Japanese Companies on United States Soil: Treaty Privileges vs. Title VII Restraints

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I. INTRODUCTION

Affiliates of foreign companies currently employ nearly two million people in the United States.¹ Yet basic questions concerning whose law controls employment discrimination suits brought by these employees remain unresolved. In the case of Japanese companies doing business in the United States, lawsuits in which American employees have asserted claims of unfair employment practices have focused on the conflict between two bodies of law: The Treaty of Friendship, Commerce and Navigation between Japan and the United States² (Japanese Treaty) and Title VII of the Civil Rights Act of 1964 (Title VII).³

The general purpose of the Japanese Treaty is to grant the companies and citizens of either country equal or “national” treatment when conducting business within the other country.⁴ Currently the United States is party to approximately two dozen bilateral commercial treaties

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that are substantially similar to the Japanese Treaty.\footnote{For a partial list of these Treaties of Friendship, Commerce and Navigation, see 1 I.L.M. 92, 94 (1962).} The overall goal of these treaties is to encourage and foster international economic investment and growth that is mutually beneficial to both countries.\footnote{Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 MINN. L. REV. 805, 805-06 (1958).}

The Japanese Treaty affords both parties great latitude in making hiring decisions. Article VIII(1) of the Japanese Treaty provides that “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.”\footnote{See Japanese Treaty, supra note 2, at 2070 (emphasis added).} Article VIII(1) thus apparently provides a Japanese company operating in the United States an unconditional right to hire only Japanese citizens for the above named positions. Because ninety-nine percent of the population of Japan consists of people who are of Japanese national origin,\footnote{D. WHITAKER, AREA HANDBOOK FOR JAPAN 70 (Foreign Area Studies of the American University, 1974).} a Japanese company that hires only Japanese citizens would in effect be hiring only people of Japanese national origin.

Title VII, on the other hand, prohibits hiring policies that have the purpose or effect of discriminating on the basis of race, color, religion, sex, or national origin.\footnote{Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1982)); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971).} When employment practices favor a class that traditionally has been subjected to discrimination, such practices constitute “reverse discrimination,” which also violates Title VII.\footnote{See Griggs, 401 U.S. at 431 (holding that in enacting Title VII, Congress intended to prohibit “[d]iscriminatory preference for any group, minority or majority.”) (emphasis added); see also McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976), where five years after Griggs the Court expressly held that Title VII prohibits racial discrimination against whites in private employment on the same terms as it prohibits discrimination against non-whites. But see Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (indicating that under Title VII, race may be an affirmative factor when a particular employer is attempting to redress past discriminatory practices).} As stated above, a Japanese company operating in the United States appears to be within its rights under the Japanese Treaty when hiring exclusively Japanese citizens for the positions designated in Article VIII(1). Yet such a
practice may constitute reverse discrimination which violates Title VII. This situation creates a conflict of laws.

The recent Supreme Court case of *Sumitomo Shoji America, Inc., v. Avagliano*\(^1\) exemplifies this conflict. In *Sumitomo*, eleven female secretarial employees of Sumitomo Shoji America, Inc., a United States corporation, and a wholly owned subsidiary of a Japanese corporation, brought a class action suit against their employer. Plaintiffs claimed that the company had discriminated against them on the basis of sex and national origin in violation of Title VII. Plaintiffs sought injunctive and compensatory relief, claiming that Sumitomo restricted them to clerical jobs and did not train them for or promote them to executive, managerial or sales positions, which were reserved primarily for male citizens of Japan.

The Supreme Court granted certiorari from the Second Circuit Court of Appeals\(^2\) on the issue of whether Sumitomo's employment practices, which allegedly violated Title VII, were privileged under Article VIII(1) of the Japanese Treaty. Instead of resolving this central issue, however, a unanimous Supreme Court disposed of the case by holding that because Sumitomo Shoji America was incorporated in the United States, it was not a "company of Japan," and therefore could claim no rights under the Japanese Treaty.\(^3\) As a United States corporation, Sumitomo was forced to comply with Title VII. By so holding, the Supreme Court resolved only the issue of who has standing to assert the rights provided in Article VIII(1) and in the Japanese Treaty generally. Locally incorporated subsidiaries of Japanese companies are considered companies of the United States and therefore have no standing to assert Treaty rights, whereas Japanese branch operations are still protected by the Treaty.

Still unresolved after the *Sumitomo* decision is whether a branch operation of a Japanese company operating in the United States could successfully assert that the privileges regarding hiring practices in Article VIII(1) provides a defense to a Title VII action.\(^4\) The importance of this

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4. In *Sumitomo* the Supreme Court stated that aside from the issue of an Article VIII(1) defense to a Title VII claim it also declined to resolve the following issues: (1) whether Sumitomo could assert a bona fide occupational qualification (BFOQ) or a business necessity defense for Japanese citizenship for the named positions in Article VIII(1) (for a discussion of this issue, see infra, notes 106-129 and accompanying text), and (2) whether Sumitomo could assert the Article VIII(1) rights of its parent corporation. The Court's refusal to decide the
question is amplified when one considers the ease with which a locally incorporated Japanese affiliate could shed its corporate status and become a branch operation, 15 in order to regain the rights provided by the Treaty. Because of this loophole in the Court's decision, the resolution of whether Article VIII(1) or Title VII controls the hiring practices of United States branches of Japanese companies remains crucial to determining the rights of both employers and employees of Japanese multinational corporations operating in the United States.

This Note examines the continuing conflict between the Japanese Treaty and Title VII. The Second and Fifth Circuits have heard cases on whether Article VIII(1) provides a defense to Title VII. 16 In Sumitomo, the Second Circuit held that Article VIII(1) did not exempt a Japanese employer from compliance with Title VII. 17 Conversely, the Fifth Circuit in Spiess, et al. v. C. Itoh & Co. 18 held that Article VIII(1) provided an exception to Title VII and therefore was a valid defense.

In dissecting this conflict of laws issue, this Note first will define the scope and the meaning of both Article VIII(1) and Title VII. After analyzing the relationship and the inevitable conflict between the two provisions, this Note then will examine methods of resolving the conflict, including the approaches used by the Fifth and Second Circuits. Special attention will be given to Title VII's bona fide occupational qualification second issue appears inappropriate in light of its holding that Japanese subsidiaries are United States corporations and therefore have no standing to assert Treaty rights. If a subsidiary were able to assert the Treaty right of its parent then the Court's decision not to allow locally incorporated subsidiaries Treaty protection would be meaningless. For a full discussion of the theoretical soundness of attempting such a defense, see Lewis & Ottley, Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based upon Sumitomo Shoji, 44 OHIO ST. L.J. 45, 61-68 (1983).

15. A subsidiary is a company that is separate but affiliated with the parent company, while a branch is an extension of the parent. Factors in determining separateness from the parent include the following: (1) The business transactions of the two entities, (2) separation of corporate procedures, (3) financial structure of the two entities, and (4) the public image of the nature of the separation. H. HENN, LAW OF CORPORATIONS § 354 (3d ed. 1983). The Court's holding in Sumitomo that any company incorporated in the United States is a United States company for purposes of asserting Treaty rights makes clear which companies are precluded from claiming that they are branches and therefore afforded rights granted under the Treaty. Nevertheless, any United States affiliate of a Japanese multinational that is a sufficiently integral part of its parent company potentially may shed its corporate status and become a branch operation if it falls within the definition of a branch operation.

16. For a full discussion of both the Fifth and Second Circuits' opinions see infra notes 67-74 and accompanying text.

17. 638 F.2d at 552. Although the Supreme Court reversed the Second Circuit, the Court only addressed the issue of standing to assert Treaty rights as an affirmative defense to Title VII. Thus, the other aspects of the Second Circuit's ruling retain force.

18. 643 F. 2d 353, 362-63 (5th Cir. 1981).
(BFOQ) exception which was incorporated into the Second Circuit's opinion. Finally, the implications of resolving this issue in favor of American plaintiffs or Japanese branches will be discussed.

II. THE MEANING AND SCOPE OF ARTICLE VIII(1) OF THE JAPANESE TREATY

It is important to define both the scope of the rights provided by Article VIII(1) of the Japanese Treaty and the proscriptions of Title VII before launching into a discussion of the potential conflict and reconciliation of the two laws. Neither the scope of Article VIII(1) nor the extent of the restraints of Title VII for cases such as *Sumitomo* has well-defined boundaries. Therefore, this section will address whether under Article VIII(1) of the Japanese Treaty, a Japanese branch may hire persons for the positions described in Article VIII(1) exclusively from its own citizenry.

The Supreme Court has held that treaties are to be construed "according to the intention of the contracting parties, and so as to carry out their manifest purpose." Among the key factors suggested by the Restatement (Second) on Foreign Relations Law of the United States for deciphering the intent of a treaty are the language of the treaty and its negotiation history.

A. Treaty Language

The language of Article VIII(1) is clear on its face. The section provides in relevant part that "[n]ationalis 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." (The positions hereinafter collectively are referred to as "upper-level management.") The problem is whether the right to hire upper-level management "of their choice" was intended to be an absolute or conditional right on the part of the foreign employer.

When the employment provisions of Article VIII(1) are put in the context of other rights granted in the Japanese Treaty, a three-tiered heirarchy of rights emerges. From bottom to top, the rights contained in

19. Wright v. Henkel, 190 U.S. 40, 57 (1903). See also Bush v. United States, 71 F.2d 635 (5th Cir. 1934); American Trust Co. v. Smyth, 247 F.2d 149 (9th Cir. 1957); Board of County Comm'rs v. Aerolinas Peruana, 307 F.2d 802 (5th Cir. 1962); United States v. A.L. Burbank & Co., 525 F.2d 9 (2d Cir. 1975).
the Treaty are as follows: (1) contingent on most-favored-nation treatment, by which the foreign investor is entitled to the highest level of protection granted to citizens of any country; (2) contingent upon national treatment, by which a foreign investor is entitled to the same protection as is granted to domestic citizens; and (3) not contingent on the treatment afforded anyone else.  

The first and second tiers concern rights that are conditional in that they are defined by the treatment the United States affords foreign and domestic citizens, respectively. The third tier, however, appears to provide for rights that are absolute because they are not contingent on the treatment afforded anyone else. Although most of the rights provided by the Treaty are granted on a contingent basis, the employment provisions of Article VIII(1) do not explicitly refer to national or most-favored-nation treatment on their face. Thus, the right to hire upper-level management personnel “of their choice” provided in Article VIII(1) appears to fall within the highest tier of rights provided by the Treaty, that of non-contingent, absolute rights.

The scope of a Treaty right that is not contingent on the treatment of other foreign corporations, or domestic United States corporations, cannot then be delineated by the constraints of United States employment statutes. Thus, the primary determinants of the scope of Article VIII(1) are its negotiation and legislative history.

B. Legislative and Negotiating History

The negotiation history addressing Article VIII(1) of the Japanese Treaty indicates that the Article was designed to override laws, in both Japan and several states in the United States, that restricted the employment of aliens in a discriminatory fashion. Overriding the discrimination laws achieved the underlying purpose of assuring foreign investors complete control of overseas operations by not requiring them to hire locally for upper-level management positions.

At the time the Japanese Treaty was drafted, many states and many other countries, including Japan, had “percentile” restrictions that se-

22. Walker, supra note 6, at 811.
24. Walker, supra note 6, at 811-12.
verely limited, and in certain professions prohibited, the employment of aliens within their boundaries.\textsuperscript{26} American investors probably were more concerned about this problem than their Japanese counterparts.\textsuperscript{27} Evidence suggests that it was the United States that sought to include in the Japanese Treaty,\textsuperscript{28} and in other commercial treaties as well,\textsuperscript{29} the right to choose upper-level management employees without percentile restrictions. After the Japanese Treaty was ratified, Herman Walker, a leading negotiator for the United States, noted that Article VIII assures “management . . . freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without interference from ‘percentile’ restrictions and the like.”\textsuperscript{30} Dr. Walker’s comments make it clear that from the perspective of the United States, and most likely from Japan’s perspective as well, Article VIII(1) had the underlying purpose of allowing a foreign company to circumvent any restrictive domestic requirements that would force it to hire local management. This would permit the foreign company to hire the upper-level management “of their choice” and thereby maintain control of overseas operations by placing its own citizens in these positions.

Article I(1)\textsuperscript{31} of the Japanese Treaty buttresses this interpretation of Article VIII(1) by relaxing visa requirements of the host country for foreign nationals affiliated with the foreign company, thus facilitating Article VIII(1)’s goal of parental control. Under Article I(1), Japanese citizens acting as upper-level management employees for Japanese employers may enter the United States under the specially created visa categories of “treaty trader” or “treaty investor.”\textsuperscript{32} It is unclear exactly

\textsuperscript{26} Walker, \textit{supra} note 25, at 236-37.
\textsuperscript{27} \textit{Hearing on Commercial Treaties Before the Comm. on Commercial Treaties and Consular Conventions of the Senate Comm. on Foreign Relations}, 82d Cong., 2d Sess. 4 (1952) [hereinafter 1952 Hearings].
\textsuperscript{28} See \textit{Outgoing Airgram, Dep’t. of State Div. of Communications and Records Telegraph Branch to USPOLAD, A-453 Tokyo} (Jan. 7, 1952).
\textsuperscript{29} For example, the legislative report for the Friendship, Commerce and Navigation (FCN) Treaty with Uruguay addressed the need for a treaty provision to guarantee American companies the right “to employ American, as distinguished from foreign technical experts, creative personnel, attorneys and other specialized employees.” \textit{S. EXEC. REP. D}, 81st Cong., 2d Sess. 5-6 (1950). The Uruguayan Treaty served as a model for the Japanese Treaty. \textit{See S. EXEC. REP. O}, 83d Cong., 1st Sess 2 (1953) (executive report for Japanese Treaty); \textit{Hearing on Commercial Treaties Before the Subcomm. of the Senate Comm. on Foreign Relations}, 83d Cong., 1st Sess. (1953) [hereinafter 1953 Hearings].
\textsuperscript{30} Walker, \textit{supra} note 25, at 234. Dr. Walker is the leading authority on commercial treaties. He is credited by the United States State Department as the formulator of the modern form of FCN treaties and has negotiated many such treaties on behalf of the United States.
\textsuperscript{31} Japanese Treaty, \textit{supra} note 2, at 2066.
\textsuperscript{32} The United States Department of State, which administers and enforces the immigration laws, has adopted regulations establishing standards for treaty trader aliens employed in
what falls within upper-level management, but the criteria include factors such as job title, duties, degree of responsibility, and pay level. Because specialized visa treatment for foreign managers (called traders or investors) was defined prior to, and subsequently included in, the Japanese Treaty, it would appear that the parties intended to allow foreign employers to hire upper-level management personnel from among their own citizens without being hindered by the host country's normal visa requirements. Thus, Article I(1) supports the notion that the "of their choice" language of Article VIII(1) is an absolute right.

The Senate Executive Report on the Japanese Treaty and several other commerce treaties in negotiation at the time also suggest that the purpose of Article VIII(1) was to bypass local restrictions on hiring aliens. The legislative history surrounding the ratification of the Japanese Treaty supports the view that the negotiations sought to secure a foreign employer's right to make certain hiring decisions without regard to nationality. Although the 1953 Senate Hearings on the Japanese Treaty barely mention the "of their choice" provision of Article VIII(1), the 1952 Senate Hearings for several other similar commercial treaties do discuss the clause. During panel discussions on Article VIII(1) of the United States-Israeli commercial treaty (which is identical to Article VIII(1) of the Japanese Treaty), one Senator summarized the provisions as an apparent "attempt to give great latitude and privileges to

the United States under Japanese and other FCN treaties. 22 C.F.R. § 41.40 (1985). Those regulations require that a treaty trader 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 qualification 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." Id. § 41.40(a). The Department of State has developed supplementary internal guidelines to be used in determining whether foreign nationals seeking entry into the United States are entitled to treaty trader status. See 9 FOREIGN AFFAIRS MANUAL OF THE DEPARTMENT OF STATE, reprinted in 6 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE (1982); see also 22 C.F.R. § 41.41 (1985).


35. FCN TREATIES, supra note 25.

36. Id. at 4.

37. 1953 Hearings, supra note 29, at 2. The text of the 1953 Hearing provides in relevant part that "[o]f the special concern to investors are such assurances as those regarding . . . the right of the owner to manage his own affairs and employ personnel of his choice . . . ." Id.

38. 1952 Hearings, supra note 27.
either party to use their own technical and professional experts within the territory of the other."

C. The Uncertain Scope of Article VIII

The Treaty's language and its legislative and negotiation history all indicate that Article VIII(1) was intended, not only to override local discrimination laws, but also to permit the companies of each country to hire only their own citizens to manage overseas operations. The purpose of the latter goal was to facilitate and assure control of overseas investment.

Several factors, however, make interpretation of the scope of Article VIII(1) difficult, and may well limit the weight that can be given the drafters' intent. First, it is quite possible that, because of the weak economic position of postwar Japan and the embryonic stage of Japanese multinational corporations, the United States negotiators never anticipated the present strength and expansion of Japanese multinationals now operating in the United States. Second, given the focus of Article VIII(1), the negotiators may not have foreseen the potential for reverse discrimination resulting from the "of their choice" provision. Third, and most important, Title VII was not in existence when the Treaty was ratified in 1953. Moreover, very few states had antidiscrimination employment statutes which would have conflicted with the reverse discrimination that Article VIII(1) may be interpreted to permit. In fact, racial discrimination through segregation was officially sanctioned until 1954. These considerations make it difficult to assess what weight should be given to the intent of the Treaty's drafters. Accordingly, resolution of the conflict between Article VIII(1) and Title VII necessarily must focus on the potential for reverse discrimination under the Treaty in light of subsequent antidiscrimination legislation.

III. CITIZENSHIP AS A VIOLATION OF TITLE VII

Whether hiring on the basis of citizenship violates Title VII is important to both Japanese branch operations, which still may assert Treaty rights, and locally incorporated Japanese subsidiaries, which, af-

39. Id. at 38.
term *Sumitomo*, no longer can assert Treaty rights.\textsuperscript{42} If plaintiffs in cases such as *Sumitomo* cannot first establish that hiring on the basis of citizenship violates Title VII, then they have no cause of action for employment discrimination.\textsuperscript{43} For locally incorporated Japanese subsidiaries, if there is no Title VII violation, their inability to resort to an Article VIII(1) defense is inconsequential. For Japanese branch operations, if there is no Title VII violation, then the issue of whether Title VIII(1) provides a defense to a Title VII claim need not be reached. This section examines whether hiring on the basis of citizenship in fact violates Title VII.

Title VII provides that "[i]t shall be an unlawful employment practice . . . to discriminate against any individual . . . because of such individual's race, color, sex, or national origin."\textsuperscript{44} In its briefs, Sumitomo Shoji America, Inc., argued that hiring on the basis of Japanese citizenship is not discrimination based on any impermissible classification stated in Title VII, and therefore does not violate Title VII.\textsuperscript{45} Respondents, Sumitomo's secretarial employees, argued that a policy of hiring only Japanese citizens for upper-level management positions has the effect of discriminating on the basis of national origin and therefore such hiring does violate Title VII.\textsuperscript{46} The Court declined to decide the discrimination issue.\textsuperscript{47}

The only Supreme Court decision to examine the issue of citizenship discrimination as a basis for a Title VII claim is *Espinoza v. Farah Manufacturing Co.*\textsuperscript{48} In *Espinoza*, the plaintiff, a Mexican citizen and resident alien of the United States, was denied employment at defendant company because the company had an express policy against hiring aliens. Plaintiff alleged that this policy discriminated on the basis of national origin and therefore violated Title VII.\textsuperscript{49} Defendant argued that the policy to hire only United States citizens was not intended to discriminate, nor did it in fact result in national origin discrimination because ninety-six percent of its employees were of Mexican ancestry.\textsuperscript{50}

\begin{thebibliography}{9}
\bibitem{42} See supra note 3.
\bibitem{43} Id.
\bibitem{45} Brief for Respondents and Cross-Petitioners at 34, *Sumitomo*, (No. 80-2070).
\bibitem{46} The Supreme Court declined to decide the issue stating it "was not set forth or fairly included in the questions presented for review. . . ." 457 U.S. at 180 n.4.
\bibitem{47} See infra note 66 and accompanying text; Japanese citizenship may be a bona fide occupational qualification and therefore qualify as a statutory exception to Title VII. See infra notes 106-129 and accompanying text.
\bibitem{48} 414 U.S. 86 (1973).
\bibitem{49} Id. at 87.
\bibitem{50} Id. at 92-93.
\end{thebibliography}
In its analysis, the Court stated that the "term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." \(^5\) Given the number of Mexican-Americans employed by the defendant company in Espinoza, it was obvious there was no discrimination on the basis of national origin. Thus, the first part of the Court's holding stated that Congress did not intend\(^5\) to equate citizenship with national origin, and therefore citizenship could not be the sole basis for a Title VII claim.

The Court specifically limited its holding, however, by stating that "[c]ertainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." \(^3\) Clarifying the meaning of "purpose or effect," the Court stated that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." \(^5\) Thus, the Court held in Espinoza that discrimination based on citizenship does not violate Title VII unless such a policy has the purpose or effect of national origin discrimination.

In applying the holding of Espinoza to the case of Japanese employers operating in the United States, some commentators have suggested that if an employer may use United States citizenship as a valid hiring criterion, then an employer also may use Japanese citizenship as a valid hiring criterion.\(^5\) This argument, however, fails to recognize the full holding of Espinoza, which requires that hiring on the basis of citizenship not result in a discriminatory effect. Thus, if a hiring policy based upon citizenship results in discrimination against a group of applicants on the basis of national origin, then under Espinoza it would violate Title VII.

The United States citizenship requirement of the defendant company in Espinosa did not have the purpose or effect of discrimination under Title VII. However, in the case of Japanese companies operating in the United States, hiring only Japanese citizens would result in dis-

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51. Id. at 89.
52. Id. at 89 (citing 110 Cong. Rec. 2549 (1964)).
53. Id. at 92.
crimination against virtually every national origin except Japanese.\textsuperscript{56} In \textit{Sumitomo}, the Supreme Court implied that hiring only Japanese citizens for executive positions may have the requisite "purpose or effect" to constitute national origin discrimination.\textsuperscript{57} Such a practice by Japanese companies operating in the United States clearly constitutes reverse discrimination.\textsuperscript{58}

Although no court has determined the impermissibility of reverse discrimination through classification by national origin, the Supreme Court consistently has rejected attempts to distinguish different forms of discrimination by whether they are designed to benefit or harm racial minorities.\textsuperscript{59} As an exception to the ban on reverse discrimination, the Court has allowed affirmative action only in the context of a university correcting its own past discriminatory practices.\textsuperscript{60} Thus, it follows that without a showing of past discriminatory practices by a particular Japanese employer against its own nationals, reverse discrimination would not be permitted on the basis of national origin. Because such a showing is unlikely, it appears that Japanese companies operating in the United

\textsuperscript{56} Ninety-nine percent of Japan's population is of Japanese origin. D. WHITAKER, AREA HANDBOOK FOR JAPAN 70 (American Univ. Foreign Area Studies, 1974).

One commentator suggests that for United States citizens as a class to state a cause of action in Title VII they must first show that the term "American" characterizes a single national origin. \textit{Japanese Corporations, supra} note 55, at 97. This is erroneous because all national origins except the Japanese would have a valid cause of action under Title VII vis-à-vis reverse discrimination principles. \textit{See supra} note 10. \textit{But see Novak v. World Bank, Lab. Rel. Rep. (BNA) 20 Fair Empl. Prac. Cas. (BNA) 1166, 1167 (D.D.C. 1979); Dowling v. United States, 476 F. Supp. 1018, 1022 (D. Mass. 1979).} If a Japanese-American wanted to state a cause of action, however, national origin discrimination could not be the basis of the cause of action, although sex discrimination could be.

On the issue of standing, one commentator suggests that American citizens would lack standing to assert a Title VII claim against a Japanese corporation in the United States which discriminates in favor of its own nationals. \textit{See Commercial Treaties, supra} note 55, at 958. This conclusion presupposes an unsettled point of law. Only if the Treaty is held to shield Japanese branches from Title VII would American citizens lack standing to assert a cause of action based on Title VII. For a discussion of Japanese citizens' right to assert a Title VII claim in American courts \textit{see Note, supra} note 10, at 972-75.

Finally, if Japanese companies operating in the United States can establish Japanese citizenship as a BFOQ or as a business necessity, then American citizens would have standing to sue, but would be defeated in their claims. For a full discussion of this issue, \textit{see infra} notes 106-129 and accompanying text.


\textsuperscript{58} \textit{See supra} note 10.

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (hinting that under Title VII race may be an affirmative factor in limited instances).
States that hire management personnel on the basis of Japanese citizenship are practicing reverse national origin discrimination in violation of Title VII. 61

IV. IS ARTICLE VIII(1) A DEFENSE TO TITLE VII?

The preceding two sections establish that (1) Article VIII(1) of the Japanese Treaty may allow a Japanese branch to hire upper-level management exclusively from its own citizenry, 62 and (2) hiring exclusively on the basis of Japanese citizenship constitutes reverse national origin discrimination 63 prohibited by Title VII. 64 Thus, when a branch of a Japanese company operating in the United States asserts its Treaty
right to hire only its own nationals for upper-level management positions, there exists a direct conflict with the provisions of Title VII.

This section will examine whether the Treaty right or the proscriptions of Title VII is the controlling law in this situation. Determining which law controls will resolve the issue of whether the Treaty right granted to Japanese branches to hire only Japanese citizens for upper level management positions is a valid defense to a reverse national origin discrimination claim based on Title VII.

A. The Opinions of the Fifth and Second Circuits

When the Second Circuit considered the Sumitomo case, it determined that Article VIII(1) did not create an exemption to compliance with Title VII. Instead, the court found that Title VII is consistent with the language of the Treaty because Title VII itself contains an exemption which, "construed in the light of the [T]reaty would not preclude the company from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business." In reaching this conclusion, the Second Circuit relied on the bona fide occupational qualification (BFOQ) exemption in section 703(e) of Title VII which provides that: "[I]t shall not be an unlawful employment practice for an employer to hire and employ employees... on the basis of... national origin if it is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise..." The Second Circuit recognized that the bona fide occupational qualification exemption in Title VII is construed "narrowly in the normal context" but concluded that "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 company doing business in the United States..." Thus, the Second Circuit advocated a relaxed standard


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66. 638 F.2d 552, 558 (2d Cir. 1981).
67. Id. at 559.
68. Id.
69. Id. (quoting 42 U.S.C. § 2000e-2(e)).
70. Id.
71. For a discussion of the Second Circuit's "relaxed standard" to establish a BFOQ, see infra notes 124-126 and accompanying text.
for determining the appropriate requirements to establish a Japanese citizenship BFOQ in a Japanese company, but held that Title VII applied to Japanese companies regardless of the Treaty rights.

An entirely different result was reached by the Fifth Circuit in *Spiess v. C. Itoh & Co. (America).* Spiess was a class action suit, virtually identical to *Sumitomo,* brought against a Japanese subsidiary in which the defendant company also claimed that Article VIII(1) of the Treaty shielded it from Title VII liability. The court held that Article VIII(1) did indeed carve out a valid exception to Title VII coverage and was an adequate defense. The Court stated:

Domestic employment discrimination laws occupy a high priority on the nation's agenda, and courts often resolve statutory conflicts in their favor. In this case, however, resolving doubts in favor of Title VII would go beyond the judicial sphere of interpretation. In the absence of Congressional guidance, we decline to abrogate the American government's solemn undertaking with respect to a foreign nation.

As a result of the *Spiess* decision, branches of Japanese companies operating in the Fifth Circuit are free to discriminate in favor of their own citizens in filling positions named in Article VIII(1).

**B. Methods of Resolving the Conflict**

It is not surprising that the circuits reached different results given the flexibility of case law on the subject of reconciling treaties with federal statutes. The Constitution provides that both treaties and federal statutes are the supreme law of the land. As such, both are weighed equally. In resolving potential conflicts between treaties and federal laws, the well-established principle set forth in *Baker v. Carr* requires that the courts first attempt to reconcile the two. As early as 1888, the Supreme Court in *Whitney v. Robertson* stated that when a treaty provision and a statute relate to the same subject, "the courts will always endeavor to construct them so as to give effect to both, if that can be done without violating the language of either . . . ." If, however, a

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72. 643 F.2d 353 (5th Cir. 1981).
73. *Id.* at 362.
74. Japanese companies which are incorporated in the United States, however, cannot assert any rights under the Japanese Treaty after the Supreme Court decision in *Sumitomo.* See supra note 43 and accompanying text.
75. U.S. CONST. art. VI, cl. 2.
76. Fong Yua Ting v. United States, 149 U.S. 698, 720-21 (1893).
77. 369 U.S. 186, 194 (1962).
78. 124 U.S. 190 (1888).
79. *Id.* at 194.
treaty and a federal statute are in irreconcilable conflict, the doctrine set forth in *Fong Yua Ting v. United States* requires that "the last expression of the sovereign will" must control.\(^{80}\)

There are two potential means to resolve the conflict between Title VII and Article VIII(1). First, applying the *Baker* standard, the courts would analyze whether Title VII and Article VIII(1) can be interpreted to give effect to both without violating the language of either. Article VIII(1) and Title VII only can be read in a consistent manner if either Article VIII(1) is interpreted to allow Japanese companies to hire upper-level management "of their choice," providing they do so in a manner that does not abrogate Title VII, or Title VII is held not to apply to foreign employers, or more specifically, to situations arising under Article VIII(1).\(^{81}\) The first interpretation requires the "narrowing" of Article VIII(1); the second requires the "narrowing" of Title VII. If, however, the court finds that the narrowing violates the intent behind the one or the other, then the two laws are considered irreconcilable. Such a determination would require the courts to look to the doctrine of "the last expression of the sovereign will."\(^{82}\) Under this doctrine, Title VII would supersede any inconsistent provisions of the Japanese Treaty since Title VII was passed by Congress in 1964, eleven years after the ratification of the Treaty.

1. Narrowing Article VIII(1)

The legislative history of Article VIII(1) could be read to support the interpretation that Article VIII(1) was intended merely to override laws that restricted the employment of aliens.\(^{83}\) If this were the only purpose of Article VIII(1), then a court could circumscribe its use and scope to the parameters of Title VII. The result of this approach would be to allow Japanese employers to hire the upper management "of their choice" regardless of nationality as long as they did not discriminate in favor of their own citizens. Thus, the rights provided in Article VIII(1) would have to be read very narrowly to achieve a result consistent with Title VII. Such a reading, however, would be contrary to the true intent

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80. 149 U.S. 698, 721 (1893).
81. A third alternative would be to hold that Title VII does not prohibit citizenship discrimination. This would be contrary, however, to the Court's holding in *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), because of the discriminatory effect a Japanese citizenship requirement would have in the categories of national origin and race (see *supra* notes 42-61 and accompanying text).
82. *See supra* note 76 and accompanying text.
83. *See supra* notes 19-41 and accompanying text.
of Article VIII(1), which was to assure control of overseas investment.\textsuperscript{84} Moreover, a narrow interpretation of Article VIII(1) would offend an important principle of treaty interpretation as set forth in \textit{Askura v. City of Seattle}.\textsuperscript{85} \textit{Askura} mandates the application of a broad and liberal spirit when defining the scope of a treaty right. The rationale for the \textit{Askura} principle of a broad interpretation rests in both the reluctance of courts to formulate foreign policy indirectly and in their desire to assure treaty beneficiaries of their full rights.\textsuperscript{86} Despite \textit{Askura}, the Second Circuit essentially adopted the approach of narrowing the meaning of Article VIII(1),\textsuperscript{87} although it added that the statutory exception to Title VII (the BFOQ) should be applied to a Japanese citizenship "requirement" with a lower level of scrutiny in deference to the intent of the Treaty.\textsuperscript{88}

2. Narrowing Title VII

The second method of reconciling Title VII with Article VIII(1) is narrowing the scope of Title VII. This could be done by interpreting Title VII as either not applicable to foreign employers, or as inapplicable to situations arising under Article VIII(1). There is nothing in the legislative history of Title VII to support the contention that Title VII does not apply equally to foreign and domestic employers in the United States.\textsuperscript{89} Indeed, a court would be adopting a counter-intuitive interpre-

\textsuperscript{84} Id.
\textsuperscript{85} 265 U.S. 332 (1923).
\textsuperscript{86} Id.
\textsuperscript{87} Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 559 (2d Cir. 1981); see also infra notes 106-129 and accompanying text.
\textsuperscript{88} See infra notes 124-126 and accompanying text. The only other court to decide the issue of whether an article similar to Article VIII(1) of the Japanese Treaty creates an exemption or defense to Title VII was the Eastern Federal District Court of New York (also in the Second Circuit) in the case of Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979). The court held in \textit{Linskey} that the provision in the Treaty of Friendship, Commerce, and Navigation, Oct. 1, 1951, United States—Denmark, 12 U.S.T 908, T.I.A.S. No. 4797, which corresponds to Article VIII(1) of the Japanese Treaty, did not exempt a Danish corporation from compliance with Title VII. The court found the legislative history of the provision focused primarily on relaxing visa requirements for the host country's nationals and therefore was inadequate to serve as a shield to Title VII. \textit{Linskey}, 420 F. Supp. at 1186. The court stated that Article VII(4) (which corresponds with Article VIII(1) in the Japanese Treaty), "was not intended to immunize foreigners from claims under the host country's employment discrimination laws." \textit{Id.} In addition the court stated that "[a] different ruling would provide an unjustified loophole with wide ranging effects for the enforcement of Title VII." \textit{Id.} at 1187.

\textsuperscript{89} The legislation does not refer to international matters in any way except in 42 U.S.C. § 2000e-1 (1976), which provides that the Act "shall not apply to an employer with respect to the employment of aliens outside any State . . . ." This clause appears to address the prevention of extraterritorial application of the Act regarding persons not within the jurisdiction of the United States.
tation of Title VII if it held that because the statute does not refer explicitly to foreign employers, they are exempt from its provisions. Clearly, Title VII is comprehensive in that it applies to all employers equally unless otherwise indicated.

There is support, however, for the position that Title VII does not apply specifically to Article VIII(1). For instance, in *Morton v. Mancari*\(^90\) the Supreme Court held that the Equal Employment Opportunity Act of 1972\(^91\) did not nullify preferential hiring of American Indians in certain circumstances under Section 12 of the Indian Reorganization Act of 1934\(^92\) even though the Equal Employment Opportunity Act was enacted later in time. In reaching its conclusion, the Court applied the general principle that a specific statute should not be deemed overruled by a subsequent general statute on the same subject.\(^93\) Using this rationale, a court could find that the more specific Article VIII(1) is not overruled by the more general Title VII.

*Morton* is easily distinguished from the case of Japanese employers, however, because in *Morton* the Court was able to cite ample support for allowing Section 12 of the Indian Act to carve out an exception to the Equal Employment Opportunity Act. First, the Court noted that the Equal Employment Opportunity Act was based on Title VII, which specifically exempts preferential employment of American Indians on or near Indian reservations.\(^94\) Second, Congress has had a longstanding federal policy of affording Indians preferential hiring treatment.\(^95\) There is no such analogous support for allowing Article VIII(1) of the Japanese Treaty to carve out a similar exception to Title VII.\(^96\)

In *Spiess*,\(^97\) the Fifth Circuit supported its finding that Congress in-

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93. 417 U.S. at 550-551.
94. Title VII excludes "an Indian Tribe" from its definition of "employer," providing in relevant part that:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

95. Justice Blackmun, in *Morton*, stated that prior to the 1972 Act, which forbids employment discrimination within the federal government, Executive Orders made an exception for Indian preferences within the Bureau. Moreover, the Justice noted that three months after the enactment of the 1974 Act, Congress passed two additional Indian preference laws. 417 U.S. at 548-49.
96. See supra note 89.
97. 643 F.2d 353 (5th Cir. 1981). See supra notes 72-74 and accompanying text.
tended Article VIII(1) to be an exception to Title VII by pointing out that there is no mention of Article VIII(1) in the congressional record pertaining to the enactment of Title VII. The court reasoned that the Treaty right should not be modified because "[n]o evidence suggests that Congress intended to repudiate Article VIII(1) when it enacted Title VII." If something concrete could be gleaned from the congressional silence on Article VIII(1) and similar provisions granted in similar treaties during the enactment of Title VII, the Fifth Circuit's decision might have the implicit support of congressional intent. The inference, however, that congressional silence is tacit approval for using Article VIII(1) to abrogate Title VII seems counter-intuitive. Further analysis of the implications of congressional silence is required in attempting to resolve the conflict.

C. The Meaning of Congressional Silence

There are three possible explanations for the lack of any congressional record regarding Article VIII(1) during the enactment of Title VII. First, and least likely, Congress may not have mentioned Article VIII(1) because it intended the Treaty to grant preferential status to foreign employers, thereby allowing for some limited reverse discrimination despite Title VII. This scenario, which essentially is advocated by the Spiess court, is implausible. Had Congress made a conscious decision to create exceptions to Title VII, such a decision certainly would have been mentioned in the congressional hearings. The analysis of the Spiess court is therefore unsatisfactory.

Second, in 1964 Congress may have interpreted Article VIII(1) so narrowly that it was not perceived as a potential tool for reverse discrimination. Thus, there would have been no need to discuss Article VIII(1) because under such a narrow interpretation, it could not violate Title VII. Under this view, the Spiess court's interpretation of congressional silence would be an erroneous and inaccurate representation of congressional perception.

Third, and perhaps most likely, Article VIII(1) may not have been considered by Congress at all during the enactment of Title VII. If Congress failed to recognize the potential use of Article VIII(1) for reverse discrimination, then the courts must decide what Congress would have done had it been aware of this potential.

98. 643 F.2d at 362.
99. Id. Note that the court in Spiess correctly characterized Article VIII(1) as an absolute right that afforded preferential treatment. Id. at 360.
The courts' interpretation of congressional silence on Article VIII(1) during the enactment of Title VII is central to resolving the conflict of laws between Article VIII(1) and Title VII. As demonstrated above, however, the task of interpreting Congress' silence is a difficult one. In fact, it may have been the uncertainty created by this silence that led the Supreme Court in Sumitomo to avoid the question completely. The Court, instead of addressing congressional silence, disposed of the case on the narrow issue of standing.100

D. Decision According to Precedent

In accordance with the principles discussed above, if the courts interpret Article VIII(1) narrowly, a position only partially supported by the Article's legislative history,101 they could reconcile Article VIII(1) with Title VII in accordance with Baker102 and Whitney.103 If, however, the courts define Article VIII(1) broadly, as mandated by Askura,104 they would then be faced with an irreconcilable conflict between Article VIII(1) and Title VII.

Another way to resolve the conflict would be to allow Article VIII(1) to carve out an exception to Title VII. This approach is unacceptable, however, because there is absolutely no indication that Congress would support such action.

Congressional silence on Article VIII(1) during the enactment of Title VII indicates that in 1964 Congress did not see the potential use of Article VIII(1) for reverse discrimination. If this is the case, the courts simply must acknowledge that Article VIII(1) grants rights that are in irreconcilable conflict with the restraints of Title VII. As "the last expression of the sovereign will,"105 Title VII would render Article VIII(1)

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100. 457 U.S. 176 (1982). The language of the Court's opinion in Sumitomo gives mixed signals as to whether Article VIII(1) might exempt Japanese branches from Title VII liability. After rejecting the Second Circuit's argument of a "crazy-quilt pattern" that would emerge if branches and subsidiaries are not treated equally, the Court states that "[t]he only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)." Id.; see Sumitomo, 638 F.2d 552, 556 (2d Cir. 1981). The use of the word "may" is ambiguous. That Article VIII(1) applies to Japanese branches is clear, but whether it will yield any significant advantage if Title VII is held to be violated by branches remains unresolved even in this dicta. Clearly, the Court could have chosen a grammatical construction such as "[t]he only significant advantage branches would have over subsidiaries ..." if it cared to shed some light on the issue.

101. See supra notes 19-41 and accompanying text; see supra text accompanying notes 83-84.


103. 124 U.S. 190 (1888).

104. 265 U.S. 332 (1923).

105. Fong Yua Ting v. United States, 149 U.S. 698, 721 (1893).
ineffective as a defense to an action based on Title VII to the extent that Article VIII(1) or its applications are inconsistent with Title VII. In short, Title VII would be the controlling law.

If Title VII is the controlling law, courts may still choose to incorporate the Second Circuit's suggestion to review Japanese citizenship as a BFOQ for upper-level management with a more lenient standard than that applied to other types of BFOQ's, thereby giving some deference to the rights granted in the Treaty. Regardless of the standard applied, the BFOQ exemption may become a last resort of branches of Japanese companies operating in the United States if Title VII is deemed controlling over Article VIII(1). Finally, because Japanese companies incorporated in the United States no longer have standing to assert rights under the Japanese Treaty, the BFOQ exemption to Title VII also may represent their last defense to employment discrimination claims.

V. THE JAPANESE EMPLOYER'S BFOQ DEFENSE TO TITLE VII

One exception to Title VII's prohibition on employment discrimination based on race, color, religion, sex, or national origin is the "bona fide occupational qualification" (BFOQ). To establish a valid BFOQ, the qualification must be "reasonably necessary to the normal operation of that particular business or enterprise." The Equal Employment Opportunity Commission (EEOC) and the federal courts, both empowered to interpret Title VII, have declared that the BFOQ exemption is "meant to be an extremely narrow exception to the general prohibition of


This note will not discuss the "business necessity" defense which is a judicially created exemption to Title VII designed to serve the same purpose as the BFOQ. The "business necessity" defense is only applicable when the plaintiff's cause of action is based on the disparate impact theory, whereas the BFOQ defense is only applicable where the cause of action is based on disparate treatment. Thus, because Japanese citizenship is technically a neutral guideline that has an impermissible disparate impact on applicants not of Japanese national origin, business necessity would technically be the appropriate defense. The test to establish the "business necessity" defense is essentially identical to only the first prong of the case law BFOQ test (see infra note 120 and accompanying text) and is thus incorporated within it. Accordingly, this Note will focus on the more complex BFOQ test. For a full discussion of applicability of the "business necessity" defense, see Lewis & Ottley, supra note 14, at 89-91.


108. The EEOC is the principal mechanism through which Title VII is enforced. See 42 U.S.C. §§ 2000e-1-2000e-6 (1976). A five-member Presidentially appointed commission is responsible for receiving employment discrimination complaints, investigating them, and attempting to eliminate unlawful practices informally, or, in the alternative, authorizing the
discrimination."\(^{109}\)

In *Sumitomo*, the Supreme Court stated, "We express no view as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions at Sumitomo..."\(^ {110}\) Indeed, this issue was not properly before the Court.\(^ {111}\) This section briefly examines the extent to which Japanese citizenship could be a BFOQ for a Japanese company operating in the United States.

In dictum, the *Sumitomo* Court stated, "[t]here can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country."\(^ {112}\) Respondents conceded this exact point in their brief, but argued that persons who are not of Japanese origin or Japanese citizenship could also meet these requirements.\(^ {113}\)

### A. Permissible Criteria

It is difficult to ascertain the precise boundaries of the BFOQ exemption as it applies to Japanese employers in the United States.\(^ {114}\) No aggrieved party to bring civil suit in federal court. The EEOC also is empowered to bring suit on behalf of the plaintiffs and to issue regulations and guidelines interpreting Title VII.


111. *Id.* at 190.

112. *Id.*


114. Because top management of a Japanese branch virtually qualify automatically under the BFOQ and business necessity exemptions, and all the lower positions not named in Article VIII(1) of the Treaty are automatically subject to Title VII, the margin of people left to assert a Title VII claim are all those wishing to gain positions named in the Treaty excluding top management. The size of this class, however, is significant, given the large presence and rate of growth of Japanese companies operating in the United States. *See supra* note 1 and *infra* notes 134-136. The size of this class is increased in the case of Japanese companies because there is a relatively large number of people that could qualify as "executive personnel" and "agents" under Article VIII(1) in Japanese style of management. For instance, "...Japanese companies' use of their own nationals is not confined to higher echelons as with most other foreign multinational corporations, but permeates middle and junior management levels as well." Sethi & Swanson, *Problem for Foreign Companies: Compliance with U.S. Discrimination Laws*, 68 MGMT. REV. 32 (1979). This is because Japanese companies have a unique style of management that emphasizes the integration of different levels of management. The integrated system of management which extends personal ties down to labor personnel is a key component in a complex decision-making process characteristic of Japanese companies. Thus, the hiring of their own citizens allows the Japanese parent company better to "exercise parental control and to introduce their own way of doing business into their U.S. affiliates." *Id.*
reported decisions directly deal with a BFOQ exemption that allows discrimination on the basis of national origin or citizenship. The legislative history of Title VII reveals through two isolated remarks an intent, in certain limited instances, to allow for a BFOQ based on national origin. Both remarks pertain to a hypothetical example in which it would be permissible for a French or Italian restaurant to require a French or Italian Chef in order to attract customers. The EEOC and the courts, however, have construed the BFOQ narrowly and have not permitted employment discrimination based on the preferences of employers, clients or customers. Thus, a requirement that, for example, the chef in a French restaurant actually be a French national to satisfy customers is now questionable in light of these pronouncements.

1. The Two-Pronged Test

Most cases dealing with the BFOQ exemption have involved sex discrimination. A number of lower courts have developed a two-pronged test to evaluate the legality of gender based BFOQ's. Under this test the defendant must prove: (1) The BFOQ is necessary to the essence of its business (business necessity); and (2) There is reasonable cause to believe that substantially all those outside the BFOQ (usually women) would be unable to perform the job efficiently.

If the courts apply the gender based BFOQ test to reverse national origin discrimination among Japanese employers, the questions presented would be entirely factual. The second prong of the test would probably be satisfied in most instances. Given the unique style of management of Japanese multinational corporations and the fact that style is rooted in Japanese culture, a Japanese employer could with little difficulty establish that "substantially all" applicants who are not Japanese citizens of Japanese origin "would be unable to perform the job efficiently." The ease with which a Japanese employer could meet the second prong, however, necessarily depends on the level of familiarity with Japanese cul-

116. Id.
117. See supra note 108 and accompanying text.
119. See generally Lewis & Ottley, supra note 14, at 76-80.
120. See Usery 20 v. Tamiami Trail Tours, 531 F.2d 224, 235-36, (5th Cir. 1976), cert. denied, 429 U.S. 976 (1976).
121. See supra note 114.
122. 531 F.2d at 224.
ture, business, and the parent company required by the specific job in question.

The larger factual problem lies in the first prong of the test, which requires that the BFOQ be necessary to the essence of the business. Again, the unique management style of Japanese multinationals is an important factor because it makes it unclear whether Japanese citizenship or national origin is a business necessity as distinguished from a mere business convenience.

2. The Second Circuit Formula

In an effort to accommodate Japanese companies operating in the United States, the Second Circuit in *Sumitomo* ignored the strict test for establishing a gender based BFOQ. Rather, the Court constructed a specific, broader BFOQ test for Japanese companies. This test consisted of four requirements:

1. Knowledge of the Japanese language and culture;
2. Familiarity with Japanese products, markets, business practices, and customs;
3. Acquaintance with the staff and functioning of the Japanese parent enterprise; and
4. Acceptability to the customers or clients of the company or branch.

Although the Supreme Court did not comment on the Second Circuit's new test, the "customer preference" requirement represents a significant departure from established case law regarding BFOQ's. The EEOC's

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123. Japanese citizenship and national origin are grouped together here, albeit loosely, because Japanese companies that would discriminate in favor of Japanese citizens also would choose Japanese citizens that are a part of Japanese culture. Japanese citizenship is preferred so that the parent company freely may transfer its employees to different branches and subsequently bring them home to Japan permanently. Japanese national origin is preferred to ensure cultural understanding.

124. 638 F.2d 552, 559 (2d Cir. 1981).

125. *Id.* At the time of the Second Circuit's decision in *Sumitomo*, the court assumed that all Japanese companies operating in the United States, including those that were locally incorporated, could assert rights under the Japanese Treaty. The Supreme Court's subsequent holding that only branches of Japanese companies that are not locally incorporated may assert the rights provided by Article VIII(1) of the treaty does not affect the Second Circuit's findings regarding the BFOQ exception for Japanese employers running branch operations. However, because the Second Circuit adopted a customized test for determining if a BFOQ exists for Japanese companies in order to give deference to Treaty rights, it can now be argued that Japanese companies that are incorporated locally within the Second Circuit cannot take advantage of this test, as there is no longer any need to give deference to Treaty rights which these companies do not have.

amicus curiae brief to the Supreme Court disapproved of the customer preference factor. It argued that subjective criteria such as customer or employer preference consistently have been rejected by the courts. Moreover, the EEOC maintained that all of the remaining requirements could be satisfied by persons not of Japanese origin. Indeed, to argue that “familiarity with language, culture, customs, and business practices” is unique to citizenship is to advance the very stereotyping Title VII condemns.

3. Current State of the Law

Future lawsuits brought under Title VII against Japanese employers...
will require the courts to determine the actual job requirements for various management positions in Japanese companies. Currently, the weight of legal authority mandates application of the standard two-pronged test for determining whether the BFOQ exemption is applicable in a given case. The courts, however, should be careful to consider not only the conventional skills required to perform management jobs in a Japanese company, but also the applicant's understanding of a unique and culturally based system of management. If both of these criteria are satisfied, the parent company's legitimate right under the Japanese Treaty to maintain control of its overseas operation should not be impaired.

VI. IMPLICATIONS

Currently, the circuits are split on the question of whether Title VII applies to positions named in Article VIII(1) for branches of Japanese companies operating in the United States.\textsuperscript{130} Judicial or congressional extension of the scope of Title VII to include Japanese branches in the United States would have enormous repercussions. The United States is party to more than two dozen treaties that are substantially similar to the Japanese Treaty.\textsuperscript{131} These treaties contain similar, identical, or in some cases broader, rights than those provided by Article VIII(1). Although the Supreme Court in \textit{Sumitomo} stated that, because of the possibility of different negotiating histories, each case must be decided on an individual basis,\textsuperscript{132} any decision on the issue of the relationship of Title VII to Japanese foreign branches' employment rights will carry great weight in subsequent interpretations of other treaties that conflict with Title VII.

A. Restructuring to Avoid Title VII

Direct foreign investments in the United States are approaching one trillion dollars\textsuperscript{133} and have created an estimated 2.5 million American jobs.\textsuperscript{134} Japanese direct investment in the United States amounted to almost fifteen billion dollars by the end of 1984,\textsuperscript{135} and continued investment is expected. In 1979, when Japanese direct investment was only nine billion dollars,\textsuperscript{136} Japanese-owned enterprises in the United States

\begin{itemize}
  \item \textsuperscript{130} See \textit{supra} notes 66-74 and accompanying text.
  \item \textsuperscript{131} For a partial list, see 1 I.L.M. 92 (1962).
  \item \textsuperscript{132} 457 U.S. 176, 185 n.12 (1982).
  \item \textsuperscript{133} N.Y. Times, Dec. 30, 1985, at A14, col.1.
  \item \textsuperscript{134} \textit{Id}.
  \item \textsuperscript{135} N.Y. Times, Dec. 29, 1985, at A18, col. 6.
  \item \textsuperscript{136} Coupe & Baier, \textit{Do International Treaties Justify Job Discrimination?}, Legal Times of Washington, Jan. 11, 1982, at 20.
\end{itemize}
employed 81,300 Americans. The number of Americans employed by Japanese companies probably has almost doubled with the corresponding increase in investment.

One possible repercussion of the Sumitomo decision is that locally incorporated Japanese subsidiaries now might choose to reorganize as Japanese branch operations. By giving up their local incorporation status they could avoid the immediate effect of the Supreme Court's holding in Sumitomo, which strips them of any Treaty rights and holds them to Title VII standards. As the Second Circuit's opinion in Sumitomo illustrates, however, Japanese branches that may assert Article VIII(1) rights still face potential Title VII liability. Moreover, although in the Fifth Circuit, Article VIII(1) is a complete defense to Title VII, locally incorporated Japanese companies in that Circuit, and in all other circuits except the Second Circuit, may determine reorganization is too great a sacrifice. For instance, one advantage of operating as a locally incorporated subsidiary rather than a foreign branch is that the liability of a subsidiary is limited to the subsidiary's assets. In the case of a branch operation, the assets of the parent company may be used to satisfy debts.

Other advantages include favorable tax treatment and possible market prestige.

B. Discouragement of Investment

Applying Title VII to Japanese branches may discourage foreign investment because parent companies may no longer perceive themselves as having control over foreign operations. Because foreign investment provides many jobs for American citizens, withdrawal by foreign companies from the United States could depress the United States economy significantly.

The United States offers so many of the advantages multinationals seek in their overseas investment, such as security and profitability, that any widespread divestiture by foreign companies over Title VII restraints is unlikely. Nonetheless, the United States must take into consideration the threat to stability in both the political and economic spheres when

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139. See supra note 73 and accompanying text.
140. Considerations regarding whether to operate through a branch or a foreign subsidiary appear in W. Streng, INTERNATIONAL BUSINESS TRANSACTIONS TAX AND LEGAL HANDBOOK, § 10.03 (1978).
141. Id.
142. Id.
unilateral restriction of a commercial treaty right is sought. Moreover, because treaties operate reciprocally, United States companies abroad similarly may be required to conform to the local hiring laws in the foreign countries in which they operate.

C. Legal Ramifications

Finally, the legal implications of the refusal to exempt Japanese branches from Title VII are unclear. On the one hand, if branches are held exempt from Title VII because of Article VIII(1), arguably they would also be insulated from other United States employment laws such as the Fair Labor Standards Act,\footnote{143} the Labor Management Relations Act,\footnote{144} and the contract compliance program.\footnote{145} Moreover, foreign branches would be completely free to discriminate unfairly among their own nationals.\footnote{146} On the other hand, to hold Japanese companies fully accountable to other federal labor and discrimination laws may unnecessarily abrogate additional Treaty rights. Conflicts between the Treaty and other federal labor laws would not be resolved as easily as the conflict between Title VII and Article VIII(1) where, for example, there is no BFOQ exemption to serve as a compromise.

VII. CONCLUSION

The Supreme Court in \textit{Sumitomo} stripped Sumitomo Shoji American, Inc., of any protection under the Japanese Treaty by holding that, as a locally incorporated subsidiary, it had no standing to assert Treaty rights. However, the Court neither decided, nor indicated in dicta, whether privileges granted in Article VIII(1) of the Treaty provide an effective defense to a Title VII action against a Japanese branch operation. Currently the Second and Fifth Circuits have reached opposite conclusions on whether Japanese branches must comply with Title VII when hiring for upper-level management positions. The Fifth Circuit in \textit{Spiess}\footnote{147} held that Article VIII(1) carves out a specific exception to general Title VII coverage. The Second Circuit read the two laws congruently, holding that Title VII does apply to Japanese branches. However,

\begin{itemize}
  \item \footnote{143} 29 U.S.C. § 201 et seq.
  \item \footnote{144} 29 U.S.C. § 141 et seq.
  \item \footnote{145} Muskee & Dupee, \textit{Policy Conflicts in Treaties, Job Bias Law Emerges}, Legal Times of Washington, Nov. 23, 1981.
  \item \footnote{147} Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353 (5th Cir. 1981).
\end{itemize}
the Court softened the impact of its holding by stating that the statutory exemption to Title VII (the BFOQ) should be applied to Japanese branches with a lower level of scrutiny, thus giving deference to the rights provided in the Treaty.

It is evident that a conflict exists between the rights granted in the Japanese Treaty and the prohibitions against discrimination embodied in Title VII. Article VIII(1) allows Japanese companies to choose upper-level management employees “of their choice,” regardless of nationality, for their overseas operations in the United States. The “of their choice” language is an unconditional right as evidenced by the language of the Treaty and its legislative and negotiating history. Title VII, however, prohibits hiring criteria, such as a Japanese citizenship requirement for upper-level management, that have any discriminatory impact on a particular national origin. Because Japan’s citizenry is almost entirely of Japanese national origin, a Japanese citizenship requirement excludes those not of Japanese ancestry from upper-level management positions. It is clear that Title VII does not permit reverse discrimination except when it is used to correct past discriminatory behavior. Because a Japanese citizenship requirement has a discriminatory effect on all applicants not of Japanese national origin, it violates Title VII.

When a treaty and a federal law conflict, the courts must first attempt to read them in a complementary fashion so that both are respected without abrogating one or the other. Consistency between Title VII and Article VIII(1) cannot be achieved without questionable restriction of either the authority of Title VII or the intended scope of Article VIII(1). Because neither of these two alternatives honors the intent of the drafters of the Treaty or Title VII, resolution by the courts is difficult. According to case law, because federal laws and treaties are equal in weight, those which come later in time must be deemed controlling as the last expression of the sovereign will. Under this principle, Title VII will be the controlling law for Japanese branches operating in the United States to the extent that Article VIII(1) is inconsistent with it.

In defending Title VII actions, Japanese branch operations, as well as locally incorporated Japanese companies, may be able to argue successfully that Japanese citizenship is a BFOQ for working in upper-level management. There is little doubt that a Japanese citizenship requirement for top executive personnel of a Japanese affiliate will meet the strict test for establishing a BFOQ exemption to Title VII. However, for the remaining management positions listed in Article VIII(1), a Japanese citizenship requirement may not be a BFOQ, and therefore may violate Title VII. To soften the impact of such a finding, courts may relax
BFOQ requirements for the remaining named positions in Article VIII(1). This was the Second Circuit's approach to effectuate a compromise between the Treaty rights and Title VII restraints.

The argument that BFOQ requirements should be relaxed to accommodate the cultural biases of a foreign employer should be rejected. It is appropriate, however, to consider an applicant's understanding of Japanese sociocultural characteristics and the unique Japanese system of business management in attempting to define BFOQ's for a Japanese branch.

The resolution of both present and future conflicts between Article VIII(1) and United States civil rights and labor laws breaks down to a balancing of policies. The goals of encouraging and accommodating foreign investment through Treaty privileges and enjoying reciprocal rights for United States companies abroad must be balanced against the commitment of the United States to civil rights and fair labor standards. Although justiciable, the question is highly political in nature. Thus, perhaps the Supreme Court correctly declined to decide the issue in *Sumitomo* in the hope that Congress would debate and decide the issue in the near future in what might be a more appropriate forum.

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148. See supra note 129.