanese treaty itself defines "[t]he term 'national treat-
ment' [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, \textit{supra
note} 7, art. XXII, para. 1, at 2079.
\bibitem{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

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 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
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. 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. It is on the second issue that the courts disagree.

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.

The district court had held that under the treaty Sumitomo lacked standing to invoke the treaty provision as a defense. 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." The district court interpreted this language to mean that foreign subsidiaries incorporated in the United States are companies of the United States, and therefore


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.
35. 473 F. Supp. at 509 (quoting Japan Treaty, supra note 7, art. XXII, para. 3, at 2080) (emphasis omitted in part).
could not invoke the "of their choice" provision in a treaty between the United States and Japan.\footnote{37}

The Second Circuit found that the subsidiary was entitled to invoke the employment provision of the FCN treaty.\footnote{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.\footnote{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 articles, but subsidiaries wholly-owned by such corporations would not. Japanese enterprises would probably transform their wholly-owned subsidiaries into branches.\footnote{40}

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

\footnote{37. Id.}
\footnote{38. 638 F.2d at 554.}
\footnote{39. Id. at 556.}
\footnote{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)). \textit{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).}
\footnote{40. Id.}
\footnote{41. Id. at 555.}
\footnote{42. Id. at 557 (citing Despatch No. 13 from Office of the United States Political Adviser for Japan, United States Department of State of State (Apr. 8, 1952); \textit{Walker, Provisions on Companies in United States Commercial Treaties}, 50 \textit{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"), \textit{reprinted in} 74 \textit{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. \textit{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.”

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,43 with three other provisions in the treaty which specifically grant rights to subsidiaries. Article VI(4),44 article VII(1),45 and article VII(4)46 specify 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. 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. 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).
ally 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.'" The court concluded that Sumitomo was "properly classified as a Japanese company for the purpose of invoking the substantive provisions of the treaty." The court further held that the treaty did not exempt defendant from Title VII; rather, defendant would have to justify its hiring practices under the BFOQ provision of Title VII. 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." 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. 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. 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. 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-

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. The Fifth Circuit reversed the district court's decision 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. While the district court concluded that State Department opinions were irrelevant due to the plain language of article XXII(3) of the treaty, the circuit court deferred to State Department opinions on this issue. 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." 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. Finally the court,

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

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

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(I) 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. The purpose of the Japanese

treaty, as stated in its preamble, is to protect foreign investment in

the two respective countries. 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 con-

structions are possible, the Court prefers the construction of the

treaty that is least restrictive of the rights that may be claimed

under it. 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 incorpo-

rated 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. 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 inter-

pretation 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.” 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.”

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.


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 preceding 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.
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." 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." Furthermore, the legislative history of the conflicting act makes no reference to the treaty the presumption is that the treaty remains in force. The legislative history of Title VII is silent on whether Title VII and the BFOQ exemption apply to foreign employers. Thus, Congress has not "clearly expressed" an intent to modify or abrogate the "of their choice" provision. 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." 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

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-

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).
utive personnel, attorneys, agents and other specialists of their choice." It does not specifically require that the personnel be essential to the operation of the corporation. However, the purpose of the "of their choice" provision is to allow foreign employers the right to control and manage their investment. 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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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, but the holding of the court applied only to discrimination in favor of Japanese nationals. Title VII proscribes discrimination on the basis of race, sex and religion, as well as national origin. The Senate hearings on the Japanese treaty, and other treaties, suggest that foreign employers may only discriminate on the basis of national origin.

Because the plaintiffs in Avigliano charged Sumitomo with sexual discrimination, 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.

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.


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.


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, such as the Fair Labor Standards Act or the Labor Management Relations Act. 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." Secondly, subjecting foreign employers to the Fair Labor Standards Act, 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.

119. 643 F.2d at 362 n.8.
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.
Because there are over forty-seven FCN treaties\textsuperscript{124} and many of them contain a variety of "of their choice" provisions,\textsuperscript{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\textsuperscript{126} and a large number of United States citizens are now employed by foreign companies operating in the United States.\textsuperscript{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.

\textit{Dushica D. Babich}

\begin{footnotesize}
\begin{enumerate}
\item[124.] See supra note 25.
\item[125.] See supra note 29.
\item[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).
\item[127.] At the end of 1974, United States companies with foreign parents employed over 1.08 million workers. Id. at 490.
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