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Brief for Petitioner and Cross-Respondent

Wender, Murase, and Whtie

LMS

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 FOR PETITIONER AND CROSS-RESPONDENT

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January 18, 1982

QUESTIONS PRESENTED

Question Presented by the Petitioner:

Is the right of Japanese companies to control and manage their U.S. investments by engaging "executive personnel . . . of their choice," as provided by the Treaty of Friendship, Commerce and Navigation between the United States and Japan, limited by Title VII of the Civil Rights Act of 1964?

Questions Presented by the Cross-Petitioners:

Whether Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, which permits nationals and companies of either party to engage executive personnel of their own choice, is applicable to a domestic corporation which is a wholly owned subsidiary of a Japanese corporation.

Whether the "bona fide occupational qualification" exception to Title VII (42 U.S.C. § 2000e-2(e)) should be relaxed when applied to an American subsidiary of a Japanese corporation in deference to the 1953 Treaty of Friendship, Commerce and Navigation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated January 9, 1981 (Pet. App. 1a) is reported at 638 F.2d 552.[1] The opinion of the United States District Court for the Southern District of New York dated

1 Citations to the Appendices to the Petition for a Writ of Certiorari are indicated as follows: Pet. App. __ a. Citations to the Joint Appendix are indicated as follows: App. __ a.

June 5, 1979 (Pet. App. 19a) is reported at 473 F. Supp. 506. Certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b) was granted in an opinion of the District Court dated August 9, 1979 (Pet. App. 39a) unofficially reported at 20 Empl. Prac. Dec. (CCH) ¶ 30,205 and 20 Fair Empl. Prac. (BNA) 72. The opinion of the District Court on reargument dated November 29, 1979 (Pet. App. 45a) is unofficially reported at 21 Empl. Prac. Dec. (CCH) ¶ 30,501 and 21 Fair Empl. Prac. (BNA) 580.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (Pet. App. 17a) was entered on January 9, 1981. On March 31, 1981, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to and including June 6, 1981. Sumitomo filed its petition for a writ of certiorari on June 6, 1981 (No. 80-2070), and a cross-petition (No. 81-24) was filed on July 1, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On November 2, 1981, the Court granted the petitions and consolidated the cases for review. ____ U.S. ____, 50 U.S.L.W. 3351.

TREATY, STATUTES AND REGULATION INVOLVED

1. Article VIII of the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953) (the "Treaty"), provides:

> (1) 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 ex-

perts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such 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.

(2) Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party.

(3) Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party.

2. Article I of the Treaty provides:

(1) Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens.

(2) Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to gather and to transmit material for dissemination to the public abroad; and (e) to communicate with other persons inside and outside such territories by mail, telegraph and other means open to general public use.

(3) The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and protect the public health, morals and safety.

3. Article VII(1) of the Treaty provides:

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.

4. Article XXII(3) of the Treaty 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.

5. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e-(2)(a), provides:

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

6. Section 703(e) of Title VII, 42 U.S.C. § 2000e-(2)(e), provides in relevant part:

> Notwithstanding 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 neces-

sary to the normal operation of that particular business or enterprise . . . .

7. Section 101(a) of the Immigration and Nationality Act of 1952, as amended (the "INA"), 8 U.S.C. § 1101(a), provides in relevant part:

> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> . . .
>
> (E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . .

8. 22 C.F.R. § 41.40(a)(1981) provides:

> An alien shall be classifiable as a nonimmigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1) He intends to depart from the United States upon the termination of his status; and (2) if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), 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.

STATEMENT OF THE CASE

This case presents the question whether the right of Japanese foreign investors to control and manage their U.S. investments by employing Japanese nationals in managerial positions pursuant to the 1953 Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (the Treaty or the Japanese Treaty), is limited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1978) (Title VII).

Petitioner, Sumitomo Shoji America, Inc. (Sumitomo) is a New York corporation and a wholly-owned subsidiary of Sumitomo Shoji Kabushiki Kaisha, a Japanese general trading company or *sogo shosha.*[2] As their name implies, general trading companies are service sector business firms that handle a wide range of products and discharge a variety of trade-related functions for their customers. Their activities include purchasing, selling and marketing, as well as the provision of transportation, warehousing, insurance and financing services. Large *sogo shosha*, like Sumitomo Shoji Kabushiki Kaisha, maintain offices around the world. Through their knowledge of products and markets, they seek to identify trade and investment opportunities for their customers, to develop new sources of supply, and to organize new industrial facilities. Together these companies handle more than half of Japan's imports and exports. *See generally* Krause & Sekiguchi, *Japan and the World Economy* in *Asia's New Giant: How the Japanese Economy Works* 389-397 (H. Patrick & H. Rosovsky eds. 1976) (hereafter *Japan and the World Economy*); Japan External Trade Organization, *The Role of Trading Companies in International Commerce* 1, 6 (1980); Affidavit of J. Portis

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2 The affiliates of petitioner are listed in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 4 n.1.

Hicks of May 18, 1978, in support of Sumitomo's motion to dismiss at ¶ 8, App. 72a, 74a (hereafter Hicks Affidavit) and authorities cited therein.

Because of the variety and complexity of the transactions in which *sogo shosha* engage, their managerial employees must have extensive training in and knowledge of international trade and investment and must be familiar with the Japanese market, culture, business practices and, of course, language. Therefore these firms typically devote great effort to the recruitment and training of their future managerial employees. A. Young, *The Sogo Shosha: Japan's Multinational Trading Companies,* 68 (1979). Candidates are selected through an intense competition among graduating university students, and successful applicants are trained by means of a rigorous apprenticeship involving a lengthy rotation throughout the various divisions of the business and among its branch offices in Japan. "It may well be a number of years before the new employee begins to make a significant contribution to the firm". *Japan and the World Economy, supra,* at 389. The training of executives involves a heavy investment on the part of the firm and executive employees typically remain with the firm throughout their working lives. *See generally* Y. Tsurumi & R. Tsurumi, *Sogoshosha* 30-34 (1980). Executive employment in *sogo shosha* is in every sense a career service.

In accordance with the general practice of *sogo shosha,* Sumitomo's Japanese parent sends members of its organization to fill key positions in Sumitomo. Hicks Affidavit, *supra,* ¶ 6, App. at 74a. These personnel are admitted to the United States as "treaty traders" under nonimmigrant E-1 visas, *id.,* which are available only to nationals of countries with which the United States has a friendship, commerce and navigation (FCN) treaty in force. An E-1 visa allows the alien to enter and stay in the United States, "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . ." Immigration and Nationality Act of 1952, as amended (INA), § 101(a)(15)(E)(i), 8 U.S.C.

§ 1101(a)(15)(E)(i). Under regulations issued by the Department of State, an E-1 visa can be issued only to a person who will be engaged in an executive or supervisory position or who has special qualifications making his or her services essential to a company "having the nationality of the treaty country . . . ." [3] The alien must depart the United States upon termination of treaty trader status. 22 C.F.R. § 41.40(a).

Plaintiffs in this litigation are, with one exception, "female citizens of the United States." Complaint, ¶ 2, App. 6a, 6a-7a. The remaining plaintiff, Reiko Turner, is female and a "citizen of Japan." Complaint, ¶ 3, App. at 7a. All plaintiffs are past or present secretarial employees of Sumitomo (Complaint, ¶¶ 4-6, App. at 7a) who allege that Sumitomo discriminated against them by restricting them to clerical jobs and by not promoting them to "executive, managerial and/or sales positions" because they are women and (with the exception of Reiko Turner) because of their U.S. "nationality." Complaint, ¶¶ 12, 13; at 9a.[4] Plaintiffs seek an unspecified amount of damages, as well as injunctive relief directing Sumitomo to promote plaintiffs to such executive, managerial and sales positions and enjoining Sumitomo from discriminating on the basis of sex and nationality in the hiring of new employees. Complaint, demand for relief, App. at 10a-11a.

No claim is made by plaintiffs that the Japanese nationals who hold managerial positions in Sumitomo are not qualified

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3 To have "the nationality of the treaty country" the employer must be owned more than 50% by foreign nationals or companies having the citizenship of the foreign treaty partner. *See* 9 Foreign Affairs Manual, Part II, § 41.40 Notes 8 & 16; 22 C.F.R. § 41.40(a). See discussion below at pp. 39-40.

4 Plaintiffs also asserted two other claims in the District Court not relevant to the questions presented here for review: (1) a claim pursuant to the Thirteenth Amendment, which they abandoned, and (2) a claim pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981, which was dismissed by the District Court for failure to state a claim upon which relief can be granted. 473 F. Supp. 506, at 508 n.1 & 514; Pet. App. 19a, 20a n.1, 30a-32a.

for those positions or that they were not properly admitted as treaty traders under E-1 visas permitting them to enter the United States for the purpose of employment in such positions.

Sumitomo denied plaintiffs' claims of discrimination and asserted as an affirmative defense that its employment of Japanese nationals in key positions is authorized by Article VIII(1) of the Treaty permitting Japanese investors "to engage . . . executive personnel . . . and other specialists of their choice," 4 U.S.T. at 2070, and related statutes and regulations. First Amended Answer of Sumitomo, ¶ 13, App. 80a, 82a. On this basis, Sumitomo moved to dismiss the complaint for failure to state a claim upon which relief can be granted.

On two separate occasions during the pendency of Sumitomo's motion to dismiss, different Deputy Legal Advisers of the State Department issued letters to the Equal Employment Opportunity Commission (EEOC) embodying contradictory constructions of the treaty. On two other occasions, the Office of the Legal Adviser of the State Department released documents from its treaty negotiating files.[5] These letters and documents were submitted to the District Court by the parties and by the EEOC, which appeared in the proceedings below as *amicus curiae.*

Ultimately, the District Court denied Sumitomo's motion to dismiss, holding that Sumitomo is, under a definition set out in in Article XXII(3) of the Treaty, a "company of the United States" and as such not entitled to invoke the employment

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5 The documents and letters issued by the State Department were: Letter from Lee R. Marks, Deputy Legal Adviser, to Abner W. Sibal, General Counsel, EEOC (Oct. 17, 1978), App. 94a, *reprinted in* 73 Am. J. Int'l L. 281 (1979); documents released under cover of a letter of a State Department Attorney Adviser, August 15, 1979, App. 102a-306a; letter from James R. Atwood, Deputy Legal Adviser, to Lutz A. Prager, Assistant General Counsel, EEOC (Sept. 11, 1979), App. 307a, *reprinted in* 74 Am. J. Int'l L. 158 (1980); and documents released under cover of letter of a State Department Attorney Adviser dated October 29, 1979. The documents released on October 29, 1979 are not part of the record herein.

right granted by Article VIII(1) of the Treaty. 473 F. Supp. at 512-513, Pet. App. at 24a. The substance of this holding was adhered to on reargument. 21 Empl. Prac. Dec. (CCH) ¶ 30,501, Pet. App. at 59a-60a.

On appeal, the United States Court of Appeals for the Second Circuit affirmed, but on different grounds. Although the Second Circuit acknowledged that Sumitomo is "entitled to invoke the employment provisions of the Treaty . . . ," 638 F.2d 552, 554, Pet. App. at 5a, it held nevertheless that the complaint stated a cause of action, reasoning that the Treaty provision authorizing Japanese investors to engage executive personnel and other specialists "of their choice" was limited by the provisions of Title VII. The Court observed that at the trial on remand the bona fide occupational qualification (BFOQ) exception to Title VII

> must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States, including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business.

638 F.2d at 558-59, Pet. App. at 14a-15a. The Court below did not directly address the question whether discrimination in employment based on nationality violates Title VII.

SUMMARY OF ARGUMENT

Sumitomo's practice of preferring Japanese nationals for managerial positions, the practice attacked by the complaint, is not prohibited by Title VII. In *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), this Court held that hiring on the basis of nationality or citizenship is not unlawful under Title VII. *Accord*, *Morton v. Mancari*, 417 U.S. 535 (1974). These holdings should dispose of this case. The Second Circuit, however, did not apply them. Instead, it assimilated Sumitomo's *nationality*-based employment preference to discrimination on the basis of *national origin,* a characterization which is both factually incorrect and legally at odds with the cited rulings of this Court.

The decision of the Second Circuit should be reversed for other reasons. The express language of the Treaty, reinforced by its legislative and negotiating history, clearly grants the employment right claimed by Sumitomo. An explicit objective of the U.S. negotiators of this and at least a dozen other postwar FCN treaties was to secure for U.S. investors abroad the right to employ U.S. citizens in managerial positions. Since the structure of the treaty is reciprocal, it follows that a parallel right is granted to Japanese investors in the United States. Well-established rules of statutory construction prescribe that an Act of Congress not be construed to abrogate or modify solemn treaty obligations in the absence of an express indication of Congressional intent to do so. *E.g., Cook v. United States,* 288 U.S. 102 (1933); *Murray v. The Charming Betsy,* 6 U.S. (2 Cranch) 64 (1804). There is neither statutory language nor legislative history to support a construction of Title VII restrictive of the Treaty rights invoked by Sumitomo. Moreover, such a construction would create duplication, confusion and conflict between the administration of Title VII by the EEOC, on the one hand, and administration of the INA by the State Department and the Immigration and Naturalization

Service (INS), on the other. All these considerations were disregarded by the Court below.

Cross-petitioners argue that because Sumitomo is a U.S. subsidiary of a Japanese corporation, it cannot invoke the Article VIII(1) employment provision. This argument is belied by the language of the Treaty and by its negotiating and legislative history, which demonstrate a purpose to promote and protect U.S.-Japanese private direct investments and specifically to assure to foreign investors the right to manage and control their investments whatever the legal form. Recognizing this purpose, both the Court below and the United States Court of Appeals for the Fifth Circuit in *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353, (5th Cir. 1981), Pet. App. 63a, *rehearing en banc granted,* 654 F.2d 302 (Aug. 7, 1981), *order granting rehearing en banc vacated,* No. 79-2382 (Dec. 9, 1981), held that the Treaty's employment right may be invoked by a U.S. subsidiary of a Japanese investor.

The Second Circuit's instruction as to the liberal BFOQ exception to be applied on remand was necessarily entailed by its holding that Title VII is applicable to employment practices authorized by the Treaty—if any significance is to be accorded the Treaty right. But this consequence is an independent ground for refusing to apply Title VII here.

For the above reasons, the complaint in this case should be dismissed for failure to state a claim upon which relief may be granted.

ARGUMENT

I.

SUMITOMO'S PREFERENTIAL EMPLOYMENT OF JAPANESE NATIONALS IN EXECUTIVE, SUPERVISORY AND SPECIALIST POSITIONS IS NOT AN UNLAWFUL EMPLOYMENT PRACTICE UNDER TITLE VII.

The Treaty expressly provides that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party. . . executive personnel . . . and other specialists of their choice." Treaty, Article VIII(1). Sumitomo has availed itself of this right and employed in executive, supervisory and specialist positions nonimmigrant Japanese nationals assigned to it by its parent company in Japan. It is this employment practice that plaintiffs attack. Thus, the central question presented by Sumitomo's motion to dismiss is whether a practice of preferring Japanese nationals for these key positions constitutes an "unlawful employment practice" for purposes of Title VII. Sumitomo contends that it does not because Title VII does not interdict employment practices based on nationality.

Sumitomo makes no claim that it is "exempt" from Title VII or that it is not an employer within the meaning of the Act. It concedes, for example, that it could not hire male U.S. citizens to the exclusion of female U.S. citizens. Similarly, it could not discriminate on the basis of national origin. See discussion at pp. 16-17, *infra*. The issue therefore is not whether Title VII "applies" to Sumitomo, or to Japanese companies in general, but whether the employment practice under attack violates Title VII.

Title VII is not a general equal protection in employment statute. *See Elrod v. Burns,* 427 U.S. 347 (1976); *Branti v. Finkel,* 445 U.S. 507 (1980). To state a Title VII claim, plaintiff must allege an employment practice "based on a discrimina-

tory criterion illegal under the Act." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575 (1978); *see also*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). As this Court said in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 95 (1973), the initial inquiry in a Title VII suit is "what kinds of discrimination the Act makes illegal." Sections 703 and 704 of Title VII, 42 U.S.C. §§ 2000e-2 & 2000e-3, define an "unlawful employment practice" as one that discriminates on the basis of "race, color, religion, sex, or national origin." It is only when an employer treats some people less favorably than others because of one of these five criteria that Title VII is violated. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *accord, Furnco Construction Corp. v. Waters, supra,* 438 U.S. at 577.

In this case, the challenged criterion is Japanese nationality. But in *Espinoza*, *supra*, this Court squarely held that

> nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.

414 U.S. at 95. The logic underlying the Court's holding is equally applicable whether the alleged discrimination favors United States citizens, as in *Espinoza*, or favors individuals having other nationalities. *See Dowling v. United States*, 476 F. Supp. 1018, 1022 (D. Mass 1979) (complaint by U.S. citizen that the National Hockey League and the World Hockey Association discriminated against him on the basis of his U.S. citizenship by hiring only Canadian referees failed to state a claim under Title VII); *Novak v. World Bank*, 20 Empl. Prac. Dec. (CCH) ¶ 30,021 (D.D.C 1979) (complaint by a U.S. citizen alleging that the hiring practices of the World Bank discriminated against him on the basis of his U.S. citizenship failed to state a claim under Title VII); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 Stan. L. Rev. 947, 958 (1979).

The principle of *Espinoza* was applied again in *Morton v. Mancari,* 417 U.S. 535 (1974), where the Court held that a preferential employment practice favoring members of federally recognized Indian tribes did not violate Title VII. The preference for Indians was "political rather than racial in nature." 417 U.S. at 553 n. 24. It was available for Indians not because of their racial or ethnic heritage, and not because of their identification with a racial or ethnic group, but rather because they were members of certain sovereign political bodies.

The Second Circuit treated the employment practices here in issue as "national origin" discrimination. *See* 638 F.2d at 559, Pet. App. at 14a (quoting only national origin language of statutory BFOQ exception). But such a characterization is both legally and factually incorrect.

As a legal matter, the statutory phrase "national origin" does not embrace citizenship. After reviewing Title VII's legislative history, this Court decided in *Espinoza* that the phrase "national origin" refers to "the country where a person was born, or, more broadly, the country from which his or her ancestors came," in contrast to the country of which he or she is a citizen or national. 414 U.S. at 88.

The distinction between nationality and national origin has consistently been recognized by the federal government. Indeed, as this Court said in *Espinoza*, to hold that national origin embraces citizenship or alienage would require the Court to conclude that "Congress itself has repeatedly flouted its own declaration of policy." 414 U.S. at 90. This is because Congress itself has passed laws discriminating against aliens, *see, e.g.*, 31 U.S.C. § 699b. Although in *Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976), the Court struck down practices of various government agencies barring aliens from government employment, it recognized that such practices could be mandated by express congressional or presidential action. Thereafter the President did prohibit employment of aliens in federal government positions. Exec. Order No. 11,935, 41 Fed. Reg. 37,301

(1976), codified at 5 C.F.R. § 7.4. In contrast, other Executive Orders prohibit national origin discrimination in federal government employment. *See* Exec. Order No. 11,478 (1969), 3 C.F.R. 803 (1966-1970 Compilation), as amended by Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1978). Similarly, an Act of Congress extended Title VII to apply to government employment. Act of March 24, 1972, Pub. L. 92-261, § 11, 86 Stat. 103. The EEOC has also recognized that discrimination on the basis of citizenship, without more, is not national origin discrimination under Title VII. *See, e.g.*, EEOC Dec. No. 76-141, Empl. Prac. Guide (CCH) ¶ 6703 (1976); EEOC Dec. No. 76-133, Empl. Prac. Guide (CCH) ¶ 6695 (1976); EEOC Dec. No. 76-111, Empl. Prac. Guide (CCH) ¶ 6677 (1976); *see also* Guidelines on Discrimination because of National Origin, 29 C.F.R. §§ 1606.1, 1606.5 (1981).

As a factual matter, the basis of the employment preference under attack in this case is Japanese nationality, not place of birth or ancestry. It prefers Japanese nationals, as opposed to the nationals, citizens and subjects of all other countries. This result occurs by operation of law, since only Japanese nationals can acquire treaty trader visa status for employment in Japanese owned firms. INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E); 22 C.F.R. § 41.40(a); 9 Foreign Affairs Manual, Part II, § 41.40 Note 16. The preference for Japanese nationals in managerial positions is not a practice directed against any particular nationality, and it has nothing to do with anyone's national origin. The group not preferred consists of persons of every other nationality, U.S. or otherwise, and persons of every conceivable national origin, including those who by birth or ancestral background might be regarded by some, or consider themselves "Japanese," but who are not Japanese nationals.

Nor does the complaint state a claim of employment discrimination on the basis of sex. Sumitomo's criterion of preference—derived directly from its treaty rights as imple-

mented by the INA—is Japanese nationality, not sex.[6] Moreover, plaintiffs cannot, on the facts alleged, construct a so-called "sex-plus" claim. Such claims have been recognized only where there was an inherent linkage between the criterion used by the employer—*e.g.*, pregnancy—and gender. *E.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971). In those cases the facially neutral criterion served as a surrogate for gender. In contrast, courts have rejected "sex plus" claims when the employer's classification is based on citizenship because there is no correlation between nationality and gender. *Spirides v. Reinhardt,* 22 Empl. Prac. Dec. (CCH) ¶ 30,740 (D.D.C. 1980), *aff'd w/o opinion,* 656 F.2d 900 (D.C. Cir. 1981); *Michalas v. Reinhardt,* No. 78-0920, slip op. at 4 (D.D.C. May 29, 1979), *aff'd w/o opinion,* No. 79-2007 (D.C. Cir. June 21, 1980).

The decisions of this Court in *Espinoza* and *Morton, supra*, are dispositive of this case, in which the plaintiffs attack an employment preference based on nationality, not "race, color, religion, sex or national origin." In accordance with those decisions, the complaint herein should be dismissed for failure to state a claim upon which relief may be granted.

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6 Sumitomo acknowledges that the sex discrimination claim of Reiko Turner, a Japanese national, is not inextricably linked to the claim of hiring practices based on nationality. Accordingly, in the proceedings below, Sumitomo conceded that her individual sex discrimination claim survives the motion to dismiss insofar as Turner alleges that Sumitomo has discriminated against her as a woman in its selection of Japanese nationals for managerial positions.

Compare case to Shelby Kramer

Admits ¶ 7 applies

II.

THE TREATY ESTABLISHES A RIGHT TO CONTROL AND MANAGE ENTERPRISES IN THE HOST COUNTRY BY EMPLOYMENT OF HOME COUNTRY NATIONALS IN MANAGERIAL POSITIONS.

A. The Right to Employ Home Country Personnel of Choice to Control and Manage Enterprises in the Host Country Is Manifest on the Face of the Treaty, from its Background and Negotiating History and from its Legislative and Administrative Implementation.

Treaties of establishment, of which the FCN treaties are the most recent form, have been a central feature of U.S international economic policy from the beginnings of the Republic. The first establishment treaty was signed with France in 1778, eleven years before adoption of the Constitution, and was the first treaty of any kind concluded by the United States. Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn. L. Rev. 805 (1958) (cited hereafter as Walker, *FCN Treaties*); S. Metzger, *Commercial Treaties of the United States and Private Foreign Investment,* in International Law, Trade and Finance: Reality and Prospects 147-48 (1963). Such treaties are designed to lay the basis for fruitful, stable and effective commercial relations between the parties and to advance American economic foreign policy objectives. Walker, *FCN Treaties supra,* at 809. *See also* Message of President to United States Senate Transmitting Treaty, Senate Exec. O, 83d Cong. 1st Sess. 2 (1953) (transmitting a Report of the Secretary of State to the President describing the Japanese treaty).

Viewed in the light of this purpose, the experience under the Japanese Treaty has been spectacularly successful. In 1953, when the Treaty was signed, trade and investment between the two countries were almost dormant. By 1980, U.S. trade with Japan amounted to over $50 billion. The Japan-United States Economic Relations Group, Supplemental Report Prepared for the President of the United States and the Prime Minister

of Japan at iii, 24 (Oct. 1981). Bilateral direct investment has also flourished. By 1980, Japanese direct investment in the United States, which helps to alleviate the impact of the imbalance in merchandise trade, rose to $4.2 billion, according to U.S. Department of Commerce figures. Brief herein for the Japan External Trade Organization (JETRO) as *Amicus Curiae,* at 6. Of course, no one can tell what part the Treaty has played in this extraordinary performance. But both the Ministry of International Trade and Industry of the Government of Japan and JETRO believe that the Treaty, and specifically the employment right here in issue, have contributed significantly to the favorable trade and investment climate. Brief herein for the Ministry of International Trade and Industry of the Government of Japan as *Amicus Curiae;* Brief for Japan External Trade Organization as *Amicus Curiae, supra.*

It is in this broad policy perspective that the Treaty should be construed.

1. The Treaty text.

Article VIII(1) of the Treaty, 4 U.S.T. at 2070, provides:

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

These words establish an unqualified right of foreign investors to employ "executive personnel . . . of their choice." According to Herman Walker, the chief architect of the post-war FCN treaties,[7] the language establishes this right on a "non-contingent" or unconditional basis. Walker, *FCN Treaties,* 42 Minn. L. Rev. at 811, 823. The force of the words of Article VIII(1) is intensified by analysis of the structure of the Treaty, and particularly by reference to Articles VII and I, with which the employment right is closely linked. *See* 638 F.2d at 554-55, 556, Pet. App. at 5a-6a, 8a.

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7 Dep't of State Airgram No. A-105 to American Embassy, Tokyo, Jan. 9, 1976, App. 157a.

In the State Department's view, "the heart of the treaty" is the establishment clause of Article VII(1). Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. 130a; *see* Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 9, 1953, App. 230a. It gives nationals and companies of each party the right to conduct business and commercial activities within the territory of the other as freely as local citizens. In accordance with the realities of modern international business and the flexibility it requires, the provisions of Article VII(1) apply whether the business activities are conducted "directly or by an agent or through the medium of any form of lawful juridical entity." 4 U.S.T. at 2069. To this end, foreign investors are empowered equally to establish branches or to organize or acquire companies under the laws of the other party. Further, Article VII(1) specifies that they shall be permitted "to control and manage enterprises which they have established or acquired." *Id.*

Article VIII(1), containing the right to employ executive and specialist personnel, follows in sequence and is regarded by the State Department as the "companion" to Article VII. Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. 130a. The State Department said of the same Article in the FCN treaty with Germany that the provision is

> an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel.

Foreign Service Despatch No. 2529 from the U.S. High Commissioner for Germany (HICOG) to the Dep't of State, March 18, 1954, App. 181a, 182a.

Completing the equation, Article I(1) of the Treaty provides for the entry of nationals of each Treaty partner into the territory of the other for the purpose of carrying on trade and commercial activity. 4 U.S.T. at 2066. The interrelationship

among the management and control rights granted by Articles VII(1) and VIII(1) and the rights of entry and sojourn granted by Article I(1) was explained by Secretary of State Acheson in 1949 upon the signing of a proposed FCN treaty with Uruguay containing similar provisions:

> [The 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. They will also be able to obtain entry into that country for managers and technicians from their own country who are needed in order to operate their enterprises effectively.

21 Dep't State Bull. 909 (1949).

In general, the postwar FCN treaties contemplate three different levels of rights: (i) those contingent on most-favored-nation treatment, in which the foreign investor is entitled to the highest level of protection granted to citizens of any foreign country (*see* Treaty Article XXII(2)); (ii) those contingent on national treatment, in which the foreign investor is entitled to the same level of protection as that granted to domestic citizens (*see* Treaty Article XXII(1)); and (iii) those that are non-contingent, the contents of which are specified in the Treaty and are not dependent on the treatment of anyone else, domestic or foreign. Walker, *FCN Treaties*, 42 Minn. L. Rev. at 810-811. Significantly, although the Article VII(1) right to conduct business is based on a national treatment standard, no such qualification is imposed on the employment right of Article VIII(1) or the entry and sojourn rights of Article I(1). Walker makes specific reference to Article VIII(1) of the Japanese Treaty as a provision "going beyond national treatment." Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am. J. Int'l L. 373, 386 & n. 62 (1956); *see* Walker, *FCN Treaties, supra,* at 813.[8] Indeed, the Article VIII(1)

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8 It is significant that in this same Article VIII, paragraph 3, dealing with scientific, educational, religious and philanthropic activities, and associations formed for such purposes, is expressly limited to national and most-favored nation treatment.

employment provision has no function except to make the right to employ key personnel unconditional. A national treatment standard "in all that relates to the conduct of the activities" of the foreign investor is already secured by Article VII(1). 4 U.S.T. at 2069.

2. The treaty background and negotiating history.

The Japanese Treaty was one of 12 FCN treaties concluded by the United States in the post-World War II period.[9] This renewal of the traditional policy favoring treaties of establishment was an integral part of U.S. post-war international economic policy. S. Exec. Rep. No. 5, 83d Cong., 1st Sess. 2 (1953); *see also* 99 Cong. Rec. 9312-13 (1953) (remarks of Senator Hickenlooper, Chairman, Foreign Relations Committee); *Commercial Treaties: Hearing before a Subcommittee of the Senate Committee on Foreign Relations,* 83d Cong., 1st Sess. at 2 (1953) (statement of Samuel C. Waugh, Ass't Sec'y of State for Econ. Affairs) (hereafter 1953 Hearing). After a review of the earlier experience with FCN treaties, the State Department prepared a standard draft to serve as the basis for negotiations with many of our principal enterprise-economy

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9 *Republic of China,* 1946, 63 Stat. 1299, T.S. No. 1871; *Italy,* 1948, 63 Stat. 2255, T.I.A.S. No. 1965 (Supplemented by Agreement of Sept. 26, 1951, Sen. Exec. H., 82d Cong., 2d Sess.); *Uruguay,* 1949 (Sen. Exec. D., 81st Cong., 2d Sess.); *Ireland,* 1950, 1 U.S.T. 785, T.I.A.S. No. 2155; *Colombia,* 9 Stat. 881, T.S. No. 54; *Ethiopia,* 1951, 4 U.S.T. 2134, T.I.A.S. No. 2864; *Israel,* 1951, 5 U.S.T. 550, T.I.A.S. No. 2948; *Greece,* 1951, 5 U.S.T. 1829, T.I.A.S. No. 3057; *Denmark,* 1951, 12 U.S.T. 908, T.I.A.S. No. 4797; *Japan,* 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, *Federal Republic of Germany,* 1954, U.S.T. 1839, T.I.A.S. No. 3853; *Nicaragua,* 1956, 9 U.S.T. 449, T.I.A.S. No. 4024; *Netherlands,* 1956, 8 U.S.T. 2043, T.I.A.S. No. 3942; *Korea,* 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947. The treaties with Ethiopia and Iran are abridged versions. Office of the Ass't Legal Adviser for Treaty Affairs, *Friendship, Commerce, and Navigation and Similar Treaties or Other International Agreements in Force in Whole or in Major Part,* Dep't and Foreign Service Series 222 (Dep't of State Pub. 9173, Dec. 1980).

trading partners. *Commercial Treaties: Hearing before a Subcommittee of the Senate Committee on Foreign Relations,* 82d Cong., 2d Sess. at 3 (1952) (statement of Harold F. Linder, Dep. Ass't Sec'y of State for Econ. Affairs) (hereafter 1952 Hearing); Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. at 130a-33a; Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 9. 1953, App. at 230a. The language of these FCN treaties, as they finally emerged, was not always identical. The standard draft itself was evolving over the period of the negotiating campaign, and there are occasional clarifications or changes in language to take account of the suggestions and needs of a negotiating partner. *See generally* Walker, *FCN Treaties*, 42 Minn. L. Rev. at 805-09; Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 9, 1953, App. at 230a-31a; Message of President to Senate, S. Exec. O, *supra* p. 19, at 3; 1952 Hearing, *supra,* at 2. But it is clear that the post-war treaties represented a single policy impulse, and are to be considered and construed *in pari materia. See* Walker, *FCN Treaties*, 42 Minn. L. Rev. at 807. The history of the negotiation of these treaties and of their consideration by the Senate confirms the view of the employment right that derives from the text.

The initiative for the post-war FCN treaties came from the United States, and this is particularly true of the provisions covering corporate activity and international investment, which were the main innovations. *Id.* at 806, 817; Sen. Exec. Rep. No. 5, *supra* p. 23, at 2; 99 Cong. Rec. at 9312 (remarks of Senator Hickenlooper). Although in the present case it is the exercise of control and management rights by a Japanese investor that is at stake, those rights were included in the Treaty not at the instance of Japan, but because the United States deemed them essential for the protection of its own investors abroad. As Senator Hickenlooper said at the time:

> [I]t is essential that we not view [these] conventions simply as documents which give aliens limited rights in

> this country. In fact, since there are many more Americans doing business abroad than there are aliens doing business in this country, Americans as measured in either numbers or in volume of business get more advantages abroad than we accord advantages here to aliens.

Id. at 9313.

Indeed, the United States insisted on retaining the Article VIII(1) employment right over the initial resistance of a number of its negotiating partners. The State Department responded to Germany's suggestion that the executive employment article should be stricken by noting that "[t]he provision is attributed some importance by American interests; and its omission from the treaty would be calculated to arouse apprehensions concerning Germany's intentions . . . ." Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 15, 1953, App. 254a, 256a; *see also* Foreign Service Despatch No. 2529 from the U.S. High Commissioner for Germany (HICOG) to the Dep't of State, March 18, 1954, App. 181a, 182a. With respect to Article VIII(1) of the Japanese Treaty, see Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. 130a, 131a-33a, providing arguments responding to Japanese proposals to alter its content. Similarly Montevideo's unwillingness to accept a provision granting an absolute right to U.S investors to place U.S. citizens in executive positions was a major point of contention in FCN treaty negotiations with Uruguay. Dep't of State Airgram No. 385 from U.S. Embassy, Montevideo, to the Dep't of State, Nov. 8, 1949, App. 89a, 90a; Dep't of State Airgram No. 262 to U.S. Embassy, Montevideo, Nov. 10, 1949, App. 92a.

The reason for this special concern for the right of foreign investors to engage key personnel "of their choice" is clear. If a host country could limit that right, it would severely undercut the ability of investors to control and manage their investments, an ability that the United States sought to assure

through these FCN treaties. 99 Cong. Rec. at 9312 (remarks of Senator Hickenlooper). As the contemporaneous negotiating documents and legislative history show, it was understood that for the right to control to be effective, the investor must be free to choose management personnel. *See* Foreign Service Despatch No. 2529 from the U.S. High Commissioner for Germany (HICOG) to the Dep't of State, March 18, 1954, App. at 182a; Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 9, 1953, App. at 230a-31a.

Laws limiting alien employment were a particular threat to the foreign investor's control. *See* 1952 Hearing, *supra,* at 4 (statement of Dep. Ass't Sec'y Linder: nonbusiness hazards "assume many forms [including] . . . rigid employment controls . . . .); S. Exec. Rep. No. 5, *supra* p. 23, at 4; 1953 Hearings, *supra,* at 2. While such laws were facially neutral in the sense that they applied equally to both domestic and foreign employers, their practical impact was on the foreign investor seeking to employ its own nationals in management level positions. The purpose of Article VIII(1) to override employment restrictions under local law is clearly stated in the Senate Executive Report accompanying the Japanese Treaty:

> Paragraph 1 of this Article states that companies doing business in the territory of the other party may hire "accountants and other technical experts," attorneys, agents, etc., of their choice and that laws regarding the nationality of employees are not to prevent such nationals and companies from carrying on their activities in connection with the planning and operation of the specific enterprises with which they are connected.

S. Exec. Rep. No. 5, *supra* p. 23, at 4 (1953).

The meaning of Article VIII(1) is further elucidated by reference to the parallel provision in the Danish FCN Treaty. There the employment article tracks the language of Article

VIII(1) of the Japanese treaty, except that it adds the clarifying phrase "regardless of nationality" after the words "of their choice." It is accepted that this additional language was not designed to work any change in the meaning of the article. 1953 Hearing, *supra,* at 5, 9 (tabular comparison of FCN treaties submitted by Ass't Sec'y Waugh and Vernon G. Setser, Chief, Econ. Treaties Branch, Commercial Policy Staff, Dep't of State). On the contrary, it is a nonsubstantive variation of the type mentioned above, apparently inserted to clarify the meaning of the words "of their choice."

Walker summed up the rationale of Article VIII(1) as follows:

> [M]anagement is assured 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) (hereafter Walker, *United States Practice*).

Despite its sweeping language, however, Article VIII(1) of the Japanese Treaty, like similar articles in other FCN treaties, was never intended to exempt the foreign investor from the generality of domestic labor legislation, nor does Sumitomo so claim. The suggestion of the Court below that this is the consequence of Sumitomo's position (638 F.2d at 559, Pet. App. at 14a) is untenable. The right granted is the right to employ managerial personnel of choice. It is hardly likely that a foreign investor would exercise that right to designate children to manage its enterprise or that a consular officer would issue an E-1 visa to a clearly ineligible person claiming to occupy a position of an "executive or supervisory" nature. Moreover, matters of "public health, morals and safety" are in any event reserved by the Treaty to the host country. Article I(3), 4 U.S.T. at 2066.

The intent of the negotiators was to secure the freedom of the foreign investor to employ its own home country nationals in management and other specialized positions. The United States was seeking assurance of the freedom to use American managers to run American investments abroad. The right claimed by Sumitomo is simply the reciprocal of the right the United States negotiated to secure.

3. Legislative and administrative implementation of the Treaty

Sumitomo's view of the meaning of the Article VIII(1) employment right is also borne out by the legislative and administrative implementation of FCN treaty provisions by the United States. The INA was passed in 1952 in the midst of the post-war FCN negotiating campaign. In its relevant provisions it was recognized as complementary to those treaties. S. Exec. O, *supra* p. 19, at 3 (1953). Section 101(a)(15)(E) deals with aliens "entitled to enter the United States under and in pursuance of the provisions of a treaty of friendship, commerce and navigation. . . ." 8 U.S.C. § 1101(a)(15)(E). The section provides that a treaty trader visa will issue to an alien the purpose of whose entry is "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . ." Thus the right of entry in Article I of the Treaty and, by extension, the employment right of Article VIII(1) were understood by Congress to apply only to nationals of the other party to the Treaty, in this case Japan.

The linkage between the entry and sojourn rights provided by Article I(1) and the employment right of Article VIII(1) is even more explicitly spelled out in the implementing regulations under the INA. These provide that to be eligible for a treaty trader visa the alien must be

> employed by a foreign person or organization having the nationality of the treaty country. . . [and] 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 . . . .

22 C.F.R. § 41.40(a) (1981). The indicia of "executive or supervisory character" are further elaborated in State Department instructions to consuls in foreign posts to consider

> the title of the position to which an applicant is destined, the location of the job in the firm's organizational structure, the duties involved, the degree to which the applicant will have ultimate control and responsibility for the firm's overall operations or a major component thereof, the number and skill levels of the employees within his responsibility, and whether he presently possesses executive or supervisory experience which would reasonably qualify him for the proposed assignment. . . . [L]evel of pay is another factor that may properly be considered. The consular officer may request such documentation as he feels necessary to satisfy himself that the position is indeed executive or supervisory in character, and should seek to elicit further info if necessary during the visa interview.

Dep't of State Telegram No. 089624 to Japanese Posts, ¶ 4, sent to all Diplomatic and Consular Posts on July 6, 1981, *reprinted in* 58 Interpreter Rel. 478, 479 (Sept. 17, 1981).

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The language of the Treaty, its negotiating history, and its contemporaneous and subsequent congressional and administrative construction, unite on a single, straightforward account of the right secured by Article VIII(1). It is the right of a foreign investor doing business in the territory of the host country to manage and control its local enterprise through

employment of home country nationals in executive positions, untrammeled by domestic legislation to the contrary. The enforcement of this right represents a solemn international obligation of the United States, not only to Japan, but to at least a dozen other countries with comparable treaty provisions. Equally, it represents a hard-won privilege for U.S. businesses operating in those countries, the continuance of which depends on continued scrupulous observance by this country of its reciprocal obligations.

B. Neither the Language nor the Legislative History of Title VII Evinces Any Intention to Abrogate the Rights of U.S. and Foreign Investors under FCN Treaties to Control and Manage Their Investments through the Employment of their Own Nationals in Management Positions.

1. Domestic legislation, such as Title VII, should not be construed to diminish treaty rights in the absence of an unambiguous expression of congressional intent to do so.

If plaintiffs were to prevail on these Title VII claims, there can be no doubt that the result would be a significant derogation from FCN treaty rights. A foreign investor's Treaty rights to control and manage its investment by employing home country nationals in executive positions, formerly unconditional, would henceforth be subject to domestic legislation establishing local preferences.

A cardinal principle of statutory interpretation is that repeals by implication are to be avoided. *Morton v. Mancari, supra*, 417 U.S. at 549-51. In the words of the Solictor General in a brief submitted to the Court this term, this principle "is by now axiomatic." Brief for the United States in *Weinberger v. Rossi,* No. 80-1924, at 25, citing *Watt v. Alaska*, 451 U.S. 259, 265-66 (1981); *United States v. Will*, 449 U.S. 200, 221 (1980); *TVA v. Hill*, 437 U.S. 153, 189 (1978).

In the present case, the rule against implied repeals is reenforced by an equally cogent independent principle: "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The injunction of *The Charming Betsy* applies with even greater force—"*a fortiorari*" in the words of the Solicitor General—when the proposed construction would violate "existing provisions or obligations under binding international agreements." Brief for the United States, *supra*, at 26. In cases involving treaty rights, this Court has laid down the requirement that "such purpose on the part of Congress [must be] clearly expressed." *Cook v. United States*, 288 U.S. 102, 120 (1933) (Brandeis, J.). The Court recently reiterated this requirement in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979): "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ." *Accord*, 41 Op. Att'y Gen. 170, 173 (1954) ("Without a clear expression of intention on the part of Congress to abrogate or restrict the application of a treaty, that purpose will not be implied.").

In the instant case, there is certainly no "explicit statutory language" in Title VII abrogating FCN treaty employment rights. Likewise, nothing in the legislative record of Title VII suggests that Congress intended to abrogate solemnly undertaken international obligations. It could hardly have been otherwise. In contrast to the FCN campaign of the 1950's, which was designed to provide protection for foreign investment as a basis for international economic revival and reconstruction (*see* 1952 Hearing, *supra*, at 2-4), Title VII of the Civil Rights Act of 1964 was an historic piece of domestic legislation, growing out of a native civil rights movement and responding to a wide range of evils in matters of employment in the United States. There is no indication that Congress even considered the impact of the legislation on FCN treaty obliga-

tions to foreigners. The policy orientations of the Treaty and Title VII are simply orthogonal.[10]

It is even harder to suppose that, by enactment of Title VII, Congress intended to limit the hard-won treaty rights of U.S. investors to employ home country citizens for key positions abroad. It would be wholly inconsistent with U.S. foreign economic policy objectives to release foreign FCN partners from their existing obligations not to discriminate against U.S. citizens and not to prefer their own nationals in executive positions. Yet, since rights under FCN treaties are reciprocal, just such a diminution of the management level employment rights of U.S. investors abroad would follow from the application of Title VII to foreign investors in the United States. Surely, if this were a purpose that animated Title VII, there would have been at least some reflection of it in the Congressional debates over the statute.

2. The administrative duplication, confusion and conflict that would result from the application of Title VII in this case provide independent grounds for declining to attribute such an intention to Congress.

To apply Title VII to the nationality based employment practice authorized by the Treaty and the INA would create a maze of administrative duplication, confusion and conflict, instead of the stable, reliable and predictable framework envisioned by the Treaty for international economic activities. *See* Walker, *FCN Treaties*, 42 Minn. L. Rev. at 809.

The State Department operates an elaborate system for screening applicants for treaty trader visas. The prospective

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10 The only reference to international matters in Title VII comes at the beginning, in 42 U.S.C. § 2000e-1, which provides that the Act "shall not apply to any employer with respect to the employment of aliens outside any State. . . ." The object of this provision is clear. It is to prevent the extraterritorial application of the act with respect to persons not within the allegiance and therefore not subject to the jurisdiction of the United States. It reenforces the overall domestic focus of the legislation.

E-1 visa entrant must appear before a U.S. consular official abroad and provide satisfactory evidence that he meets well-defined criteria before being granted treaty trader status and permitted to enter the United States. The State Department has broad discretion to define the criteria for issuance of the visa and to ensure that the number of treaty traders is appropriately limited.[11] In addition, each treaty trader's status is subject to annual review by the INS to insure that the statutory criteria are met on a continuing basis. 8 C.F.R. § 214.2(e) (1981).

The enforcement of Title VII is also committed to an elaborate administrative apparatus. Complainants must apply first to the EEOC, which undertakes a complicated investigatory and conciliation process, culminating in a determination whether the agency should proceed itself or leave the complainant free to sue or both. 42 U.S.C. § 2000e-5(b) to 5(f)(1); 29 C.F.R. §§ 1601.15-.29 (1981). In either case there may be court review of the question whether the employer has engaged in a prohibited discriminatory employment practice.

As the Second Circuit foresaw, Title VII cases involving treaty traders will almost inevitably call forth the BFOQ defense. 638 F.2d at 559, Pet. App. at 14a-15a. The criteria suggested by the court below for resolving this issue are substantially similar to those applied by the State Department in making the treaty trader determination in the first place and by the INS in its annual reviews. Thus the EEOC and the courts would as a practical matter be in the position of second guessing—or collaterally attacking—the visa determination of the State Department and the INS.

Such conflicts between determinations made by the EEOC and the State Department would be unavoidable no matter how heroic the attempts at interagency coordination. Even if the INA criteria and the BFOQ requirements were verbally identical, the visa determination made by the consular officer abroad acting under the INA would not foreclose a Title VII

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11 *See* Dep't of State Telegram No. 089624, *supra* p. 29; *U.S. Tightens Japanese Visas,* N.Y. Times, Oct. 7, 1980, Section D, at 1.

review. The effect would be to circumvent the strict limitations this Court has traditionally maintained on review of visa decisions:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. . . . The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

Mathews v. Diaz, 426 U.S. 67, 81-82 (1976) (footnotes omitted). As a matter of fact, the court below in remanding this very case has in effect called for reexamination by the judicial branch of the determinations made by the Executive in issuing treaty trader visas to Sumitomo's managerial employees.

Perhaps it is within the power of Congress, by apt statutory language, to create such a quagmire if it wishes to do so. But certainly it should not be conjured up by the courts in the absence of any indication that Congress intended such a result or was even aware of the possibility.

* * * *

In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), this Court was urged to apply remedial domestic legislation establishing fundamental rights of employees and obligations of employers in a manner that was inconsistent with international law. The relevant statutory language there, like that of Title VII, was in terms unqualified. Nevertheless, in considering whether the statute reached so far, the Court remarked that petitioners were

> unable to point to any specific language in the Act itself or in its extensive legislative history that reflects such a congressional intent.

372 U.S. at 19. The Court declined to apply the Act:

> [F]or us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."

Id. at 21-22 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

The present cases equally are ruled by that injunction.

III.

SUMITOMO, AS A WHOLLY-OWNED U.S. SUBSIDIARY OF A JAPANESE INVESTOR, MAY INVOKE THE EMPLOYMENT RIGHT GRANTED BY ARTICLE VIII(1).

In their cross-petition, respondents put in issue whether Sumitomo is eligible to claim the Article VIII(1) employment right. Relying on Article XXII(3) of the Treaty, a definitional provision, they argue that since Sumitomo is incorporated under the laws of New York, Sumitomo is a company "of the United States" and therefore is not entitled to claim the benefits accorded to Japanese nationals and companies pursuant to Article VIII(1) of the Treaty.[12] Both the Court below and the Fifth Circuit in *Spiess v. C. Itoh, supra,* correctly

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12 In this connection, the courts below commonly make reference to Sumitomo's "standing" to invoke Article VIII(1) of the Treaty, but such references do not import standing in its traditional sense as an element of justiciability. It is undisputed that for purposes of traditional "standing" under Article III of the Constitution, the interests that Sumitomo is asserting are within the "zone of interests" to be protected by the Treaty, and that Sumitomo's interests will be directly affected by any interpretation of the Treaty to be rendered in this action. *See Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

rejected this attempt to deny Article VIII(1) rights to locally incorporated subsidiaries as inconsistent with both the terms and the purposes of the Treaty. On this point the Second Circuit opinion bears repeating:

> We are satisfied that the Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary incorporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States. To hold that the Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form, something which we have previously rejected in treaty construction. *Reed v. Wiser*, 555 F.2d 1079, 1085-86 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). Moreover, such a reading would overlook the purpose of the Treaty, which was not to protect foreign investments made through branches, but rather to protect foreign investments generally. See generally, *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *Maximov v. United States*, 299 F.2d 565, 568 (2nd Cir. 1962), *affd.*, 373 U.S. 49 (1963). . . . To adopt such a reading would also in our opinion do violence to the admittedly unitary structure of Articles VII and VIII, see, e.g., Foreign Service Despatch No. 2529, from High Commissioner for Germany to the Department of State, dated March 18, 1954, p. 1. It is unlikely that the parties to the Treaty would have agreed to grant each other broad rights to establish and manage subsidiaries abroad in Article VII, and then gone on to bar those same subsidiaries from invoking almost all of the substantive provisions which the Treaty contains.

638 F.2d at 556-57; Pet. App. at 7a-8a. *See also* Walker, *United States Practice,* 5 Am. J. Comp. L. at 233. The court went on to note that disparate treatment as between subsidiaries and

branches would result in an unintended "crazy-quilt pattern." [13] 638 F.2d at 556, Pet. App. at 8a. The Fifth Circuit, in *Spiess v. C. Itoh, supra*, fully endorsed the position of the Court below that the Article VIII(1) right may be invoked by local subsidiaries. 643 F.2d at 358-59, Pet. App. at 71a.

Both courts of appeals were united in treating Article XXII(3), relied on by respondents, as defining a company's nationality merely for the purpose of recognizing its status as a legal entity and not for the purpose of restricting substantive Treaty rights. 638 F.2d at 557, Pet. App. at 11a; *Spiess v. C. Itoh, supra,* 643 F.2d at 357-58, Pet. App. at 69a. This conclusion is supported by the negotiating history of the Treaty and similar FCN treaties. For example, during the negotiation of the treaty with the Netherlands, U.S. negotiators emphasized to their counterparts that the definitional provision analogous to Article XXII(3) of the Japanese Treaty

> was *not* calculated to detract in any way from the rights and privileges a "controlled company" would otherwise enjoy. . . . [T]he treaty is always a floor and not a ceiling. The effect of the [State Department] legal adviser's formulation was to assure that the "controlled company" will always, as a minimum, get everything that the parent company gets as a matter of treaty *right*—but was not calculated to detract from any additional privileges that the "controlled company" may actually have. . . . The [State] Department has the same interests as [the Dutch negotiators] in avoiding damage to the position of "controlled companies", because Americans

13 Foreign direct investment predominantly takes the form of locally incorporated subsidiaries. The Department of Commerce, *Survey of Current Business,* August, 1980, indicates that for the period 1966-1979, approximately 85% of U.S. direct investments abroad and about 94% of foreign direct investments in this country were made through subsidiaries.

> have "controlled companies" abroad just as the Dutch have them in the U.S.

Official-Informal Letter from Herman Walker, Jr., Trade Agreements and Treaty Division, Commercial Policy Staff, Dep't of State, to Counselor for Economic Affairs, American Embassy, the Hague, Netherlands, Oct. 28, 1955, App. 287a, 288a (emphasis in original).

The same views were expressed by the Department during the negotiation of the Japanese Treaty with specific reference to Article XXII(3):

> Mr. Nagai [a Japanese negotiator] then asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph 3 [of Article XXII] meant anything more than the recognition of the existence of a juridical person.
>
> Mr. Bassin [an American negotiator] replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

Dep't of State Despatch No. 13 from USPOLAD, Tokyo, to Dep't of State, Washington, D.C., Apr. 8, 1952, App. 136a, 143a-44a; *see also* Walker, *Provisions on Companies,* 50 Am. J. Int'l L. at 380-81, 383 (distinguishing between "civil" and "functional" capacities of companies and noting that recognition of status and nationality does not create substantive rights); Dep't of State Airgram No. A-105 to American Embassy, Tokyo, Jan. 9, 1976, App. 157a, 158 (confirming position of State Department that Article XXII(3) is merely meant to establish a "procedural test" for determining the status of an association); Letter from Lee R. Marks, Dep. Legal Adviser, Dep't of State, to Abner W. Sibal, Gen. Counsel, EEOC,

Oct. 17, 1978, App. 94a, *reprinted in* 73 Am J. Int'l L. 281 (1979).[14]

As discussed above, practice under the INA treaty trader provisions illuminates the meaning of employment rights granted by the Treaty. See pp. 28-30, *supra*. Throughout the period that the Treaty has been in force, treaty trader visa applications for employees of locally incorporated subsidiaries of Japanese companies have been treated on a par with applications for employees of branches. Both subsidiaries and branches are deemed Japanese companies:

> The nationality of a firm is determined for the purpose of section 101(a)(15)(E) [of the INA] by the nationality of those persons who own the principal amount (i.e., more than 50 percent) of the stock of that corporation, regardless of the place of incorporation.

9 Foreign Affairs Manual, Part II, § 41.40, Note 8; *see also* Note 16. The rule has also been applied consistently by the INS. *See, e.g., Matter of N____ S____*, VII I. & N. Dec. 426, 428 (1957); *Matter of Z____ and R____*, VIII I. & N. Dec. 482 (1959).

The underlying rationale was expressed by the Department of State in the negotiation of similar employment provisions in the FCN treaty with Germany:

> The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of

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14 A later Department of State letter takes a contrary view. Letter from James R. Atwood, Dep. Legal Adviser, Dep't of State, to Lutz A. Prager, Ass't Gen. Counsel, EEOC, Sept. 11, 1979 (App. 307a), *reprinted in* 74 Am. J. Int'l L. 158 (1980). The Second Circuit observed that "both letters were conclusory in tone, providing little guidance as to how the author reached the position adopted. Finally, neither of the letters referred to any documentary evidence supporting its position, nor did the 1979 letter explain how the 1978 letter writer had fallen into error." 638 F.2d at 558 n.5, Pet. App. at 12a n.5; *see also, Spiess v. C. Itoh, supra,* 643 F.2d at 358 n.3, Pet. App. at 70a n.3.

> liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under 22 C.F.R. 41.70, 41.71 and other applicable regulations.

Dep't of State Instruction No. A-852 to the U.S. High Commissioner for Germany (HICOG), Bonn, Jan. 21, 1954, App. at 160a-61a.

The result below can be reached on a theory similar to that of the U.S. negotiators (and of the INA regulations), piercing the corporate veil and considering the U.S. subsidiary as a "company of Japan" for the purposes of Article VIII(1). *See* 638 F.2d at 557-558, Pet. App. at 11a-12a; *Spiess v. C. Itoh, supra,* 643 F.2d at 358-59 & n.5, Pet. App. at 71a & n.5. A slightly different technical approach is to treat the U.S. subsidiary as asserting the rights of its Japanese parent, which is admittedly a "company of Japan." *See* 638 F.2d at 555-556, Pet. App. at 7a-8a. The difference is one of form, not

substance. Both Courts recognized that the Treaty was designed to permit decisions as to the form of foreign investment to respond to the realities of international business, undistorted by legalistic technicalities. 638 F.2d at 555-56, Pet. App. at 7a-8a; *Spiess v. C. Itoh, supra,* 643 F.2d at 358-59, Pet. App. 71a & n.5. The common result reached in the two Circuits implements this design. *Cf. Jordan v. Tashiro,* 278 U.S. 123 (1928) (treaties to be liberally construed in order to effectuate purposes).

To change the rules now so that important legal consequences will hinge on the foreign investor's choice of the form of enterprise by which it does business would be to turn back the clock on the entire post-war FCN treaty era.

IV.

IF TITLE VII APPLIES TO SUMITOMO'S PREFERENCE FOR JAPANESE NATIONALS IN MANAGERIAL POSITIONS, THE BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION SHOULD BE LIBERALLY APPLIED.

The Second Circuit should not have reached the question whether the BFOQ exception to Title VII applies to Sumitomo's practice of filling managerial positions with Japanese nationals because, as shown above, the practice does not violate the Civil Rights Act. If Title VII is to be applied, however, the Court below was certainly correct in suggesting that recognition should be given to the foreign investor's Treaty right to choose its own managers as well as to attributes of Japanese nationality, such as linguistic and cultural skills, knowledge of Japanese products, markets, customs and business practices, familiarity with the personnel and workings of the principal or parent enterprise in Japan, and acceptability to those persons with whom the company or branch does business. If such a reading of the BFOQ exception to Title VII is the only way to provide for the treaty employment right, then obviously that reading must be adopted. But one might well conclude that the effect on the BFOQ exception is a further argument against holding that Title VII is applicable.

The point is, of course, that all the factors listed by the court below can best be given recognition, not through the BFOQ exception, but by applying according to its terms the treaty right of Japanese direct investors to control and manage their enterprises in this country by engaging "executive personnel . . . and other specialists of their choice." Treaty, Article VIII(1), 4 U.S.T. at 2070.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit should be reversed and this case remanded with directions to dismiss.

Respectfully submitted,

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