FOREIGN SUBSIDIARIES ARE NOT IMMUNE FROM EMPLOYMENT DISCRIMINATION LAWS

Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2d Cir.), *cert. granted,* 102 S. Ct. 501 (1981)

In *Avigliano v. Sumitomo Shoji America, Inc.*[1] the Second Circuit Court of Appeals rejected a treaty-based[2] attempt by an American subsidiary of a foreign corporation to avoid compliance with Title VII of the Civil Rights Act of 1964.[3]

Plaintiffs, female employees of Sumitomo Shoji America, Inc.[4] (Sumitomo), brought a class action[5] suit against Sumitomo under Title VII of the Civil Rights Act of 1964.[6] Plaintiffs alleged that Sumitomo's practice of hiring only male Japanese nationals[7] for management posi-

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1. 638 F.2d 552 (2d Cir.) *cert. granted,* 102 S. Ct. 501 (1981).

2. The defendant based its motion to dismiss the action on the Treaty of Friendship, Commerce and Navigation, April 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Japanese Treaty].

3. 42 U.S.C. § 2000e (1976 & Supp. III 1979).

4. Sumitomo Shoji America, Inc. is a wholly-owned subsidiary of a Japanese parent company and incorporated under the laws of New York.

5. The Federal Rules of Civil Procedure require that a class meet the following prerequisites:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

6. 42 U.S.C. § 2000e-2(a) (1976) provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunity or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

7. Sumitomo allegedly hired only Japanese *nationals* for management positions. If Sumitomo had hired only Japanese *citizens*, they arguably would not have violated Title VII. *See* Espinoza v. United States, 414 U.S. 86 (1973). In *Espinoza* the Supreme Court held that Congress never intended the term "national origin" to embrace "citizenship" requirements. 414 U.S. at 88, 89. The term "national origin" only "refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Id.* at 88. Citizenship restrictions that are not a pretext to hidden national origin discrimination or that lack that purpose or effect do not violate Title VII. *Id.* at 92.

tions discriminated against them on the basis of nationality and sex.[8] Sumitomo claimed immunity from the Act by virtue of the Treaty of Friendship, Commerce and Navigation (FCN) of 1953,[9] which permits Japanese companies to hire managerial and other specialized staff "of their choice."[10] The trial court denied Sumitomo's motion to dismiss, holding that because Sumitomo was a subsidiary incorporated in the United States it was not entitled to invoke Treaty rights.[11] The court, however, certified for immediate appeal.[12] The Second Circuit affirmed on other grounds,[13] and *held*: American subsidiaries of Japa-

8. Plaintiffs, female secretarial employees, alleged discrimination on the basis of sex and national origin under: Title VII; Civil Rights Act of 1966, 42 U.S.C. § 1981 (1976); and the thirteenth amendment. Plaintiffs ultimately abandoned their thirteenth amendment claim and the district court dismissed their § 1981 claim. Avigliano v. Sumitomo Shoji America, Inc., 473 F. Supp. 506, 513 (S.D.N.Y. 1979), *modified,* 638 F.2d 552 (2d Cir.), *cert. granted,* 102 S. Ct. 501 (1981). 42 U.S.C. § 1981 (1976) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

The Japanese Treaty superceded this subsequently enacted statute. *See* note 17 *infra* and accompanying text.

9. Japanese Treaty, *supra* note 2.

10. *Id.*, art. VIII(1) at 2070. Article VIII(1) provides in relevant part:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they have qualified for the practice of a profession within the territories of the other Party, for the particular purpose of making examinations, audits, and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

11. Avigliano v. Sumitomo Shoji America, Inc., 473 F. Supp. 506, 513 (S.D.N.Y. 1979), *modified,* 638 F.2d 552 (2d Cir.), *cert. granted,* 102 S. Ct. 501 (1981).

12. The district court certified the cause for immediate appeal pursuant to 28 U.S.C. § 1292(b) (1976), which provides:

> When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

13. Because the district court held that the treaty did not protect Japanese subsidiaries incorporated in the United States, it did not reach the question of whether article VIII of the treaty exempted such subsidiaries from United States discrimination laws. The Second Circuit, how-

nese corporations may claim article VIII Treaty rights, but they are not thereby immune from American employment discrimination laws.[14]

The supremacy clause[15] of the United States Constitution accords treaties the status of congressional acts.[16] Conflicts between treaties and congressional acts are generally resolved in favor of the latest enactment.[17] Nevertheless, subsequent acts must manifest a clear intent to modify or abrogate a preexisting treaty.[18] When possible, courts attempt to give validity to both.[19] Reconciliation attempts may result, however, in faulty and expansive readings of either the act or the treaty, or both.[20]

A Treaty of Amity and Commerce with France in 1778 was the first commercial treaty to which the United States was a party.[21] Since then the United States has entered into numerous other commercial trea-

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ever, decided that the subsidiary could invoke the treaty's provisions, thus raising the question of the subsidiaries' immunity from Title VII.

14. 638 F.2d at 558.

15. U.S. CONST. art. VI, § 2 provides:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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 notwithstanding.

16. Sullivan v. Kidd, 254 U.S. 433, 435-36 (1921) (treaty superior to state law); Foster & Elam v. Neilson, 27 U.S. (1 Pet.) 253, 314 (1829) (treaty is law of land and equivalent to legislative acts).

17. Hijo v. United States, 194 U.S. 315, 324 (1904); United States v. Domestic Fuel Corp., 71 F.2d 424, 428 (C.C. P.A. 1934). *See* note 8 *supra*. Congress enacted Title VII eleven years after the FCN Treaty with Japan.

When conflicts between treaties and state or local laws occur, the treaty governs regardless of the date of ratification. *See, e.g.,* Asakura v. Seattle, 265 U.S. 332 (1924). "The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws." *Id.* at 341. *See also* Sullivan v. Kidd, 254 U.S. 433 (1921).

18. Reid v. Covert, 354 U.S. 1, 18 (1957); Frost v. Wenie, 157 U.S. 46, 58 (1895); Edye v. Robertson (Head Money Cases), 112 U.S. 580, 597 (1884).

THE RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 145(1) (1965) adopts the stated position by providing that "[a]n act of Congress enacted after an international agreement of the United States becomes effective, that is inconsistent with the agreement, supercedes it as domestic law of the United States, if the purpose of Congress to supersede the agreement is clearly expressed."

19. Baker v. Carr, 369 U.S. 186 (1962). "[A] court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute." *Id.* at 212. *See* Moser v. United States, 341 U.S. 41, 45 (1951); Clark v. Allen, 331 U.S. 503, 510 (1947); Whitney v. Robertson, 124 U.S. 190, 194 (1888).

20. *See* notes 71-73 *infra* and accompanying text.

21. Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 AM. J. COMP. L. 229, 231 (1956).

ties[22] which provide the juridical basis for international business transactions.[23] Since World War II commercial treaties have been primary instruments in serving the investment needs of developed and developing nations.[24] One of the primary purposes of the treaties is to "establish agreed legal conditions favorable to private investment."[25]

The functional rights of corporations under commercial treaties are embodied in one of the three designated standards of treatment: national treatment,[26] most-favored-nation treatment,[27] and noncontingent treatment.[28] The first two standards attempt to equalize the status of foreign nationals and corporations with citizens of the host country.[29] The third standard elevates foreign status to a level higher than that of citizens.[30] When noncontingent clauses are incorporated into commercial treaties, foreigners may have rights and privileges unavailable to nationals.

Judicial attempts to resolve conflicts between commercial treaties

22. *See generally Foreign Assistance Act of 1962: Hearings on S. 2996,* S. REP. No. 1535, 87th Cong., 2d Sess. 602-09 (1962), *reprinted in* 1 INT'L LEGAL MATERIALS 92 (1962); Walker, *Provisions on Companies in United States Commercial Treaties,* 50 AM. J. INT'L. L. 373-78 (1956).

23. Walker, *supra* note 21, at 230. *See* Recent Development, *Amenability of Foreign Corporations to United States Employment Discrimination Laws,* 14 VAND. J. TRANSNAT'L L. 197, 198 (1981).

24. Walker, *supra* note 21, at 231. "In the last ten years [*i.e.,* since 1946] such treaties have been signed with 15 countries." *Id.* at 230.

25. Walker, *supra* note 22, at 385. For a discussion of the impact of Japanese investment in the United States, see generally Emch, *Japanese Direct Investment In American Manufacturing,* 17 STAN. J. INT'L L. 1 (1981); Givens & Rapp, *What It Takes to Meet the Japanese Challenge,* 99 FORTUNE 104 (June 18, 1979); Okita, *Japan, China and the United States: Economic Relations and Prospects,* 57 FOREIGN AFFAIRS 1090, 1090-1100 (1979).

26. The national treatment standard is a contingent standard of international treatment that provides for the automatic equalization of the status of foreign nationals in the host country. It was designed to place foreign nationals on a par with citizens of the host country. Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805 (1958).

27. The most-favored-nation treatment is another contingent standard of international treatment, and was designed to provide equal treatment among all foreign nationals. *Id.*

28. Noncontingent, or absolute, standards of treatment purport "to attribute to aliens independent rights placing them in a privileged status over citizens of the country." Walker, *supra* note 26, at 806. The court in Spiess v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir.), *vacated pending rehearing,* No. 79-2382 (5th Cir. Aug. 7, 1981), found that the FCN Treaty with Japan embodied a noncontingent standard of treatment: "It is apparent that article VIII(1)'s 'of their choice' provision was intended, not to guarantee national treatment, but to create an absolute rule permitting foreign nationals to control their overseas investments." 643 F.2d at 360.

29. Walker, *supra* note 26, at 811-12.

30. *Id.*

and federal civil rights laws[31] are recent.[32] In 1979, the District Court for the Eastern District of New York faced the issue of treaty-based corporate immunity from American employment discrimination laws[33] in *Linskey v. Heidelberg Eastern, Inc.*[34] The court held that a commercial treaty with Denmark[35] did not exempt a Danish corporation from liability for discriminatory discharges.[36] The court determined that the foreign parent corporation and its American subsidiaries were "em-

31. The employment discrimination laws are: Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976); Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976); Civil Rights Act of 1879, 42 U.S.C. § 1985(3) (1976); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976 & Supp. III 1979); Civil Rights Act of 1866, 42 U.S.C. § 1983 (1976).

32. Treaty-based corporate immunity from federal civil rights laws for American subsidiaries of foreign corporations is an "entirely novel" question that has produced conflicting results in Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2d Cir.), *cert. granted,* 102 S. Ct. 501 (1981), and Spiess v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir.), *vacated pending rehearing,* No. 79-2382 (5th Cir. Aug. 7, 1981). Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 STAN. L. REV. 947 (1979). *Avigliano* and *Spiess* both held that American subsidiaries of foreign corporations may assert the same treaty rights as the foreign parent corporation itself. 638 F.2d at 557; 643 F.2d at 358. Other courts have denied the ability of American subsidiaries to claim full treaty rights in other contexts. *See, e.g.,* United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957). In *Oldham* a wholly-owned subsidiary of a Japanese corporation resisted the district court's jurisdiction to entertain an indictment for antitrust violations. The subsidiary maintained that the FCN Treaty with Japan removed the court's jurisdiction by providing the exclusive remedy for anticompetitive trade practices. 152 F. Supp. at 822. The court rejected this defense as to the subsidiary, reasoning that "by the terms of the treaty itself . . . a corporation organized under the laws of a given jurisdiction, is a creature of that jurisdiction, with no greater rights, privileges, or immunities than any other corporation of that jurisdiction." *Id.* at 823. The court observed that if the foreign parent operated the subsidiary as a branch, the branch would retain its foreign identity and would receive any benefits the FCN Treaty extended to foreign corporations. *Id. See generally* 6 N.C.J. INT'L L. & COM. REG. 111 (1980). Both *Spiess* and *Avigliano* rejected the subsidiary/branch distinction. *See* notes 52, 58 & 61 *infra* and accompanying text.

33. *See generally* Dehner, *Multinational Enterprise and Racial Nondiscrimination: United States Enforcement of an International Human Right,* 15 HARV. INT'L L.J. 71 (1974); Sethi & Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?,* 4 EMPLOYEE REL. L.J. 485 (1979); Recent Development, *supra* note 23; Note, *supra* note 32; Note, *Civil Rights in Employment and the Multinational Corporations,* 10 CORNELL INT'L L.J. 87 (1976).

34. 470 F. Supp. 1181 (E.D.N.Y. 1979). A former employee of the defendant corporation, an American incorporated subsidiary of East Asiatic Co., Ltd., brought suit alleging discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976 & Supp. III 1979), and on the basis of age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, 623(a), 626(c), 630(a), (b) (1976). Plaintiff joined the parent and subsidiary as defendants.

35. Article VII(4) of the Treaty provides in part: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialized employees of their choice, regardless of nationality." Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797.

36. 470 F. Supp. at 1187.

ployers" within the meaning of the statutes[37] and denied defendant's motion to dismiss.[38]

Without benefit of interpretive materials on the Treaty with Denmark,[39] the *Linskey* court concluded that Congress intended article VII(4) of the Treaty to exempt foreign corporations from admissions requirements of the host country, not from employment discrimination laws.[40] The court based its conclusions upon interpretations of similar provisions in treaties with Haiti,[41] Iran,[42] and Thailand.[43]

One federal circuit court[44] since *Avigliano* has addressed the issue of whether the FCN Treaty with Japan[45] grants American subsidiaries of Japanese corporations immunity from American employment discrimi-

37. Title VII defines "employer" as follows: "The term 'employer' means a person engaged in an industry affecting commerce . . . and any agent of such a person." 42 U.S.C. § 2000e(b) (1976). The language in the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1976), is almost identical.

38. 470 F. Supp. at 1185.

39. The court lamented the scarcity of legislative interpretations of commercial treaties in general:

> For example, an examination of the legislative history of commercial treaties with China, Italy, Columbia, Greece, Finland, Ethiopia, Israel, Denmark and Germany, provide no clues to the precise meaning of the treaty provision in issue here. Even though each treaty contains such a provision, the legislative reports and accompanying testimony are silent.

Id. at 1185-86, n.5.

40. 470 F. Supp. at 1186. The court based its conclusion upon a New York City Bar Association memorandum concerning Haitian and Iranian treaty provisions similar to the one at issue. Quoting from the memorandum, the court stated:

> While it is recognized that it is within a country's jurisdiction to enact rules and regulations for the general admission to liberal professions, it should also be noted that a too-restrictive exercise of a country's prerogative in this field may impede the flow of international trade and investments . . . The committee, in summary, believes that a treaty clause permitting the employment of experts of one's own choice and nationality, *regardless of qualification* in such foreign country is highly desirable and important.

470 F. Supp. at 1186 (quoting Association of the Bar of the City of New York, Committee on Foreign Law, Comments on the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Haiti of March 3, 1955, and Iran, of August 15, 1955 (1956)) (emphasis in original). *But see* Note, *supra* note 32, at 950-54. "[T]he choice provision should . . . be read only to allow foreign employers to hire their own citizens." *Id.* at 954.

41. Ironically, the court noted that the treaty with Haiti was not in force at the time of its decision. 470 F. Supp. at 1186 n.6.

42. Treaty of Amity, Economic Relations and Consular Rights, August 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853.

43. Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540.

44. Spiess v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir.), *vacated pending rehearing,* No. 79-2382 (5th Cir. Aug. 7, 1981).

45. Japanese Treaty, *supra* note 2.

nation laws.[46] In *Spiess v. C. Itoh & Co. (America)*,[47] the Fifth Circuit reversed the district court and held that such subsidiaries may discriminate on the basis of nationality.[48] The court characterized the Treaty as the "supreme law of the land,"[49] and found that the subsequent enactment of Title VII did not supercede the Treaty's hiring provision.[50] The text of Title VII neither expressly nor impliedly disavows Treaty rights.[51]

After determining that American subsidiaries of Japanese parent companies may claim full rights granted by the Treaty,[52] the *Spiess* court focused on the substance of article VIII. According to the court, that article exempted the subsidiary, Itoh-America, from employment discrimination laws.[53] Apparently dissatisfied with its decision or its reasoning, the *Spiess* court vacated its decision[54] and granted a rehearing.

In *Avigliano v. Sumitomo Shoji America, Inc.*[55] the Second Circuit found that although an American subsidiary of a Japanese corporation

46. Plaintiffs, three non-Japanese employees of C. Itoh & Co. (America), Inc. brought a class action suit under Title VII of the Civil Rights Act of 1964. Plaintiffs alleged discrimination on the basis of nationality.

47. 643 F.2d 353 (5th Cir.), *vacated pending rehearing,* No. 79-2382 (5th Cir. Aug. 7, 1981).

48. *Id.* at 363.

49. U.S. CONST. art. VI, cl. 2 provides that "all Treaties made . . . under the Authority of the United States, shall be the supreme law of the Land. . . ." *See* note 15 *supra*.

50. 643 F.2d at 356.

51. *Id.*

52. Judge Clark found that Itoh-America was a "company of Japan" within the meaning of article XXII(3), which provides:

> As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."

Japanese Treaty, *supra* note 2, at 2079-80.

A contemporaneous memorandum prepared by State Department negotiators and articles by a leading architect of the FCN Treaty convinced the court that American subsidiaries of Japanese parent companies may claim full rights granted by the Treaty. 643 F.2d at 358-59. *See also* note 32 *supra* and accompanying text.

53. *Id.* at 359. The court reasoned that the presence of both contingent and noncontingent (or absolute) standards of treatment in the treaty evinced a clear intent to grant foreign nationals and companies the most extensive protection possible. *Id.* at 360. Immunity from American employment discrimination laws is consistent with the intent of the treaty to afford foreign nationals absolute control over their investments. *Id.* at 361.

54. Spiess v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir.), *vacated pending rehearing,* No. 79-2382 (Aug. 7, 1981).

55. 638 F.2d 552 (2d Cir.), *cert. granted,* 102 S. Ct. 501 (1981).

may assert article VIII Treaty rights,[56] these rights do not exempt the subsidiary from compliance with Title VII of the Civil Rights Act of 1964.[57] Writing for the court, Circuit Judge Mansfield addressed first the issue of Sumitomo's standing by stating that neither the place of incorporation nor the form of business operation relates to the determination of whether a corporation could invoke article VIII Treaty rights.[58] That position stemmed from concern that only three provisions explicitly granted rights to subsidiaries. Article VIII was not among those provisions.[59] From a practical standpoint, permitting Japanese, but not American-incorporated subsidiaries, to claim full Treaty rights would result in a "crazy-quilt pattern" of application.[60] More-

56. *Id.* at 557-58.

57. *Id.* at 559.

58. *Id.* at 555-56. The district court had held that because article VIII(1) of the Treaty made reference only to "nationals and companies of either Party . . . within the territories of the other Party", subsidiaries incorporated in the United States were ineligible for article VIII protection. 473 F. Supp. 506, 509 (S.D.N.Y. 1979). See note 11 *supra* and accompanying text.

59. The three provisions are Article VI(4), Article VII(1) and Article VII(4) of the FCN. Article VI(4) reads as follows:

> 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 in paragraphs 2 [relating to the right to be free from unlawful entry, molestation, and search] and 3 [relating to right to be free from condemnation of property except for a public purpose, and right to compensation therefor] of the present Article. 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.

Article VII(1) reads as follows:

> Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, *enterprises which they control, whether in the form of individual proprietorships, companies or otherwise*, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

Article VII(4) reads as follows:

> 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.

Japanese Treaty, *supra* note 2, at 2069-70 (emphases added).

60. 638 F.2d at 556.

over, negotiations over identical language in an FCN treaty between the United States and the Netherlands revealed an intent to treat subsidiaries and branches equally with respect to treaty rights.[61]

The *Avigliano* court found no conflict between article VIII of the Treaty and Title VII of the Civil Rights Act of 1964.[62] The pertinent treaty language that grants Japanese firms the right to hire executives "of their choice" merely exempts foreign corporations from local legislation restricting the hiring of noncitizens.[63] The impetus behind the provision was to ensure the operational success of the foreign corporation in the host country.[64] Employment of a corporation's own nationals is often crucial to that success because of cultural differences in managerial style.[65] The court, however, found no intent to grant the right to discriminate. The tension between operational success and unjustified discriminatory practices was resolved by the court's juxtaposi-

61. *Id.* at 556-57. The negotiators were concerned that a provision identical to article XXII(3) of the Japanese Treaty would exclude subsidiaries incorporated in the host country from the substantive benefits accorded to "companies of either Party." Article XXII(3) defines the nationality of a company on the basis of the place of incorporation. The *Avigliano* court emphasized that article XXII(3) defined the legal status of the company, not its substantive rights. *Id.* at 557.

62. *Id.* at 559.

63. *Id.* A State Department position is consistent with the court's reasoning:

> Article VIII(1) of the FCN Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, "accountants, and other technical experts, executive personnel, attorneys, agents, and other specialists of their choice." This provision was intended to ensure that U.S. Companies operating in Japan could hire U.S. personnel for critical positions, and vice versa. The phrase "of their choice" should be interpreted to give effect to this intention, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. We express no opinion on what positions would, in a particular case, qualify as "executive personnel."

Letter from Lee R. Marks, Deputy Legal Advisor, Department of State, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission (Oct. 17, 1978), *reprinted in* Nash, *Contemporary Practice of United States Relating to International Law,* 73 AM. J. INT'L L. 277, 281 (1979).

See Note, *supra* note 32. The author argued that the employer choice provision "in effect only lets Japanese employers select the *citizenship* of certain key personnel. . . . Rather than immunizing foreign businesses from all domestic laws regulating choice of personnel, the choice provision should therefore be read only to allow foreign employers to hire their own citizens." *Id.* at 952-54 (footnotes omitted).

64. 638 F.2d at 559.

65. Sethi & Swanson, *supra* note 33, contended, in reference to Itoh-America, that exclusion of non-Japanese in company staff meetings "may be traced to the highly ritualistic nature of Japanese internal communications and decision-making processes, which may be quite alien to the American staff whose presence and participation would be not only counterproductive but actually harmful to the deliberative process." *Id.* at 506.

tion of article VIII of the Treaty and Title VII. Title VII's "bona fide occupational qualification" (bfoq) exception,[66] the court suggested, permits the hiring of Japanese nationals when the successful operation of the business so requires.[67] Thus, the court's interpretation gives validity to both the treaty[68] and the Act.[69]

The *Avigliano* court rendered a sound decision. Article VIII of the FCN Treaty with Japan does not grant a license to foreign subsidiaries to violate American employment discrimination laws.[70] Arguments to the contrary, as the *Spiess* opinion amply demonstrated, are faulty and illogical. The *Spiess* court's reasoning was based solely on the absence of evidence of congressional intent to repudiate article VIII(1) when it enacted Title VII.[71] The court ignored the conflict between the provisions and made no attempt to reconcile them. It also rejected the *Avigliano* court's reconciliation of the provisions through Title VII's bfoq exemptions.[72] The court simply concluded that inclusion of bfoq requirements "would render . . . the Treaty virtually meaningless" in the

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66. Title VII states in part:

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

42 U.S.C. § 2000e-2(e) (1976).

67. 638 F.2d at 559. *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321 (1977) (bfoq exemption should be interpreted narrowly). *But cf.* Swint v. Pullman-Standard, 624 F.2d 525, 534 (5th Cir. 1980) (selection of personnel based on race not within bfoq exception) *cert. granted in part,* 451 U.S. 906 (1981); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971) (customer preference for female flight attendants is not within bfoq exemption). *See generally* Sethi & Swanson, *supra* note 33, at 518-20; Note, *supra* note 32, at 967-70; 10 DEN. J. L. & PUB. POL'Y 373, 377-78 (1981). Sethi & Swanson argued that a bfoq defense is proper for only two categories of employees: "(1) the top two or three executives in the overseas affiliate and (2) specialists assigned to the overseas affiliate for short durations and for very specialized jobs." *Id.* at 519.

68. "From the American perspective, the Japanese Treaty was 'intended primarily to facilitate American private-sector investment in foreign nations.' . . . It is self-evident that this same goal . . . was the goal of Japanese negotiators who sought it to protect Japanese companies operating in the United States." Spiess v. C. Itoh & Co. (America), 643 F.2d 353, 361-62 (5th Cir.), *vacated pending rehearing,* No. 79-2382 (5th Cir. Aug. 7, 1981) (citation omitted). *Accord,* Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d at 556; Walker, *supra* note 21, at 231.

69. *See* Moser v. United States, 341 U.S. 41, 45 (1951); Clark v. Allen, 331 U.S. 503, 512 (1947).

70. *See* notes 63-65 *supra* and accompanying text.

71. Spiess v. C. Itoh & Co. (America), 643 F.2d at 363.

72. *Id.* at 362.

employment context.[73]

The two critical aspects of treaty-based immunity from employment discrimination laws are whether American-incorporated subsidiaries may claim rights under the Treaty, and the scope of the Treaty with respect to the employment of foreign nationals. Both *Avigliano* and *Spiess* concluded that subsidiaries are entitled to full rights under the Treaty and that their place of incorporation is irrelevant in this regard.[74] Both courts made adequate use of the appropriate tools of treaty interpretation.[75] The second, more controversial aspect of the issue divides *Avigliano* and *Spiess*. *Spiess*, having the benefit of the *Avigliano* court's analysis,[76] reached a contrary conclusion permitting employment discrimination by foreign subsidiaries.[77] Its interpretation of article VIII led to the conclusion that subsidiaries need not abide by *any* employment laws. *Avigliano* pointed to the potential for wholesale immunity from American labor and employment laws should the *Spiess*-endorsed result prevail.[78] The *Spiess* court, however, refused to define the breadth of the immunity it recognized.[79] This omission left the door open for an expansive reading of article VIII(1). *Avigliano*, on the other hand, specifically merged the Treaty's "of their choice" provision with Title VII's bfoq exception,[80] to harmonize application of the enactments. Thus, under *Avigliano*, a subsidiary's employment of only Japanese nationals is justifiable only when the criteria of the bfoq exception are met.[81]

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73. *Id.* The Fifth Circuit has opted to rehear the arguments and reassess its position. *See* note 54 *supra* and accompanying text.

74. *See* notes 52, 58-60 *supra* and accompanying text. In fact, *Spiess* cited *Avigliano* as support for this conclusion. 643 F.2d at 358.

75. *Id.*

76. The Second Circuit decided *Avigliano* on January 9, 1981. The Fifth Circuit decided *Spiess* on April 24, 1981.

77. *See* notes 48-49 *supra* and accompanying text.

78. The court suggested that complete immunity would exempt Sumitomo "not only from Title VII but also 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. §§ 147-87, and the like." Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d at 559.

79. In reference to *Avigliano*, the *Spiess* court stated, "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, . . ." Spiess v. C. Itoh (America), 643 F.2d at 362 n.8.

80. *See* notes 66-67 *supra* and accompanying text.

81. The court listed several factors for the district court to consider in applying Title VII's bfoq exemption to Sumitomo's employment practices. Those factors are "a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business

The primary purpose of commercial treaties is to protect corporate investments in foreign countries.[82] Judicial interpretations of such treaties must give effect to that purpose. When Japanese or other foreign investments are involved, carrying out that purpose may afford foreign corporations benefits that are unavailable to nationals of the host country to ensure stable, attractive investment conditions. Thus far, Title VII is the only statute whose employment provision litigants have used to challenge the Japanese Treaty. Because of Title VII's bfoq exception, foreign corporations and American subsidiaries can follow the provisions of both documents.[83]

The economic and political repercussions from the Supreme Court's review of *Avigliano*[84] will no doubt be substantial both internationally and domestically. In light of the volume of Japanese and other foreign investments in America,[85] the likelihood of more litigation in this area is great. The Supreme Court now has the opportunity to provide the needed guidance for lower federal courts and accordingly should affirm *Avigliano*.

F.L.W.

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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." 638 F.2d at 559. The court's suggestions find support in the following statement:

> We believe that in determining bona fide need, the U.S. courts should not only consider the comparable conventional job requirements and skills required to perform these jobs, but also should consider the special sociocultural environment of the foreign parent company's home country and the unique management style and characteristics developed in those countries and practiced by their multinationals.

Sethi & Swanson, *supra* note 33, at 518-19.

82. *See* notes 21-25 *supra* and accompanying text.

83. *See* notes 66-69 *supra* and accompanying text.

84. The United States Supreme Court granted certiorari in *Avigliano* on November 2, 1981, 102 S. Ct. 501 (1981).

85. "Between 1962 and 1976 Japanese direct investment in the United States increased more than thirty-five fold, from $110.3 million to over $3.8 billion." Emch, *supra* note 25, at 1.