1981

Brief of the American Jewish Congress, the American Civil Liberties Union, the American Jewish Committee, the Anti-Defamation League of B'Nai B'rith, the Mexican-American Legal Defense and Educational Fund, NOW Legal Defense and Educational Fund, and the Puerto-Rican Legal Defense and Educational Fund, Inc., Amici Curiae

American Jewish Congress, et al.

No. 80-2070
No. 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

v.

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER AND ELIZABETH WONG,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN JEWISH CONGRESS, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NOW LEGAL DEFENSE AND EDUCATION FUND, AND THE PUERTO-RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., *AMICI CURIAE*

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Interest of the *Amici*

This brief *amici curiae* is submitted on behalf of the American Jewish Congress, the American Civil Liberties Union, the American Jewish Committee, the Anti-

Defamation League of B'nai B'rith, the Mexican American Legal Defense and Educational Fund, the NOW Legal Defense and Education Fund and the Puerto-Rican Legal Defense Fund, Inc. The American Jewish Congress, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith are concerned with the preservation of the security and the constitutional and civil rights of Jews in America through preservation of the rights of all Americans. The American Civil Liberties Union is a 250,000-member national organization dedicated to protecting the fundamental rights of the people of the United States. The Mexican American Legal Defense and Educational Fund is a national legal and educational organization devoted to protecting the civil rights of Mexican Americans. The NOW Legal Defense and Education Fund is a non-profit civil rights organization established in 1970 by leaders of the National Organization for Women to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. The Puerto-Rican Legal Defense Fund was founded in 1972 and is dedicated to the protection of civil and human rights of Puerto Ricans and other Hispanics.

Amici's interest in the instant case stems from their concern for the continued vitality of Title VII as a means to prevent and remedy discrimination in employment. They believe that the decision below erroneously interprets both the Japanese-American Treaty of Friendship, Commerce and Navigation and Title VII. *Amici* believe that if permitted to stand, that decision will inexorably lead to the weakening of Title VII's protection in all employment relationships covered by that statute.

Statement of the Case

Eleven female employees of Sumitomo Shoji America, Inc. ("Sumitomo"), a company incorporated in New York which is a wholly-owned subsidiary of a Japanese firm,

brought a class action suit in the United States District Court for the Southern District of New York under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, the Civil Rights Act of 1966, 42 U.S.C. § 1981, and the Thirteenth Amendment. Plaintiffs, who are American citizens,[1] claimed that Sumitomo's policy of hiring only male Japanese nationals for executive and managerial positions discriminated against them on the basis of sex and national origin.

Sumitomo moved to dismiss the complaint on the ground, *inter alia,* that the 1953 Japanese-American Treaty of Friendship, Commerce and Navigation, 4 U.S.T. 2065, T.I.A.S. No. 2863 (1953) (the "Treaty") exempts Japanese trading companies and their wholly-owned subsidiaries from the application of Title VII for purposes of filling executive and supervisory positions.[2]

The district court denied Sumitomo's motion to dismiss, ruling that, pursuant to Article XXII(3), Sumitomo was a United States and not a Japanese company and therefore lacked standing to invoke the freedom-of-choice provision of Article VIII(1). *Avigliano* v. *Sumitomo Shoji America, Inc.,* 473 F. Supp. 506 (S.D.N.Y. 1979), *adhered to,* 21 F.E.P. Cas. 580 (S.D.N.Y. 1979), *aff'd remanded,* 638 F.2d 552 (2d Cir.), *cert. granted,* 102 S.Ct. 50 (1981). In a supplementary opinion issued after consideration of State Department documents proffered by Sumitomo which purportedly bore on the intent of the Treaty negotiators, the district court declined to alter that ruling. *See Avigliano* v. *Sumitomo Shoji American, Inc.,* 21 F.E.P. Cas. 580 (S.D.N.Y. 1979).

Sumitomo was granted an immediate appeal of this question pursuant to 28 U.S.C. § 1292(b). *Avigliano* v. *Sumitomo Shoji America, Inc.,* 473 F.Supp. 506 (S.D.N.Y. 1979).

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[1] One of plaintiffs is a Japanese citizen.

[2] Only the Title VII claims are presently at issue.

The United States Court of Appeals for the Second Circuit affirmed the district court's denial of Sumitomo's motion to dismiss, but on different grounds. *Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981). The Court held that the Treaty's freedom-of-choice provision could be invoked by a wholly-owned Japanese subsidiary incorporated in the United States. It further held, however, that the freedom-of-choice language of Article VIII did not wholly exempt Sumitomo from Title VII obligations:

> Subjecting a Japanese [sic] company to Title VII is consistent with the language and purpose of Article VIII of the Treaty, since Title VII, construed in the light of the Treaty, would not preclude the company from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business.

Id. at 559. The court concluded by stating that, while the bona fide occupational qualification ("bfoq") exception to Title VII is ordinarly a narrow one,

> as applied to a Japanese [sic] company enjoying rights under Article VIII . . . it must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese [sic] 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.

Cross-petitions for certiorari were filed and were granted by this Court on November 2, 1981, 102 S.Ct. 501 (1981).

Summary of Argument

Sumitomo, as a United States corporation, has no standing to invoke Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation Between the United States and Japan. Pursuant to Article XXII(3) of that Treaty, Sumitomo's nationality is determined by its place of incorporation. Accordingly, Sumitomo is not entitled to invoke the Article VIII(1) right given companies of one party operating within the territory of the other party to engage executive personnel "of their choice."

However, if Sumitomo could invoke the Treaty to hire executive personnel of its choice, its hiring practices are nevertheless subject to Title VII. The Treaty and Title VII are not in conflict because the Treaty only gives Japanese and American companies operating within the territory of the other the right to conduct their business and commercial activities as freely as local citizens; it does not sanction discriminatory hiring practices in violation of domestic anti-discrimination law.

Subjecting Sumitomo's employment practices to Title VII would create no maze of administrative duplication, confusion or conflict. The State Department's obligations in regulating the entry of alien treaty traders are fundamentally different from the role of the EEOC and the courts in enforcing anti-discrimination legislation.

The Second Circuit's ruling fundamentally misconceives the nature of the bfoq defense. The court below erred in suggesting that Sumitomo could establish a bfoq for persons of Japanese national origin by a showing that only such persons would be acceptable to Sumitomo, its customers or other of its employees. The law is clear that employer, customer, or co-worker preferences cannot create a bfoq.

ARGUMENT

I.

As The United States Subsidiary Of A Japanese Corporation, Sumitomo Has No Standing To Invoke Article VIII(1) Of The Treaty

The starting point for determining the nationality of a company for purposes of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2065, T.I.A.S. No. 2863 (1953) (the "Treaty"), is necessarily the Treaty itself.

Article XXII(3) of the Treaty provides that:

> 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.

4 U.S.T. at 2079-80 (emphasis added). Thus, the criterion for determining a company's nationality for purposes of invoking substantive rights under the Treaty is its place of incorporation, not the nationality of its controlling shareholder. Indeed, determining the place of incorporation is termed the "classical" test by Herman J. Walker Jr., one of the foremost authorities on Friendship, Navigation and Commerce Treaties. Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am. J. Int'l L. 373, 382 (1956).

The Second Circuit held that "Article 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." *Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552, 557 (2d Cir.), *cert. granted,* 102 S.Ct. 501 (1981). However, that Court apparently ignored the first half of the pertinent provision. While the second part of the second sentence of Article XXII(3) does establish a corporation's legal status, the first part of that sentence specifically provides that companies incorporated within the jurisdiction of either of the countries *"shall be deemed companies thereof. . . ."* 4 U.S.T. at 2080. The Second Circuit failed to include the *first part* of this conjunctive sentence in its analysis and focused solely on the second part relating to the establishment of juridical status. The sentence must be read as a whole, and neither part ignored.[3] *See Spiess* v. *C. Itoh & Company (America), Inc.*, 643 F.2d 353, 364 (5th Cir. 1981) (dissenting opinion), *rehearing en banc granted,* 654 F.2d 302, *vacated,* 664 F.2d 480 (1981).

Article XXII(3) does not restrict all substantive Treaty rights. Sumitomo may invoke those substantive rights inuring to the benefit of United States subsidiaries of Japanese corporations;[4] Sumitomo may not, however, as a United States corporation, invoke those rights granted only to nationals of Japan or to Japanese corporations.[5]

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[3] The dialogue between Messrs. Nagai and Bassin, two of the Treaty negotiators, is most peculiarly relied upon by Sumitomo in that it is completely irrevelant to the point at issue. Brief of Petitioner and Cross-Respondent at 38. That dialogue addresses only the meaning of "juridical status," set forth in the *second* part of the second sentence of Article XXIII(3) and makes no reference to the first part of that sentence. Department of State Dispatch No. 13 from U.S., POLAND, Tokyo, to Department of State, Washington, D.C., April 8, 1952, App. 136a, 143-44a (emphasis added).

[4] Article VII(4) of the Treaty provides that "controlled enterprises" shall "be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other party."

[5] Under the same reasoning advanced by Sumitomo, an Iranian subsidiary of a Japanese parent could do business in New York and invoke the protections of the Treaty afforded to Japanese corporations, as could any of its other branches. The ramifications would, indeed, be grave.

To allow Sumitomo to invoke rights specifically granted to different types of entities is to disregard the express language of the Treaty which distinguishes among "nationals", "companies" and "controlled enterprises." *See* Article VII(1), 4 U.S.T. at 2069; Article VII(4), 4 U.S.T. at 2070; Article VI(4), 4 U.S.T. at 2069.

This reading is consistent with the official view of the operative provision when originally adopted. Thus, in discussing the history behind the inclusion of corporations in commercial treaties, Herman J. Walker, Jr. stated that:

> when commercial treaties . . . [began] evidencing concern with corporations as a class, the provisions made for their rights were not only set apart from, but were for many years strictly limited as compared with the provisions made for individuals. *The now established official view, accordingly, is that in general corporations are not deemed to be within the purview of a commercial treaty except as there may be express provision to that effect.*

Walker, *Provisions on Companies in United States Commercial Treaties, supra* at 378 (emphasis added and footnote omitted). Thus, the treatment accorded a particular type of entity is that stipulated in the Treaty and nothing more. *See* Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am. J. Comp. L. 229, 236 (1956).

The Treaty negotiators clearly contemplated that different types of entities would be granted different substantive rights.[6] Article VII(1) provides:

> *Nationals* and *companies of either Party* shall be

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[6] Treaty provisions are careful to delineate between "controlled enterprises", "companies" and "nationals". Significantly, Article VII(4) provides:

> 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.

4 U.S.T. at 2070 (emphasis added). *See also* Article VI(4), 4 U.S.T. at 2069.

> accorded national treatment . . . within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. . . . *Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall . . . be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.*

4 U.S.T. at 2069 (emphasis added).

The rights granted "controlled enterprises" (i.e. subsidiaries) are, contrary to the Second Circuit's suggestion, substantial. *Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d at 556. Under Article VIII(1), United States subsidiaries of Japanese corporations are to be afforded the same treatment as "like enterprises controlled by nationals and companies of such other Party." 4 U.S.T. at 2069. Thus, the United States subsidiary of a Japanese corporation has the same rights as every other corporation formed in the United States.

By the express terms of Article VIII(1), only Japanese nationals and companies, and not enterprises controlled by said nationals and companies, may invoke the right to engage executive personnel "of their choice."

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel, . . . of their choice.

4 U.S.T. at 2070. These Treaty provisions, specifically enumerating the entities to which certain rights are granted, make clear that Article VIII(1) was not intended to apply to United States subsidiaries of Japanese corporations. Granting rights to a corporation organized under the laws of Japan which are not granted to its United States subsidiary is wholly consistent with the Treaty's purpose of promoting international trade and investment.

> It is very reasonable that the two nations would reserve the most extraordinary degree of Treaty protection only for business enterprises created under their own laws, and would allow enterprises created under the laws of the other party to be subject to those laws on a basis equal to all other companies of that party.

Spiess v. *C. Itoh & Company (America), Inc., supra* at 369 (dissenting opinion).

Sumitomo erroneously contends that there is no substantive difference between a Japanese corporation which chooses to operate in this country through an American branch and a Japanese corporation which invokes our domestic law and chooses, instead, to operate through a wholly-owned United States subsidiary. Thus, it argues that the subsidiary should be able to assert, as can a branch office, the rights of its Japanese parent for purposes of Article VIII(1) and that "important legal consequences [should not] hinge on the foreign investor's choice of the form of enterprise by which it does business. . . ." Brief of Petitioner and Cross-Respondent at 41.

However, there are important legal consequences resulting from the choice of the form of enterprise. A foreign corporation operating through a wholly-owned U.S. subsidiary may not be considered to be "doing business" in the state to subject it to the state's jurisdiction. *See Delagi* v. *Volkswagenwerk AG of Wolfsburg, Germany,* 29 N.Y.2d 426, 328 N.Y.S.2d 653 (1972). *See also* W. Fletcher, 18A *Cyclopedia of the Law of Private Corporations,* § 8813 (1977).[7] Thus, while gaining the benefits of incorporating its subsidiary in New York, Sumitomo Shoji Kabushiki Kaisha, the parent of Sumitomo, remains im-

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[7] The parent corporation *will* be subject to the state's jurisdiction where the subsidiary is the agent of the parent, *Frummer* v. *Hilton Hotels International, Inc.,* 19 N.Y.2d 533, 281 N.Y.S.2d 41, *cert. denied,* 389 U.S. 923 (1967), or where the subsidiary is a mere instrumentality of the parent thus justifying a piercing of the corporate veil. *Taca International Airlines, S.A.* v. *Rolls-Royce, Ltd.,* 15 N.Y.2d 97, 256 N.Y.S.2d 129 (1965).

mune from the state's exercise of jurisdiction. The effect of this is to isolate the assets of the parent, as well as of its directors, from any liability imposed on the subsidiary. However, if the parent corporation chooses instead to operate through a U.S. branch ,it would be "doing business" in the state and would subject itself to liability.

Sumitomo argues that there are no important ramifications to the foreign investor's choice of the form of enterprise by which it chooses to do business for purposes of applying the Treaty rights, at the same time that the investor reaps the benefits of operating through a wholly-owned subsidiary rather than a branch office. Sumitomo cannot have it both ways. Judge Reavley, in *Spiess* v. *C. Itoh & Company (America), Inc., supra,* eloquently addressed this paradox:

> If a company of Japan wishes to safeguard a few superior legal rights under the Treaty, it may choose to do business in the form of a branch office. But if the Japanese company seeks to gain the additional tax and legal benefits that our laws confer on American-incorporated companies, they will create a separate legal entity under the aegis of American law. *The line between Japanese incorporation and American incorporation is a bright and distinct one. If Japanese investors choose to cross that line in order to gain all the benefits of our legal system on a basis equal with American corporations [it is] reasonable that they accept legal responsibilities and duties on an equal basis as well.*

643 F.2d at 369 (emphasis added) (dissenting opinion).

II.

Even If Sumitomo Could Invoke The Treaty, Its Hiring Practices Are Subject To Title VII Requirements

Even were the Second Circuit correct in determining that a United States subsidiary of a Japanese corporation

could invoke the Treaty, Sumitomo's hiring practices must nevertheless comply with the anti-discrimination provision of Title VII. As noted by the court below,

> [t]he right of Japanese firms operating in the United States under the Treaty to hire executives "of their choice" does not give them license to violate American laws . . . .

Avigliano v. *Sumitomo Shoji America, Inc., supra,* at 558. Thus, even if Sumitomo is deemed a "treaty trader", its hiring practices would nevertheless have to withstand the scrutiny of Title VII.

As this Court recognized in its seminal decision in *Whitney* v. *Robertson,* 124 U.S. 190, 194 (1888),

> [b]y the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control . . . .

Absent some indication of congressional intent to the contrary, then, this Court must construe the Treaty and Title VII so that the former is consistent with the latter.[8]

A. The Treaty and Title VII Are Not In Conflict

Sumitomo's sole claim to exemption from the strictures of Title VII is premised upon Article VIII(1) of the Treaty, which provides that "[n]ationals and companies

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[8] The apparent conflict between the Treaty and Title VII cannot be resolved by expanding the bfoq exception to Title VII. As discussed in Point III, *infra,* the Second Circuit's expansive reading of the bfoq provision emasculates the protections afforded by Title VII.

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". Sumitomo argues that these words "establish an *unqualified right* of foreign investors to employ 'executive personnel . . . of their choice' ", Brief of Petitioner and Cross-Respondent at 20 (emphasis added), and that application of Title VII to its hiring of executive personnel would result in "a significant derogation from FCN treaty rights", *id.* at 30.

Sumitomo, however, has distorted the purpose underlying Article VIII(1). Indeed, Sumitomo itself admits that it is not "exempt" from Title VII and that its hiring rights under the treaty are not "unqualified" in that Sumitomo admits that "matters of 'public health, morals and safety' are in any event reserved by the Treaty to the host country." Brief of Petitioner and Cross-Respondent at 27. It follows that a matter of such public morality as discriminatory hiring practices would be a matter reserved to the host country. Brief of Petitioner and Cross-Respondent at 14, 27. In fact, the background and negotiating history of the Treaty indicates not only that Article VIII(1) was intended to serve a more limited purpose than that advanced by Sumitomo but that the Treaty, when properly construed, is not in conflict with Title VII.

As Sumitomo itself has recognized, the central aim of the Treaty here, like all FCN treaties, is to give nationals and companies of the U.S. and Japan "the right to conduct business and commercial activities within the territory of the other *as freely as local citizens*". Brief of Petitioner and Cross-Respondent at 21 (emphasis added). As noted by Herman J. Walker, the chief architect of the post-war FCN treaties, Article VIII(1) assures treaty-trader companies "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. . . ." Walker, *Treaties for the Encouragement and Protection of Foreign*

Investment: Present United States Practice, 5 Am.J. Comp.L. 229, 234 (1956) (emphasis added).

To the same effect, Secretary of State Acheson, in amplifying upon a proposed FCN treaty with Uruguay, noted that the proposed Treaty "provides, for example, that citizens of one country may set up and operate business enterprises in the other *on the same footing* as citizens of that country". 21 Dep't State Bull. 909 (1949) (emphasis added).

Similarly, in connection with a proposed FCN treaty with West Germany, a Foreign Service dispatch from HICOG, Bonn to the Department of State comments on the limited purpose of provisions similar to Article VIII(1) by noting that the *"major special purpose is to preclude the imposition of 'percentile' legislation".* Foreign Service Dispatch No. 2529, from HICOG, Bonn, to Department of State, re FCN Treaty with Germany, dated March 18, 1954, App. at 182a (emphasis in original). The dispatch goes on to note that Article VIII(1) "gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law", *id.*

In short, Article VIII(1) merely serves to prevent "the imposition of ultra-nationalistic policies with respect to essential executive and technical personnel". Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am. J. Int'l Law 373, 386 (1956). It does not, however, affirmatively sanction discriminatory hiring practices.

Thus, far from granting treaty-trader companies an "unqualified" right to hire executives and other personnel, the Treaty here, like all FCN treaties, merely assures that treaty-trader companies will be accorded the same status as U.S. companies. Like their U.S. counterparts, treaty-trader companies may hire executives and supervisory personnel "of their choice," unfettered by quota restrictions and percentile requirements so long as their deci-

sions can be justified by reference to valid business goals and are non-discriminatory. Far from conflicting with Title VII, the Treaty, in effect, advances the goals of U.S. civil rights legislation: non-discriminatory merit hiring based upon legitimate business needs.

Furthermore, this interpretation of the Treaty is consistent with the Department of State's own pronouncements on the issue. In a letter addressed to the General Counsel of the Equal Employment Opportunity Commission, for example, the Deputy Legal Adviser to the Department of State indicated that the phrase "of their choice" should not be read "as insulating the employment practices of foreign companies from all local laws . . . [and] we [the Department of State] do not believe that it confers any right to discriminate against a particular sex, religious, or minority group". Letter of Lee R. Marks, Deputy Legal Adviser, U.S. Department of State to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission dated October 17, 1978, App. at 95a.

Given the underlying purpose of Article VIII(1)—to prevent the imposition of "ultra-nationalistic" quotas on the hiring of key executives by Japanese treaty-traders—as well as the Department of State's own interpretation of this provision, Sumitomo's construction must be rejected. Sumitomo's claim to an "unqualified" right to hire executive and supervisory personnel is neither required, given the text of the Treaty, nor persuasive, given the history of this and similar provisions.

B. The Construction Advanced By *Amici* Would Not Result in "Administrative Duplication, Confusion and Conflict"

The application of Title VII to Sumitomo's employment practices would not, as Sumitomo claims, create "a maze of administrative duplication, confusion and conflict. . . ." Brief of Petitioner and Cross-Respondent at 32. To the contrary, application of Title VII to

Sumitomo's hiring practices would impose no greater burden on Sumitomo than that imposed upon U.S. corporations—to carry out hiring decisions in a nondiscriminatory fashion. Indeed, if Title VII is not applied to the hiring decisions in question, Sumitomo will be permitted to evade the obligations imposed upon all other U.S. corporations, and its hiring decisions will be free of scrutiny by any regulatory body.

Sumitomo's argument on this point confuses two fundamentally distinct bodies of law and regulations. While the State Department, pursuant to the Immigration and Nationality Act, is charged with the duty of regulating the *entry* of treaty-trader aliens into this country, the employment practices of treaty-trader companies, once active within this country, including their hiring decisions regarding supervisory and executive personnel, is governed in part by Title VII. The application of Title VII to the employment practices here at issue involves considerations irrelevant to, and thus noticeably absent from, the regulations concerning the entry of treaty-traders into the United States.

In spite of the above, Sumitomo maintains that its view of the meaning of Article VIII(1) employment rights is "borne out by the legislative and administrative implementation of FCN treaty provisions by the United States". Brief of Petitioner and Cross-Respondent at 28. In support of this claim, Sumitomo argues that the regulation touching upon the eligibility of aliens for treaty-trader visas, 22 C.F.R. § 41.40(a) (1981), demonstrates the "linkage between the entry right and sojourn rights provided by Article I(1) [of the Treaty] and the employment right of Article VIII(1) . . . ." *Id.* The absence of any requirement in § 41.40(a) that a treaty-trader advance some basis for its decision to hire only Japanese citizens for executive and supervisory positions, however, indicates that the central concern of Title VII is never addressed under this regulation.

Section 41.40(a), in pertinent part, provides that an alien, in order to qualify for a visa as an employee of a treaty-trader company, must establish that he

> will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

22 C.F.R. § 41.40(a) at 150. While the State Department has elaborated on the indicia of the "executive or supervisory" positions which qualify for treaty-trader visa treatment (see Dep't of State Telegram No. 089624 to Japanese Posts, 4, reprinted in 58 Interpreter Rel. 478, 479 [Sept. 17, 1981] and Brief of Petitioner and Cross-Respondent at 29), both § 41.40(a) and the State Department's own policy statements concerning that section's implementation deal with the nature of the *duties* to be performed, rather than the basis for any individual *hiring decision.*

Thus, while a visa applicant employed in a "minor capacity" must prove that he possesses unique qualifications for the position in question, executive and supervisory personnel need not prove their credentials and must only establish that they have been hired to fill a position satisfying the State's Department's criteria. Both § 41.40(a) and the State Department's interpretation of that section are silent on the issue here presented: whether the nationality of an applicant for an executive or supervisory position constitutes a bona fide occupational qualification justifying discriminatory treatment. In short, once the State Department determines that the position to be filled is "executive" or "supervisory", it will not further scrutinize the employer's hiring procedures.

Given the limited nature of the determination undertaken by the State Department pursuant to § 41.40(a), no danger exists that application of Title VII to Sumitomo's decisions regarding the employment of executives will re-

sult in needless administrative duplication. While the State Department, pursuant to 22 C.F.R. § 41.40(a) (1981), is charged with determining whether an alien qualifies for an entry visa as a "treaty-trader", the concerns addressed by Title VII are separate and distinct. Title VII, along with the administrative and enforcement mechanisms it creates, furthers a public policy in no way addressed by the INA.

If the employment practices here in issue are exempt from Title VII review, the individual hiring decisions of hundreds of treaty-trader companies will be immune from all scrutiny. Merely by its designation of a position as "supervisory" or "executive", a treaty-trader company could effectively isolate itself from any claim of discriminatory hiring practices. If Sumitomo's position is adopted by this Court, decisions not reviewed by the State Department will be isolated from any review by the courts or the EEOC.[9]

Finally, application of Title VII to the employment practices here in issue would not constitute, as Sumitomo claims, judicial review of visa decisions. A finding by the district court, for example, that Sumitomo impermissibly discriminates on the basis of national original cloaked as "alienage", would in no way invalidate or call into question the visa decisions of the State Department. This is because the federal court would be examining an issue

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[9] Indeed, all "executive" and "supervisory" positions filled by non-Japanese nationals would also be immune from Title VII scrutiny, if Sumitomo's interpretation of the Treaty is adopted by this Court. While the entry of individual supervsory and executive personnel into this country is controlled by the State Department pursuant to 22 C.F.R. § 41.40(a), the Treaty does not *require* a treaty-trader to fill all "executive" and "supervisory" positions with Japanese nationals. If Sumitomo's position is adopted by this Court, however, a treaty-trader company's employment decisions concerning these positions would be immune from Title VII attack. This expansive reading of the "of their choice" language of the Treaty, which is implicit in Sumitomo's argument, is clearly at odds with the rules of construction adopted by this Court in *Whitney* v. *Robertson, supra.*

never considered by the State Department's consular officials—i.e., the bona fide occupational qualifications for "executive" or "supervisory" positions, including whether national origin, in the guise of alienage is being used as a job qualification and, if so, whether the former is a bona fide occupational qualification for the executive and supervisory positions in question. For this reason, the policy considerations advanced by this Court in *Mathews* v. *Diaz,* 426 U.S. 67 (1976), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963), are simply inapposite.

In short, the expansive reading of the Treaty advanced by Sumitomo must be rejected. Neither the language of the Treaty itself, nor the purposes underlying Article VIII(1), requires adoption of that extreme position. Furthermore, a ruling by this Court exempting Sumitomo's hiring decisions concerning executive and supervisory personnel from Title VII scrutiny would create a vacuum in United States civil rights enforcement. Such an exemption is not required in order to give effect to FCN treaty rights, and would do severe damage to the policies underlying Title VII.

III.

BFOQ Is A Very Narrow Exception To Title VII's Discrimination Ban

Title VII's broad prohibitions against employment discrimination are qualified by Section 703(e), 42 U.S.C. § 2000e-2(e), which provides that,

> [n]otwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the

> normal operation of that particular business or enterprise . . . .

The Equal Employment Opportunity Commission and the courts, including this Court, have uniformly recognized that the bfoq exception is as narrow as a needle's eye. The court below, however, while giving lip service to the narrowness of the exception, has nevertheless construed it with a breadth undermining Title VII's objectives. The Second Circuit held:

> Although the BFOQ exception of Title VII is to be construed narrowly in the normal context, *Dothard* v. *Rawlinson,* 433 U.S. 321, 334 (1977), we believe that as applied to a Japanese [sic] company enjoying rights under Article VIII of the Treaty it must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese [sic] company doing business in the United States. . . .

638 F.2d at 559.

The Second Circuit erred in so holding. As argued in Point I *supra,* Sumitomo is not entitled to claim any right under Article VIII(1) of the Treaty "to engage . . . executive personnel . . . of [its] choice." However, even assuming Sumitomo could claim the right to hire personnel of its choice, that right would not permit it to discriminate in violation of Title VII. See Point II, *supra.*

The Second Circuit's expansive construction of the bfoq exception is unnecessary to give "due weight" to the "unique requirements of a Japanese company doing business in the United States". Title VII's bfoq provision in its "normal context" allows for consideration of a company's particular nature and its special employment requirements. To distort Title VII's bfoq so as to reflect Treaty concerns would inevitably open the door to an unwarranted expansion of the bfoq exception, the operation of which must be confined to those narrow circumstances it was designed to address.

The guidelines promulgated by the EEOC are unambiguous:

> The exception stated in Section 703(e) of Title VII, that national origin may be a bone fide occupational qualification, shall be strictly construed.

29 C.F.R. § 1606.4 at 141 (1981).

Although we have found no cases in which a Title VII defendant has asserted a bfoq defense based on national origin, sex as a bfoq has been litigated with some frequency and been uniformly found insufficient as a defense to a Title VII discrimination claim except in those special cases where privacy or safety interests were implicated. The case law makes it clear that the factors to which the Second Circuit adverted are insufficient to establish that defense. Sumitomo's claim, advanced for the first time in this Court, that it engages in legal "nationality" discrimination, not proscribed "national origin" discrimination, must be rejected, since it is based on an apparent misreading of this Court's decision in *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86 (1973).[10]

A. The Court Of Appeals Erred In Suggesting That Japanese Linguistic Skills And The Like Can Render Japanese National Origin A BFOQ

The Court of Appeals for the Second Circuit suggested that Sumitomo might establish entitlement to a "national

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[10] *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86 (1973), does establish the proposition that employment discrimination favoring United States citizens is not unlawful under Title VII. But *Espinoza* does not address the question of the legality or illegality of discriminating *against* United States citizens, precisely those persons Title VII was designed to protect.

In any event, even if *Espinoza* could be read broadly to remove from Title VII's scope all discrimination based on alienage or nationality, whether such discrimination is in favor of or against United States citizens, *Espinoza* itself recognizes that "an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination. Certainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." *Id.* at 92. Sumitomo's "Japanese citizens only" rule undoubtedly has the proscribed effect; that rule therefore violates Title VII.

origin" bfoq by proving that the employment positions at issue required "(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. . . ." 638 F.2d at 559. None of these qualifications, however, require Japanese citizenship or Japanese national origin.

Amici do not dispute that Japanese language skills and knowledge of Japanese business may well be legitimate qualifications for the jobs at issue or that such qualifications may most often be found in persons of Japanese ancestry or nationality. *Amici* maintain, however, that neither Japanese citizenship nor ancestry constitutes a bfoq. To recognize a bfoq here would be to seriously misconstrue the nature of Title VII and of the bfoq defense.

Title VII was designed specifically to end the practice of employment decisions premised on stereotypical or overgeneralized conceptions of members of particular sexual, racial, religious or national origin groups. *Dothard* v. *Rawlinson,* 433 U.S. 321, 328 (1977). Under Title VII, employment decisions must be based on the specific qualifications of individuals, not on general qualifications or characteristics which correlate those individuals with particular population groups, even where such correlations are high. For example, although some jobs may require physical strength most frequently possessed by men, sex is nevertheless not a bfoq for positions requiring physical strength. *See, e.g., Weeks* v. *Southern Bell Tel. & Tel. Co.,* 408 F.2d 228, 235 (5th Cir. 1969); *Long* v. *Sapp,* 502 F.2d 34 (5th Cir. 1974).

Similarly, that Japanese linguistic skills may be more common to Japanese than others does not mean that there is a valid bfoq in Japanese nationality. It is the *language* skill which is a bona fide occupational qualification, not the Japanese passport. The Second Circuit's holding to the contrary misunderstands and unnecessarily expands the

bfoq defense, and, in so doing, vitiates Title VII's goal—the outlawing of empolyment decisions based on group stereotypes rather than on individualized considerations.

B. Customer Preference Cannot Create a BFOQ

The Second Circuit also erred in suggesting that customer preference may create a bfoq. Except in those special cases where privacy interests were implicated, customer preference has uniformly been found an insufficient defense to a Title VII discrimination claim. No special rules exist, nor should exceptions be created, for the discriminatory preferences of foreigners.

The question of customer preference is nowhere addressed in the national origin discrimination regulations, although it is discussed and rejected[11] in the sex discrimination guidelines. 29 C.F.R. § 1604.2 (1979).

The EEOC has steadfastly refused to recognize the preferences of co-workers, the employer or customers as justification for sexually discriminatory employment practices.[12]

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[11] The only time that sex may constitute a bfoq is "[w]here it is necessary for the purpose of authenticity or genuineness . . . *e.g.*, an actor or actress." 29 C.F.R. § 1604.2(a)(2).

[12] Thus, in a 1971 Commission case, an employer refused to promote a female to the position of branch manager because the job involved accompanying male customers to football games, dinners and hunting trips, arguing that customers would not go on hunting trips with female managers "unless they were built like Raquel Welch." The Commission rejected the defense. EEOC Dec. No. 71-2338, (CCH) EEOC Decisions (1973) ¶ 6247 at 4437. In a similar case, an employer refused a female applicant employment as an armored car guard, arguing that loss of customer confidence in the company's ability to provide security services justified a bfoq. The EEOC held that "this argument is, in law, without merit, since it presumes that customers' desires may be accommodated even at the price of rendering nugatory the will of Congress." EEOC Dec. No. 70-11, (CCH) EEOC Decisions (1973) ¶ 6025 at 4049.

Not only are the Commission's guidelines wholly consistent with the statutory language and legislative history, but the EEOC's construction of the statute is not particularly novel. New York State's Law Against Discrimination, originally enacted in 1945, Executive Law §296(1)(d) (McKinney 1981), was the first fair employment law in this country. It too had a bfoq exception. The Commission charged with enforcing that statute has repeatedly rejected asserted bfoq defenses based on the prejudices of third parties and maintained that:

> [T]raditional practices or the preferences of customers, employers and employees to deal or work with persons of a particular race, creed, color or national origin or the maintenance of a particular business atmosphere identified with a particular race, creed, color or national origin, will not as a general rule be deemed material to the existence of a bona fide occupational qualification.

See, e.g., New York State Commission Against Discrimination, Report of Progress at 18 (1964).

Congress determined that the bfoq exception of § 703(e) should apply *only* "in those certain instances" where "reasonably necessary" to the operation of that "particular enterprise." As the Fifth Circuit noted in *Diaz* v. *Pan American World Airways, Inc.,* 442 F.2d 385, 387 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971):

> The care with which Congress has chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening the kind of enormous gap in the law which would exist if, [for example] an employer could legitimately discriminate against a group solely because his employees, customers, or clients discriminated against that group. Absent much more explicit language, such a broad exception should not be assumed for it would largely emasculate the act.

The legislative history *nowhere* suggests a looser reading of the statute. In fact, the Senate specifically rejected a proposed amendment to protect the employer's right to make hiring decisions based on its own business judgment. 110 Cong. Rec. 13825 (1964). *See generally,* Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification,* 55 Tex. L. Rev. 1025, 1027-30 (1977); *Wilson* v. *Southwest Airlines Co.,* 517 F.Supp. 292, 297-298 (N.D. Tex.1981).

A reading of the entire statute shows that its primary goal was to provide equal access to the job market regardless of religion, sex or national origin. The expansive construction of Section 703(e) suggested by the Second Circuit would permit the exception to swallow the rule. *See Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542, 545 (1971) (Marshall J., concurring).

This Court has, of course, already recognized the narrowness of the bfoq exception and the validity of the EEOC's guidelines. In *Dothard* v. *Rawlinson, supra,* 433 U.S. at 334 (footnote omitted), the Court said:[13]

> We are persuaded . . . by the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.

Relatively few cases have directly addressed the question of whether co-worker, employer or customer prefer-

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[13] At issue in *Dothard* was an Alabama regulation which precluded the hiring of women for contact positions in maximum security prisons. Although this Court upheld a bfoq defense, its decision was based on the particular nature of the prison, characterized by "rampant violence" and a "jungle atmosphere", 20 percent of whose inmates were sex offenders.

ence may give rise to a bfoq under Title VII. The leading case is *Diaz, supra,* where the Fifth Circuit properly rejected an airline's refusal to hire males as flight cabin attendants because of its passengers' preference for female stewardesses.

> While we recognize that the public's expectations of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.

442 F.2d at 389.

It is only in those limited circumstances where strong privacy interests are present that customer preferences have been permitted to establish a bfoq.[14]

There is no reason to create a special exception to the rule where the customer, employer, or co-worker preferences asserted are those of foreign nationals. In fact, that contention was unambiguously rejected by the Court of Appeals for the Ninth Circuit in *Fernandez* v. *Wynn Oil Co.,* 653 F.2d 1273 (9th Cir. 1981).

In that case, Fernandez charged that she was denied a promotion to the position of Director of International Operations because of her sex. The employer defended by asserting, *inter alia,* that the position involved doing busi-

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[14] Thus, in *Fesel* v. *Masonic Home of Delaware, Inc.,* 447 F. Supp. 1346 (D.Del. 1978), *aff'd without opinion,* 591 F.2d 1334 (3d Cir. 1979), a bfoq defense was upheld against a male nurse who sought a job at a residential nursing home because of the preference given to its female patients' privacy interests and the intimate nature of the duties to be performed. *See also Backus* v. *Baptist Medical Center,* 510 F. Supp. 1191 (E.D. Ark. 1981); *Iowa Dept. of Social Services* v. *Iowa Merit Emp. Dept.,* 261 N.W. 2d 161, 16 FEP Cas. 923 (Iowa 1977). The privacy interests found sufficient to justify an exception to the rule that customer preference cannot create a bfoq are, of course, totally absent in the instant case.

ness in Latin America where the cultural mores worked against acceptance of a woman. The Ninth Circuit held:

> [S]tereotypic impressions of male and female roles do not qualify gender as a BFOQ. Nor does sterotyped customer preference justify a sexually discriminatory practice [citing *Diaz, supra*]. Furthermore, the Equal Employment Opportunity Commission has held that the need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid BFOQ exception. EEOC Decision No. 72-0697, CCH EEOC Decisions 1971, ¶ 6317, at 4569. . . .
>
> Wynn attempts to distinguish *Diaz,* by asserting that a separate rule applies in international contexts. Such a distinction is unfounded. Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here.

653 F.2d at 1276-1277 (footnote and citations omitted).

The *Fernandez* holding is plainly correct. The validity of employment practices in the United States must be measured against the commands of Title VII, and not the cultural biases entertained by persons outside the United States.

Cultural biases of foreigners, no matter how intractable, cannot excuse discriminatory conduct in this country. As a matter of statutory public policy, the United States cannot allow the attitudes of foreign nationals to justify discriminatory practices within its borders.

The Arab boycott, of course, presents the clearest example of an attempt by other nations to impose their cultural biases on businesses subject to American anti-discrimination laws. American companies which have ac-

ceded to such pressure have not successfully asserted foreign coercion as a defense to charges of employment discrimination.

American Jewish Congress v. *Carter,* 23 Misc.2d 446, 190 N.Y.S.2d 218 (Sup. Ct. N.Y. 1959), *modified,* 10 A.D. 2d 833, 199 N.Y.S. 2d 157 (1st Dept. 1960), *aff'd,* 9 N.Y.2d 223, 213 N.Y.S. 2d 60 (1961), involved a complaint against the Arabian-American Oil Company ("Aramco"), charging it with violation of New York State's Law Against Discrimination in inquiring into the religion of job applicants.

The employer in that case was not faced with mere religious preferences and cultural biases of the Saudi Arabians with whom it sought to do business. Rather, the undisputed facts were that Saudi Arabia both prohibited the employment of Jews in that country and "strenuously objects to the employment of Jews in any part of Aramco's operation." 23 Misc.2d at 448.

The New York Supreme Court, in the strongest possible language, rejected Aramco's defense that religion was a bfoq.

> *This court does not pretend to assert that Saudi Arabia may not do as it pleases with regard to whom it will employ within the borders of Saudi Arabia. Nor does this court pretend to say that Aramco may not hire whom it pleases to conform to its Arab master's voice. What this court does say is that Aramco cannot defy the declared public policy of New York State and violate its statute within New York State no matter what the King of Saudi Arabia says. New York State is not a province of Saudia Arabia, nor is the constitution and statute of New York State to be cast aside to protect the oil profits of Aramco.* Nor will the fact, if it be such, that the employment is for possible service in Saudi Arabia

> permit the subversion of our State law aimed to preserve our democratic heritages.

23 Misc.2d at 448-449 (emphasis in original).

> No foreign nation may dictate the nonenforcement of a valid State law. . . . *An engineer who is Jewish is no less an engineer by being so—and no cavalier attempt to classify him as not having a "bona fide qualification" because he is Jewish will be countenanced by this court.*

Id. at 450 (emphasis in original).

Title VII, the wording of which is similar to New York State's anti-discrimination law, mandates the same result. Indeed, the United States Department of Justice has taken the position that employment discrimination attributable to the Arab boycott is actionable under Title VII. *See* Lewin, *Domestic Civil Rights Aspects of the Boycott,* in *Transnational Economic Boycotts & Coercion* at 91 (R. Mersky ed. 1978).

Thus, even where official governmental policies of foreign states encourage or compel discriminatory hiring practices as the price of doing business there, such policies, and economic coercion based upon those policies, do not provide a defense to discrimination which is outlawed by Title VII. *A fortiori,* mere cultural biases and predelictions of foreigners with whom a company doing business *here* seeks to do business and which do not, in any sense, raise serious questions of governmental foreign policy, cannot render sex, religion, or national origin bona fide occupational qualifications.

Sumitomo, a U.S. subsidiary of a Japanese corporation, has chosen to do business in the United States. It cannot now be heard to assert that "those persons with whom (it) does business" prefer to deal only with Japanese and thus that Japanese citizenship is a bona fide occupational qualification. The Second Circuit's suggestion to the contrary must therefore be rejected.

Conclusion

For the reasons set forth above, the *amici* respectfully submit that this Court should affirm the ruling below refusing to dismiss plaintiffs' Title VII claims, because:

1. Sumitomo has no standing to claim the Treaty right to engage personnel of its choice, or alternatively

2. the Treaty right to engage personnel of its choice does not include the right to discriminate in violation of Title VII.

This Court should further hold that no special or expansive bfoq exception exists for companies claiming rights under the Treaty and that the factors mentioned by the court below as relevant to the existence of a bfoq are, as a matter of law, insufficient to establish a bfoq defense.

Respectfully submitted,

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