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Title VII and the FCN Treaty: The Exemption of Japanese Branch Operations from Employment Discrimination Laws

I. INTRODUCTION

The United States and Japan concluded the Treaty of Friendship, Commerce and Navigation,¹ (FCN Treaty) to regulate the day-to-day relationship between private parties within the two countries.² In general, the FCN Treaty permits citizens and companies of either country to conduct business within the other country just as that country's own citizens and companies could.³ Companies of either party are permitted to engage in a wide variety of enterprises on a reciprocal basis and to organize those enterprises as either branches or subsidiaries.⁴ The FCN Treaty thus grants Japanese companies broad rights when operating within the United States.

1. Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Japanese FCN Treaty].

2. Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 805 (1958). The United States has concluded Friendship, Commerce, and Navigation (FCN) Treaties of a similar type with the following countries: Kingdom of Belgium, Feb. 1, 1961, 14 U.S.T. 1284, T.I.A.S. No. 5432; China, 63 Stat. (2) 1299, T.I.A.S. No. 1871; Denmark, Oct. 1, 1951, 12 U.S.T. 908, T.I.A.S. No. 4797; Ethiopia, Sept. 7, 1951, 4 U.S.T. 2134, T.I.A.S. No. 2864; France, Nov. 25, 1959, 11 U.S.T. 2398, T.I.A.S. No. 4625; Federal Republic of Germany, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593; Greece, Aug. 3, 1951, 5 U.S.T. 1829, T.I.A.S. No. 3057; Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853; Ireland, Jan. 21, 1950, 1 U.S.T. 785, T.I.A.S. No. 2155; Israel, Aug. 23, 1951, 5 U.S.T. 550, T.I.A.S. No. 2948; Italy, Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965; Republic of Korea, Mar. 13, 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947; Luxembourg, Feb. 23, 1962, 14 U.S.T. 251, T.I.A.S. No. 5306; Muscat and Oman, Dec. 20, 1958, 11 U.S.T. 1835, T.I.A.S. No. 4530; Netherlands, Mar. 27, 1956, 8 U.S.T. 2043, T.I.A.S. No. 3942; Nicaragua, Jan. 21, 1956, 9 U.S.T. 449, T.I.A.S. No. 4024; Pakistan, Nov. 12, 1959, 12 U.S.T. 110, T.I.A.S. No. 4683; Republic of Viet Nam, Apr. 3, 1961, 12 U.S.T. 1703, T.I.A.S. No. 4890; Kingdom of Thailand, May 29, 1966, 19 U.S.T. 5843, T.I.A.S. No. 6540.

The volume of U.S. trade with Japan has greatly increased in recent years. Total foreign direct investment in the United States has increased at an annual percentage rate of 27% over the last four years and reached a high in 1981 of \$89.7 billion. Of this amount, Japanese investment totaled almost \$6.9 billion, while the annual increase in such investments has accrued at a rate of 41%. *Foreign Investment in the U.S. is Growing Sharply with Some Funding Shifts*, 29 BUS. INT'L 305, 309 (1982).

3. Walker, *Provisions on Companies in United States Treaties*, 50 AM J. INT'L L. 373, 385 (1956).

4. Japanese FCN Treaty, *supra* note 1, art. VII, 4 U.S.T. 2063, 2069, T.I.A.S. No. 2863. Article VII provides in part that

[n]ationals and companies of either Party . . . [are permitted] to engag[e] in all types of commercial, industrial, financial and other business activities within the territories of the other Party . . . to establish and maintain branches, agencies, offices, factories and other establishments . . . to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and to control and manage enterprises which they have established or acquired.

Id.

This treaty also affords Japanese companies great latitude when making hiring decisions.⁵ Article VIII(1) of the FCN 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."⁶ Based solely on this provision, companies of Japan operating within the United States might be permitted to hire only Japanese persons to fill such positions;⁷ however, Title VII of the Civil Rights Act of 1964⁸ restricts the freedom of an employer to hire whomever he chooses.⁹ Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin."¹⁰ Thus, employers within the scope of the Act¹¹ are prohibited from making employment decisions "of their choice" if those decisions are made on the basis of national origin.¹² The conflict between Article VIII(1) of the FCN Treaty and Title VII arises when "companies of Japan" are also employers within the scope of Title VII and make the hiring decisions permitted by Article VIII(1) on the basis of national origin. In such a situation, the Japanese company operates within the provision of the FCN Treaty, but may at the same time be violating Title VII.

5. Walker, *supra* note 3, at 386. Numerous provisions of the Japanese FCN Treaty regulate other rights of Japanese companies operating in the United States. See, e.g., Japanese FCN Treaty, *supra* note 1, art. II, 4 U.S.T. 2063, 2067 (freedom from unlawful molestation); art. IV, *id.* at 2067 (access to courts); art. VI, *id.* at 2068 (protection of property); art. IX, *id.* at 2071 (ability to lease property); art. X, *id.* at 2071 (freedom to obtain patents and trademarks).

6. *Id.* at 2070 (emphasis added). Many of the modern FCN Treaties concluded since 1946 include provisions similar to Article VIII(1) of the Japanese FCN Treaty. See, e.g., the following treaties, *supra* note 2: Ethiopia, art. VIII(5), 4 U.S.T. 2134, 2141-42, T.I.A.S. No. 2864; Denmark, art. VII(4), 12 U.S.T. 908, 915-16, T.I.A.S. No. 4797; France, art. VI(1), 11 U.S.T. 2398, 2405, T.I.A.S. No. 4625; Federal Republic of Germany, art. VIII(1), 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593; Greece, art. XII(4), 5 U.S.T. 1829, 1857-59, T.I.A.S. No. 3057; Iran, art. IV(4), 8 U.S.T. 899, 903-04, T.I.A.S. No. 3853; Israel, art. VIII(1), 5 U.S.T. 550, 557, T.I.A.S. No. 2948; Republic of Korea, art. VIII(1), 8 U.S.T. 2217, 2223, T.I.A.S. No. 3947; Luxembourg, art. VIII(1), 14 U.S.T. 251, 257, T.I.A.S. No. 5306; Muscat and Oman, art. V(3), 11 U.S.T. 1835, 1838, T.I.A.S. No. 4530; Netherlands, art. VIII(1), 8 U.S.T. 2043, 2053, T.I.A.S. No. 3942; Nicaragua, art. VIII(1), 9 U.S.T. 449, 454-55, T.I.A.S. No. 4024; Republic of Viet Nam, art. V(2), 12 U.S.T. 1703, 1708, T.I.A.S. No. 4890; Kingdom of Thailand, art. IV(6), 19 U.S.T. 5843, 5849, T.I.A.S. No. 6540.

7. Spiess v. C. Itoh & Co. (America), 643 F.2d 353, 363 (5th Cir. 1981).

8. 42 U.S.C. §§ 2000e-2000e-17 (1976) (Title VII). Title VII defines employer as any "person engaged in an industry affecting commerce who has fifteen or more employees. . . ." 42 U.S.C. § 2000e(b) (1976). An "industry affecting commerce" is defined by Title VII to include those industries or activities which are subject to the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffith Act), Pub. L. No. 86-257, § 3, 73 Stat. 520, 29 U.S.C. § 402(c) (1976). 42 U.S.C. § 2000e(h) (1976). In turn, foreign employers have previously been held to be subject to the provisions of the Landrum-Griffith Act. See, e.g., The Royal Bank of Canada (San Juan Branch), 67 N.L.R.B. 403, 418 (1946) (U.S. branch of foreign bank subject to the constraints of the Act).

9. 42 U.S.C. § 2000e-2 (1976).

10. *Id.*

11. 42 U.S.C. § 2000e(b) (1976).

12. 42 U.S.C. § 2000e-2 (1976). The Act does, however, allow certain discriminatory hiring practices if there is a bona fide occupational qualification which requires the practice. *Id.*

The Supreme Court recently confronted such a conflict in *Sumitomo Shoji America, Inc. v. Avagliano*.¹³ Several American women and one Japanese woman brought suit against their employer, Sumitomo Shoji America, Inc., a U.S. incorporated, wholly owned subsidiary of a Japanese corporation.¹⁴ The plaintiffs charged that Sumitomo's practice of hiring only male Japanese citizens to fill certain executive positions violated Title VII of the Civil Rights Act of 1964.¹⁵ In a unanimous decision, the Court held that since Sumitomo was incorporated in the United States, it was not a "company of Japan"¹⁶ for purposes of invoking the FCN Treaty.¹⁷ As an U.S. corporation, the Japanese subsidiary was subject to all the hiring constraints Title VII imposes on U.S. corporations.¹⁸ The Court did not specifically address the issue of whether a conflict exists between Article VIII(1) and Title VII.¹⁹ The Supreme Court did suggest, however, that branches of Japanese corporations, unlike subsidiaries, may be afforded the shield of Article VIII(1) of the FCN Treaty as protection against charges of hiring discrimination.²⁰

This Note examines the conflict between the hiring restraints imposed by Title VII in the United States and the FCN Treaty's hiring provisions. An examination of case law and the purposes behind Title VII and Article VIII(1) of the FCN Treaty suggest methods which may resolve this conflict. An analysis of the *Sumitomo* decision and other related cases illustrates that while the question of which entities have standing to invoke Article VIII(1) is well-settled, exactly what rights this treaty provision affords those entities remains unresolved. The language of Article VIII(1), as well as its negotiating and legislative history, indicate that, at a minimum, Japanese companies operating in the United States are permitted to make hiring decisions based upon the citizenship of the applicant; such hiring may in fact constitute national origin discrimination. Despite such discrimination, Title VII cannot be read to abrogate the rights granted by Article VIII(1). Article VIII(1), therefore, serves as a shield against Title VII claims for the Japanese company operating in the United States.

13. 457 U.S. 176 (1982).

14. *Sumitomo*, 457 U.S. at 178.

15. *Id.*

16. Article XXII(3) of the Japanese FCN Treaty defines the term "company" as follows:

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 have their juridical status recognized within the territories of the other Party.

4 U.S.T. 2063, 2079-80, T.I.A.S. No. 2863.

17. *Sumitomo*, 457 U.S. at 189.

18. *Id.*

19. *Id.*

20. *Id.*

II. THE *Sumitomo* DECISION

A. *The District Court Opinion*

In *Avighano v. Sumitomo Shoji America, Inc.*,²¹ the plaintiffs alleged employment discrimination on the basis of sex and national origin, in contravention of Title VII of the Civil Rights Acts of 1964,²² and 1866.²³ The defendant, though organized under the laws of New York, is a wholly owned subsidiary of the Japanese company Sumitomo Shoji Kabushiki Kaishai.²⁴ The subsidiary asserted that it was a Japanese company, and that Article VIII(1) of the FCN Treaty allows such companies complete freedom to make hiring decisions, thus providing an exemption from the requirements of Title VII.²⁵ The U.S. District Court for the Southern District of New York dismissed the Section 1981 claim²⁶ and examined the issue of whether a wholly owned subsidiary of a Japanese corporation can invoke the terms of the FCN Treaty and thus insulate itself from Title VII constraints.²⁷

The defendant in the *Sumitomo* case relied upon Article VIII(1) of the FCN Treaty to justify its hiring practices. Before *Sumitomo* could invoke the shield of Article VIII(1), however, the company had to prove that it was a Japanese company operating in the United States.²⁸ Article XXII(3) requires that companies be established under Japanese laws to be considered a Japanese company for treaty purposes.²⁹

Sumitomo based its claim of being a "company of Japan" on two major

21. 473 F. Supp. 506 (S.D.N.Y. 1979); *aff'd on other grounds* 638 F.2d 552 (2d Cir. 1981), *vacated and remanded* 457 U.S. 176 (1982).

22. 42 U.S.C. §§ 2000(e)-2000e-17 (1976).

23. 42 U.S.C. § 1981 (1976).

24. The parent corporation is a general trading company or *sogo shosha*. *Sumitomo*, 457 U.S. at 178. The function of the general trading company is to market and distribute products manufactured in Japan to various nations around the world as well as to import raw materials and certain products into Japan. Krause & Sekiguchi, *Japan and the World Economy in ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS*, 383, 389-97 (H. Patrick & H. Rosovsky ed. 1976). These trading companies also serve a financial function by lending money and exchanging foreign capital. *Id.* at 391. The ten largest Japanese trading companies, of which *Sumitomo's* parent is one, handle 50% of Japan's exports and 60% of its imports. *Sumitomo*, 457 U.S. at 178 n.l.

25. *Sumitomo*, 473 F. Supp. at 508.

26. *Id.* at 513-14. The court's dismissal of the § 1981 claim was based on several factors. First, the district court held that § 1981 does not apply to sex discrimination. Second, the court found that this is not the type of national origin claim (i.e., one indistinguishable from race discrimination) that is actionable under § 1981. Finally, the court reasoned that the plaintiffs would be afforded an adequate remedy under Title VII. *Id.* The § 1981 claim was not revived on appeal.

27. *Id.* at 509-13.

28. *Id.*

29. Japanese FCN Treaty, *supra* note 1, art. XXII(3), 4 U.S.T. 2063, 2079-80, T.I.A.S. No. 2863. For the text of Article XXII(3), see *supra* note 16.

grounds.³⁰ First, the defendant looked to a recent State Department letter from the Department's Deputy Legal Advisor, Lee R. Marks (Marks Letter) originally written in response to queries by the Equal Employment Opportunity Commission regarding the treaty.³¹ The Marks Letter supported Sumitomo's contention that subsidiaries of Japanese corporations should be considered companies of Japan for treaty purposes.³² Second, Sumitomo argued that the court should use the criteria employed by the State Department to determine the nationality of foreign corporations under its immigration regulations.³³ Since the State Department considers subsidiaries to be Japanese companies when determining the status of individuals employed by such companies who wish to immigrate to the United States from Japan,³⁴ Sumitomo urged the court to use these same immigration standards to determine the applicability of Article VIII(1).³⁵

The district court rejected both of Sumitomo's contentions.³⁶ Although mindful of the doctrine that great weight should be given to the interpretations of treaties made by agencies charged with their enforcement,³⁷ the court dismissed the Marks Letter since, in the court's opinion, it lacked analysis or reasoning.³⁸ The court also rejected Sumitomo's claim based on the immigration regulations.³⁹ Instead the court held that the regulations are only to be used to determine an individual's immigration status and have no bearing on the juridical status of the corporation itself.⁴⁰

30. *Sumitomo*, 473 F. Supp. at 511-13.

31. *Id.* at 511.

32. *Id.* The text of the letter reads in part that "[the Department of State] see[s] no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor [does the Department] see any policy reason for making the applicability of Article VII dependent on a choice of organizational form." Letter from Lee R. Marks, Deputy Legal Advisor, Department of State, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, October 17, 1978, *quoted in*, Brief for Petitioner/Cross-Respondent at Joint Appendix 94, *Sumitomo, Shoji (America) v. Avaghano*, 457 U.S. 176 (1982) [hereinafter cited as Marks Letter].

33. *Sumitomo*, 473 F. Supp. at 510-11.

34. 22 C.F.R. § 41.40 (1983) (companies of Japan for immigration purposes are those which are "principally owned by a person or persons having the nationality of the treaty country. . .").

35. *Sumitomo*, 473 F. Supp. at 512.

36. *Id.* at 513.

37. *Id.* at 511, *citing* *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1960). The Supreme Court has long examined the interpretation given the treaty by those charged with its enforcement, as a tool in determining the scope of treaty provisions. *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Nielson v. Johnson*, 279 U.S. 47, 52 (1929).

38. *Sumitomo*, 473 F. Supp. at 511-12. The court stated that "in the absence of analysis or reasoning offered by the State Department in support of its position, this court does not find in the letter sufficiently persuasive authority to reject the Treaty's clear definition of corporate nationality. . . ." (footnote omitted). *Id.*

39. *Id.* at 512.

40. *Id.* at 512 n.14. The court found support for its contention in two other district court decisions, *Tokyo Sansei v. Esperdy*, 298 F. Supp. 945 (S.D.N.Y. 1969) (corporate employer, a U.S. incorporated subsidiary of a Japanese corporation, did not have standing to sue on behalf of its employees for a change in immigration status); *Nippon Express U.S.A. v. Esperdy*, 261 F. Supp. 561 (S.D.N.Y. 1966) (Japanese employer itself had no power to confer immigration status on any of its employees).

The court declared that under the plain definition set forth in Article XXII(3) of the FCN Treaty with Japan, Sumitomo was not a "company of Japan" since it was not constituted under the laws or regulations of Japan.⁴¹ The district court interpreted the plain meaning of Article XXII(3) to be that companies incorporated under the laws of one party to the treaty will be considered a company of that party.⁴² Sumitomo thus could not invoke Article VIII(1) of the FCN Treaty as a defense against Title VII suits.⁴³ The court found this interpretation consistent with the plain meaning of the treaty,⁴⁴ and with established principles of corporate law.⁴⁵ In addition, the court found support for this decision in two district court cases which construed Article XXII(3) in a similar way.⁴⁶ The district court then held that Sumitomo was subject to the hiring imposed by Title VII because it was not a Japanese corporation.⁴⁷ In an effort to avoid litigating the Title VII claim, Sumitomo sought immediate appeal on the issue of whether Article VIII(1) protects subsidiaries, as well as branches, from employment discrimination claims.⁴⁸

B. *The Second Circuit Court of Appeal Decision*

The Second Circuit, in analyzing the treaty's definition of "companies of Japan," took a broader, more interpretive view and reversed the district court. In a unanimous decision written by Judge Mansfield, the court held that subsidiaries of Japanese corporations are "companies of Japan" under the terms of the FCN Treaty.⁴⁹ Although the treaty language suggests the interpretation settled on by the district court, i.e., that a company must be organized under Japanese law to be a "company of Japan," the appellate court declared that such an interpretation overlooked the purpose of the treaty, which was to protect all foreign investments.⁵⁰ It added that interpreting the treaty to exclude Japanese subsidiaries from the protection of Article VIII(1), would "disregard substance for form, something which [has been] previously rejected in treaty construction."⁵¹

41. *Sumitomo*, 473 F. Supp. at 510.

42. *Id.* at 509.

43. *Id.* at 510.

44. *Id.* at 509-10.

45. *Id.* Under corporate law principles, the juridical status of a corporation is determined by its place of incorporation and not by the nationality of its shareholders. *Id.*; see *Louisville, Cincinnati, & Charlestown R.R. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844).

46. *Sumitomo*, 473 F. Supp. at 510, citing *United States v. R.P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957) and *Spieß v. C. Itoh & Co.*, 469 F. Supp. 1 (S.D. Tex. 1979) *rev'd* 643 F.2d 353 (5th Cir. 1981).

47. *Sumitomo*, 473 F. Supp. at 513.

48. *Avigliano v. Sumitomo Shoji (America)*, 638 F.2d 552, 553 (2d Cir. 1981).

49. *Sumitomo*, 638 F.2d at 554.

50. *Id.* at 556.

51. *Id.* citing *Reed v. Wiser*, 555 F.2d 1079, 1085-86 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

The court of appeals also stated that an interpretation which does not include subsidiaries of Japanese corporations in the definition of "companies of Japan" would result in a "crazy quilt pattern"⁵² of rights granted by the treaty.⁵³ Judge Mansfield asserted that if subsidiaries were not considered companies of Japan they would not be entitled to access to the courts,⁵⁴ freedom from molestation,⁵⁵ freedom to dispose of property at will,⁵⁶ or freedom to obtain patents and trademarks.⁵⁷ Thus Japanese branches, by virtue of their status as "companies of Japan," would be entitled to the rights granted by the treaty — rights which would be denied to subsidiaries.⁵⁸ The Second Circuit found additional support for its interpretation by examining the negotiating history of a similar FCN Treaty concluded between the United States and the Netherlands which indicated that the definition of "company" was not intended to deny a subsidiary any rights granted to its foreign parent.⁵⁹ The Circuit Court, therefore, concluded that the term "companies of Japan" must include subsidiaries.⁶⁰

The question on appeal to the Second Circuit was limited to the issue of Sumitomo's standing to invoke Article VIII(1) of the FCN Treaty.⁶¹ The court reasoned nonetheless that since the parties had briefed and fully argued the issue of the scope of Article VIII(1) as a shield to hiring discrimination claims, judicial economy required its resolution.⁶² It then found that the "of their choice" provision in Article VIII(1) was directed primarily at exempting Japanese companies from state laws which placed restrictions upon employment of non-citizens within their boundaries and therefore could not be read to exempt companies of Japan from Title VII constraints.⁶³

52. *Id.* The Second Circuit used this phrase to describe the situation in which certain rights are granted by treaty to subsidiaries while other rights are granted to branches. *Id.*

53. *Id.*

54. Japanese FCN Treaty, *supra* note 1, art. IV(1), 4 U.S.T. 2063, 2067, T.I.A.S. No. 2863.

55. Japanese FCN Treaty, *supra* note 1, art. VI(2), 4 U.S.T. 2063, 2068, T.I.A.S. No. 2863.

56. Japanese FCN Treaty, *supra* note 1, art. IX(4), 4 U.S.T. 2063, 2071, T.I.A.S. No. 2863.

57. Japanese FCN Treaty, *supra* note 1, art. X, 4 U.S.T. 2063, 2071, T.I.A.S. No. 2863.

58. *Sumitomo*, 638 F.2d at 556. The Second Circuit ignored the fact that subsidiaries, as corporations of the United States, would be granted these rights by virtue of that status. *See, e.g.*, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 189 (1982).

59. *Sumitomo*, 638 F.2d at 557. The provisions of the FCN Treaty with the Netherlands are identical to those of the Japanese FCN Treaty. *See* Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. VIII(1), 8 U.S.T. 2043, 2055, T.I.A.S. No. 3942.

60. *Sumitomo*, 638 F.2d at 557-58.

61. *Id.* at 558 n.6.

62. *Id.* The Court explained that "[f]ailure to resolve the question [of the conflict between Article VIII(1) and Title VII] would only open the door to a wasteful second appeal after trial below. Under these circumstances we are not limited to deciding the question formulated by the district court," *citing* *Bersch v. Drexel Firestone*, 519 F.2d 974, 994-95 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975); *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 660 (2d Cir. 1975); *Sumitomo*, 638 F.2d at 558 n.6.

63. *Id.* at 559. In making this determination, the court relied upon two sources: Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 952-53,

The practical consequences of the district and circuit court decisions were identical for Sumitomo. At the district court level Sumitomo was barred from invoking Article VIII(1) as a shield to Title VII suits because as an organization incorporated in the United States it was not covered by Article VIII(1).⁶⁴ At the circuit court level, Sumitomo was granted standing to invoke Article VIII(1), but the court found that the Article itself could not be used as a shield against Title VII.⁶⁵ As a result, Sumitomo effectively gained nothing by the appellate decision and appealed to the U.S. Supreme Court.⁶⁶

C. *The Supreme Court Decision*

The Supreme Court, in a unanimous decision written by Chief Justice Burger, held that wholly owned subsidiaries of Japanese corporations are, for treaty purposes, U.S. corporations.⁶⁷ In reaching its decision, the Supreme Court examined the language of the treaty and the intent of the signatories.⁶⁸ In determining Sumitomo's citizenship for purposes of the treaty, the Supreme Court interpreted the language of Article XXII(3) literally, ruling that Sumitomo is a U.S. company because it was incorporated in New York.⁶⁹

The Court found support for this reading in recent documents exchanged between the countries and in documents exchanged at the time the treaty was negotiated.⁷⁰ The Court looked to several sources for the parties' current interpretation of the treaty.⁷¹ First, the Court examined two 1982 dispatches

n.28 (1979); and S. METZGER, *INTERNATIONAL LAW, TRADE AND FINANCE: REALITY AND PROSPECT* 151 (1962). The court also relied upon a dispatch sent between Germany and the U.S. State Department regarding a similar treaty provision. Foreign Service Dispatch from HICOG, Bonn to Department of State, No. 2529, March 18, 1954 *quoted in* Brief for Petitioner/Cross Respondent at Joint Appendix 181a, *Sumitomo Shoji (America) v. Avagliano*, 457 U.S. 176 (1982) [hereinafter cited as *German Airgram*].

64. *Sumitomo*, 473 F. Supp. at 513.

65. *Sumitomo*, 638 F.2d at 554.

66. *See Sumitomo*, 457 U.S. at 179-80. The Fifth Circuit, in a case with facts nearly identical to those in *Sumitomo*, came down in the same way as the Second Circuit on the issue of the subsidiary's standing as a "company of Japan." *Spieß v. C. Itoh America*, 643 F.2d 353, 363 (5th Cir. 1981). On the issue of whether Article VIII(1) shields companies of Japan from hiring discrimination suits, however, the Fifth Circuit ruled in the affirmative. The court looked to the negotiating history of the treaty and to several articles written at the time by a treaty negotiator. *See Walker, supra* note 3; Walker, *Treaties for Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956) [hereinafter cited as *Walker, United States Practice*], to support its literal reading of the treaty provision. *Spieß*, 643 F.2d at 361.

67. *Sumitomo*, 457 U.S. at 189.

68. *Id.* at 180, *citing* *Maximov v. United States*, 373 U.S. 49, 54 (1963) (An American trust was not exempt from Federal income taxation by virtue of the United States/United Kingdom Income Tax Convention even though the trust beneficiaries were British subjects); *and* *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 72 (1821).

69. *Sumitomo*, 457 U.S. at 182.

70. *Id.* at 183-87.

71. *Id.*

between the governments of the United States and Japan.⁷² In reference to the *Sumitomo* case, both governments reconfirmed their view that the place of incorporation test⁷³ is the correct method for determining the juridical status of corporations for treaty purposes.⁷⁴ In addition, the Court, citing the principle that the meaning attributed to treaty provisions by the government agency charged with its enforcement should be afforded great weight,⁷⁵ looked to the latest State Department interpretation of Article XXII(3).⁷⁶ The opinions expressed in this document also support an interpretation excluding subsidiaries from Article VIII(1) coverage.⁷⁷ The intent of the signatories during negotiations was also found to be consistent with a literal reading of the treaty.⁷⁸ The Court found that the United States and Japan intended that companies of each party be accorded the same treatment regardless of their nationality.⁷⁹ The

72. *Id.* at 183-84.

73. The "place of incorporation" test, used by most U.S. courts, stipulates that a corporation is a citizen of the state where it is incorporated. *Louisville, Cincinnati & Charlestown R.R. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). See also HORNSTEIN, *CORPORATE LAW AND PRACTICE* 281 (1959). This test is also the one generally applied in international law and was articulated by the International Court of Justice in *Barcelona Traction, Light & Power Co., (Belgium v. Spain)* 1970 I.C.J. 3, 42 ("The traditional rule attributes the right of diplomatic protection of a corporate entity to the state under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long standing practice and by numerous international instruments."). *Id.* See RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 27 (1965). In contrast to the U.S. and international law rule, civil law jurisdictions determine the citizenship of a corporation by the center of corporate activity or the corporate seat as designated in the corporate charter. Kronstein, *The Nationality of International Enterprises*, 52 COLUM. L. REV. 983, 986 (1952); Walker, *supra* note 3, at 381; Hadari, *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises*, 1974 DUKE L.J. 1, 7-11 (1974); Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 740-41 (1970).

74. *Sumitomo*, 457 U.S. at 183-84, citing State Department Cable, Tokyo No. 03300, February 26, 1982 (relaying the position of the Ministry of Affairs of Japan to the U.S. State Department) ("[a] subsidiary of a Japanese company incorporated under the laws of New York is not covered by Article 8 Paragraph 1 when it operates in the United States."), and citing Diplomatic Communication from the Embassy of Japan in Washington to the United States Department of State, April 21, 1982 (reconfirming Japanese view that entities incorporated in the United States are U.S. corporations for treaty purposes).

75. *Sumitomo*, 457 U.S. at 184-85. See *supra* note 37.

76. *Sumitomo*, 457 U.S. at 184-85. The court found that although the letter upon which it relied for support, Letter of James R. Atwood, Legal Adviser, United States Department of State, to Lutz Alexander Prager, Assistant General Counsel, Equal Employment Opportunity Commission, September 1, 1979, quoted in Brief for Petitioner/Cross Respondent at Joint Appendix 98a, *Sumitomo Shoji (America) v. Avagliano*, 457 U.S. 176 (1982) [hereinafter cited as Atwood Letter], conflicted with the Marks Letter, *supra* note 32, an earlier piece of State Department correspondence, both letters are inconclusive and not indicative of the state of mind of the treaty negotiators. The *Sumitomo* Court relied on the Atwood Letter, however, since it was the most recent interpretation by the State Department. *Sumitomo*, 457 U.S. at 184.

77. *Sumitomo*, 457 U.S. at 184 n.10.

78. *Id.* at 185-89.

79. *Id.* at 185. The Court looked to several articles written by a treaty negotiator shortly after the ratification of the treaty, Walker, *supra* note 3, Walker, *supra* note 2, as well as Congressional Hearings regarding ratification, *Commercial Treaties: Hearing on Treaties of Friendship, Commerce and Navigation*

Court determined that treating subsidiaries as domestic companies would carry out the purpose and intent of the signatory parties.⁸⁰

The Supreme Court in *Sumitomo* pointed out that any other interpretation of the plain meaning of the treaty language, *e.g.*, that corporate citizenship is determined by nationality of the stockholders, would be inconsistent with other treaty provisions.⁸¹ The Court explained that the drafters of the treaty utilized two terms to distinguish the status of corporations for treaty purposes — “companies of either party” and “enterprises of one party controlled by companies of the other party.”⁸² For example, Article VII(1) permits companies and nationals of either party to control or acquire majority interest in companies of the other party, while Article XVI(2) refers to articles produced by companies of either party or by enterprises controlled by such companies.⁸³ Were the nationality of a corporation to be determined by a test other than “place of incorporation,”⁸⁴ the further designation of “enterprises controlled by companies of either party” would be superfluous and unwarranted.⁸⁵ Thus, if the nationality of a corporation were determined by the nationality of its controlling interest, there would be no need to designate rights to “enterprises of one country controlled by companies of the other.”⁸⁶

Finally, the Supreme Court refuted the Circuit Court’s “crazy quilt” argument⁸⁷ by explaining that subsidiaries would not be denied access to courts, freedom from molestation or the ability to obtain patents because, as U.S. corporations, they would enjoy all the treaty rights granted to companies of Japan by virtue of their status as a domestic corporation.⁸⁸ The Court concluded by stating that “[t]he only significant advantage that branches may have over subsidiaries is that conferred by Article VIII(1).”⁸⁹ In this manner, the Court reversed the Second Circuit on the issue of standing to invoke Article VIII(1), and held that subsidiaries incorporated in the United States are not Japanese companies for treaty purposes.⁹⁰ But, the Court left open the question of

Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark and Greece Before a Subcommittee of the Senate Committee on Foreign Relations, 82d Cong., 2d Sess. 4-5 (1952) [hereinafter cited as *1952 Hearing*], in making this determination.

80. *Sumitomo*, 457 U.S. at 188.

81. *Id.* at 182 n.8.

82. *Id.*; see also *Spiess*, 643 F.2d at 365 (dissenting opinion).

83. Japanese FCN Treaty, *supra* note 1, art. XVI(2), 4 U.S.T. 2063, 2076, T.I.A.S. No. 2863.

84. For example, one might use the nationality of shareholders or the “seat” of the corporation test as delineated *supra* in note 73.

85. *Sumitomo*, 457 U.S. at 182 n.8. *Spiess*, 643 F.2d at 365-67. See also Japanese FCN Treaty, *supra* note 1, arts. VI(3) and VII(4), 4 U.S.T. 2063, 2069, 2070, T.I.A.S. No. 2863 for other references to enterprises controlled by companies.

86. *Sumitomo*, 457 U.S. at 182 n.8.

87. See *supra* text accompanying notes 52-58.

88. *Sumitomo*, 457 U.S. at 189.

89. *Id.*

90. *Id.*

whether Article VIII(1) will in fact insulate a branch of a Japanese corporation from liability for discrimination in hiring practices.⁹¹

D. *Current Law Construing Article VIII(1)*

This question is by no means settled under current law, and the Circuits are divided on the issue of whether Article VIII(1) exempts "companies of Japan" from Title VII. Although the Second Circuit in *Sumitomo* found that Article VIII(1) did not exempt Japanese companies from Title VII,⁹² the Fifth Circuit differed in its approach to this question.⁹³

In *Spiess v. C. Itoh (America) Inc.*,⁹⁴ the plaintiffs, American employees of a U.S. incorporated subsidiary of a Japanese corporation, charged employment discrimination as a result of the subsidiary's practice of hiring only Japanese citizens to fill its managerial positions.⁹⁵ After finding that the subsidiary was a Japanese company for treaty purposes,⁹⁶ the *Spiess* court read the language of Article VIII(1) literally so as to allow Japanese corporations to hire executives "of their choice" regardless of Title VII.⁹⁷ The Fifth Circuit, as did the Second Circuit, based its determination upon the language of the provision and the intent of the negotiating parties.⁹⁸ In addition, the Fifth Circuit looked to the same sources as the Second Circuit in determining the intent of the negotiating parties.⁹⁹ Although the *Spiess* court recognized, as the Second Circuit had, that the "of their choice" provision was aimed at exempting Japanese companies from state court percentile restrictions,¹⁰⁰ it held that Article VIII(1) must also be read literally to exempt companies of Japan from Title VII.¹⁰¹ The single dissent in *Spiess* did not reach the question whether Article VIII(1) shields branches from Title VII constraints but suggested in dicta that it might.¹⁰²

The only other case construing the hiring of a FCN treaty arose in the Eastern District of New York and called into question the FCN Treaty with

91. *Id.*

92. See *supra* notes 61 to 63 and accompanying text.

93. See *Spiess*, 643 F.2d at 359-63.

94. 643 F.2d 353 (5th Cir. 1981).

95. *Spiess*, 643 F.2d at 355.

96. *Id.* at 358-59. However, the *Spiess* Court failed to note that the airgram to which it looked for support in this decision explicitly stated that, for treaty purposes, the nationality of a company is determined by its place of incorporation. Airgram from Department of State to American Embassy in Tokyo, No. A-105, January 9, 1976, quoted in Brief for Petitioner/Cross Respondent at Joint Appendix 157a, *Sumitomo Shoji (America) v. Avagliano*, 457 U.S. 176 (1982) [hereinafter cited as U.S. Airgram]; *Spiess*, 643 F.2d at 357.

97. *Spiess*, 643 F.2d at 359.

98. *Id.* at 359-63.

99. For a list of these sources, see *supra* note 63.

100. See *supra* text accompanying note 63.

101. *Spiess*, 643 F.2d at 362. The Court reasoned that to restrict the meaning of the "of the choice" provision to only overriding state law would render the provision meaningless. *Id.*

102. *Spiess*, 643 F.2d at 369.

Denmark.¹⁰³ In *Linskey v. Heidelberg Eastern, Inc.*,¹⁰⁴ plaintiff, an American male employee of defendant, a Danish corporation and its subsidiary, alleged Title VII hiring discrimination against his employer.¹⁰⁵ In finding that Article VII(4) of the FCN Treaty with Denmark does not exempt companies of Denmark from Title VII constraints,¹⁰⁶ the court looked to Senate hearings¹⁰⁷ regarding two other treaties (Haiti¹⁰⁸ and Iran¹⁰⁹) with provisions identical to the FCN Treaty with Denmark, and determined that the purpose of the "of their choice" provision was to facilitate admission of specialized employees from foreign countries and not to exempt foreign corporations from Title VII.¹¹⁰

As the previous discussion illustrates, U.S. incorporated subsidiaries of Japanese corporations are not companies of Japan for treaty purposes and therefore do not have standing to invoke the provisions of Article VIII(1). However, were an enterprise established as a Japanese company for treaty purposes, the circuits do not agree on what hiring privileges would accrue to such a company. The Second Circuit in *Sumitomo*, as well as the District Court for the Eastern District of New York in *Linskey*, read the treaty provision as granting only such freedoms as U.S. corporations possess, while the Fifth Circuit in *Spieß* read Article VIII(1) very broadly, as a grant of exemption from Title VII constraints. An analysis of the treaty and its history suggest that resolution of the conflict between the circuits is possible.

III. THE CONFLICT BETWEEN TITLE VII AND ARTICLE VIII(1)

A. *The Definition of "Companies of Japan"*

For a corporation to be able to invoke the provisions of Article VIII(1) of the FCN Treaty with Japan, it must be a "compan[y] of either party engag[ing personnel] within the territories of the other party. . . ."¹¹¹ Under the definition

103. Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797 [hereinafter cited as Danish FCN Treaty]. Article VII(4) of the Danish FCN Treaty is nearly identical to Article VIII(3) of the Japanese FCN Treaty. However, there is one important difference — the Denmark treaty states that "companies of either Party" may engage certain executive personnel "of their choice, regardless of nationality." Danish FCN Treaty, *supra*, 12 U.S.T. 908, 915-16, T.I.A.S. No. 4797 (emphasis added).

104. 470 F. Supp. 1181 (E.D.N.Y. 1979).

105. *Linskey*, 470 F. Supp. at 1182. Since one of the defendants was a Danish corporation, the court did not consider the issue of whether subsidiaries are "corporations of Denmark" for purposes of the treaty. *Id.* at 1185.

106. *Id.* at 1186.

107. *Hearing Before the Subcommittee of the Committee on Foreign Relations on the Treaty of Friendship, Commerce and Navigation with Haiti and Iran*, 84th Cong., 2d Sess. (1956).

108. The treaty with Haiti is not in force today. *Linskey*, 470 F. Supp. at 1186 n.6.

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

110. *Linskey*, 470 F. Supp. at 1186. The court did not cite any of the sources noted in *Spieß* or in *Sumitomo* which illuminate the negotiating history of the Japanese treaty.

111. Japanese FCN Treaty, *supra* note 1, art. VIII(1), 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863.

of "companies of either Party" which is contained in Article XXII(3) of the treaty, an enterprise is a company of the country under whose laws it has been constituted.¹¹²

Based on the language of Article XXII(3), a branch of a Japanese corporation will be considered a company of Japan for the purpose of invoking the Article VIII(1) hiring provisions if it was "constituted under the applicable laws of Japan."

In the *Sumitomo* case the Supreme Court read Article XXII(3) literally, holding that a company's place of incorporation determines its nationality.¹¹³ Under such an interpretation the unincorporated branch of a Japanese corporation operating in the United States would be a Japanese company and would, therefore, have standing to invoke Article VIII(1). This interpretation is supported by the U.S. State Department. In two recent letters sent by the State Department to the Equal Employment Opportunity Commission¹¹⁴ concerning the interpretation of the FCN Treaty, the State Department concurred in the view that branches are companies of Japan for treaty purposes.¹¹⁵

Therefore, based on the Supreme Court's reasoning in *Sumitomo*, branches have standing to invoke Article VIII(1).

B. *The Scope of the Rights Granted by Article VIII(1)*

The Circuit Courts which have examined this question differ in their interpretation of the scope of the protection which Article VIII(1) affords Japanese companies.¹¹⁶ The Fifth Circuit has gone so far as to hold that a literal reading of this provision would allow foreign employers to determine "which executives and technicians will manage their investment in the [United States] without regard to [U.S.] laws."¹¹⁷ The Second Circuit, however, in a far narrower interpretation, has determined that the provisions cannot be read even so literally as to allow Japanese companies to make hiring decisions "of their choice" if domestic companies would be denied freedom to make the same choice due to Title VII constraints.¹¹⁸ In attempting to reconcile the conflicting approaches to the scope of Article VIII(1) taken by the Fifth and Second Circuits, the issue is whether Article VIII(1) grants Japanese companies any rights greater than those afforded domestic corporations in the employment area.

112. *Id.* at 2079, T.I.A.S. No. 2863. For the text of Article XXII(3), see *supra* note 16.

113. 457 U.S. at 182.

114. Marks Letter, *supra* note 32, and Atwood Letter, *supra* note 76.

115. *Id.*

116. Compare *supra* notes 61 to 63 and accompanying text with notes 97 to 101 and accompanying text.

117. *Spies*, 643 F.2d at 361. For an analysis of the court's reasoning, see *supra* text accompanying notes 97 to 101.

118. *Sumitomo*, 638 F.2d at 558. For an analysis of the court's reasoning, see *supra* text accompanying notes 61 to 66.

1. The Meaning of Article VIII(1)

The FCN treaty series was the first major treaty series to provide for the rights of corporations in addition to detailing the rights afforded nationals of the parties to the treaty.¹¹⁹ FCN treaties were concluded to afford foreign corporations "national treatment" when operating within the territories of the other party.¹²⁰ "National treatment" as defined by the FCN Treaty with Japan means the same treatment afforded domestic corporations in similar circumstances.¹²¹ Article VII of the FCN Treaty with Japan, which the treaty negotiators termed the "heart of the treaty,"¹²² summarizes the notion that companies of either party are entitled to treatment on a par with domestic corporations with respect to all phases of their operation.¹²³ As Article VII illustrates, the central theme within the treaty is equal (rather than better) treatment for companies of Japan operating in the United States.¹²⁴

With respect to Article VIII(1), however, the negotiators of the treaty may have intended to grant more than just "national treatment" in the employment area.¹²⁵ "[I]n the matter of employment, provisions have been developed technically going beyond national treatment, to prevent the imposition of ultra-nationalistic policies with respect to essential executive and technical personnel."¹²⁶ In distinguishing between the national treatment standard and that used in the employment provisions of Article VIII(1), one treaty negotiator termed these standards either "contingent" or "non-contingent."¹²⁷ When the contingent standard is used, the treaty grants foreign corporations rights equal to, and contingent upon, either the treatment domestic corporations receive under U.S. law (national treatment) or the treatment rendered to corporations of foreign, non-party countries operating in the United States (most-favored-nation treatment).¹²⁸ When the treaty accords rights on a noncontingent basis, the foreign corporation is given an absolute right, regardless of the treatment afforded

119. Walker, *supra* note 3, at 380; Spiess, 643 F.2d at 359.

120. *Sumitomo*, 457 U.S. at 186; Walker, *supra* note 3, at 385.

121. Japanese FCN Treaty, *supra* note 1, art. XXII(1), 4 U.S.T. 2063, 2079, T.I.A.S. No. 2863. The text of this article provides as follows: "The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." *Id.*

122. Airgram from the Department of State to USPOLAD, Tokyo, No. A-453, January 7, 1952, quoted in Brief for Petitioner/Cross Respondent at Joint Appendix 130a, *Sumitomo Shoji (America) v. Avagliano*, 457 U.S. 176 (1982) [hereinafter cited as Japanese Airgram].

123. Japanese FCN Treaty, *supra* note 1, art. VII(1), 4 U.S.T. 2063, 2069, T.I.A.S. No. 2863. See *supra* note 4, for the text of Article VII(1).

124. Walker, *supra* note 3, at 380.

125. See, e.g., Walker, *supra* note 3, and U.S. Airgram, *supra* note 96. Herman Walker, Jr. was one of the negotiators of the Japanese FCN Treaty.

126. Walker, *supra* note 3, at 386.

127. Walker, *supra* note 2, at 811.

128. *Id.*

domestic corporations or corporations of non-party countries.¹²⁹ Although the vast majority of rights granted by the treaty are granted on a contingent basis,¹³⁰ the employment provisions make no mention of national or most-favored-nation treatment on their face¹³¹ and, as a result, fall into the category of rights granted on a non-contingent basis.¹³² Since Article VIII(1) rights are not contingent upon the treatment domestic corporations receive under U.S. law, United States employment statutes cannot be used as a guide in determining the limits of Article VIII(1).¹³³ As a result, the language of Article VIII(1) and its negotiating and legislative histories will determine the scope of the rights involved.

An examination of the negotiating history of Article VIII(1) reveals that one of its purposes was to grant Japanese companies an exemption from state laws, in place at the time the treaty was negotiated, which were aimed at restricting the employment of aliens in certain professions.¹³⁴ Numerous states had enacted statutes which barred or severely restricted non-citizen employment in those states.¹³⁵ Subsequent to the ratification of the FCN Treaty one treaty negotiator noted that Article VIII assures "management . . . freedom of choice in the engaging of essential executive and technical employees in general . . . without legal interference from 'percentile' restrictions and the like."¹³⁶ The negotiating history of Article VIII(1) in the German FCN treaty,¹³⁷ which is identical to Article VIII(1) in the Japanese treaty,¹³⁸ lends support to this interpretation. The understanding between the parties to the German FCN treaty with regard to the hiring provision was that "[i]ts major special purpose is to preclude the imposition of 'percentile' legislation. It gives freedom of choices among persons lawfully present in the country and occupationally qualified under the local law."¹³⁹

The negotiating history as well as the legislative history of the FCN Treaty with Japan indicate that Article VIII(1) was also intended to give Japanese companies complete freedom to hire their own citizens. Article VIII did not merely exempt such companies from specific state laws. The Supreme Court has warned that although the language of FCN treaties may be similar, their negotiating his-

129. *Id.*

130. *See, e.g.*, Japanese FCN Treaty, *supra* note 1, arts. III, IV, VI(4), VII, VIII(3), IX, X, XII, XIII, XIV, XVI, XIX(4), 4 U.S.T. 2063, 2067, 2067-68, 2069, 2069-70, 2070, 2071, 2071, 2072-73, 2073, 2074, 2076, 2077, T.I.A.S. No. 2863.

131. For the text of Article VIII(1), *see supra* text accompanying note 6.

132. Walker, *supra* note 3, at 386.

133. *See Spiess*, 643 F.2d at 360-61.

134. Japanese Airgram, *supra* note 122.

135. *Id.*

136. Walker, *United States Practice*, *supra* note 66.

137. Treaty of Friendship, Commerce and Navigation, October 29, 1954, United States-West Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593 [hereinafter cited as German FCN Treaty].

138. Compare German FCN Treaty, *supra* note 137, 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593 with Japanese FCN Treaty, *supra* note 1, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863.

139. German Airgram, *supra* note 63.

tories may give rise to differing interpretations.¹⁴⁰ An examination of the negotiating history of Article VIII of the Japanese FCN Treaty reveals an understanding between the parties that Article VIII(2)¹⁴¹ rather than Article VIII(1) served to exempt these companies from state employment statutes.¹⁴² Moreover, there is evidence to suggest that the treaty negotiators understood Article VIII(1) to grant freedom of choice in the hiring of executive personnel "in general, regardless of their nationality."¹⁴³

The view that the signatories intended Article VIII(1) to permit Japanese companies to make hiring decisions based upon nationality gains further support from the legislative history surrounding the ratification of the treaty.¹⁴⁴ The Senate Executive Report on the Japanese treaty and several other FCN treaties¹⁴⁵ indicates that the purpose of Article VIII(1) was to free up restrictions on nationality based hiring.¹⁴⁶ Although the 1953 Senate Hearings regarding the Japanese treaty¹⁴⁷ make only fleeting and unexplained reference to the "of

140. *Sumitomo*, 457 U.S. at 185 n.12.

141. Article VIII(2) of the Japanese FCN treaty, provides as follows:

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.

Japanese FCN Treaty, *supra* note 1, art. VIII(2), 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863.

142. *Sumitomo*, 457 U.S. at 185 n.12. The negotiators explained to the Japanese that all states required citizenship for attorneys, thirteen states required citizenship for physicians and for engineers, in addition to random restrictions for various other professions. Japanese Airgram, *supra* note 122. The differing interpretations by the signatories of the identical Article VIII(1) language contained in the Japanese and German Treaties may be attributed to the fact that the German FCN Treaty does not include the Article VIII(2) provision contained in the Japanese Treaty. Compare the Japanese FCN Treaty, *supra* note 1, art. VIII, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863, with the German FCN Treaty, *supra* note 137, art. VIII, 7 U.S.T. 1839, 1845, T.I.A.S. No. 3593. The hiring provision contained in Article VII(4) of the Danish Treaty which was at issue in *Linskey*, see *supra* notes 113-20 and accompanying text, is substantially different from Article VIII of the Japanese Treaty, so as to distinguish the reasoning in *Linskey* from the situation at issue here. Compare the Danish FCN Treaty, *supra* note 103, art. VII, 12 U.S.T. 908, 914-15, T.I.A.S. No. 4797 with the Japanese FCN Treaty, *supra* note 1, art. VIII, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863.

143. Walker, *United States Practice*, *supra* note 66, at 234.

144. For another analysis of this issue see Note, *supra* note 63.

145. TREATIES OF FRIENDSHIP, COMMERCE AND NAVIGATION, S. EXEC. DOC. No. 5, 83d Cong., 1st Sess. (1953).

146. *Id.* at 4. The text of the report provides in relevant part:

Article VIII: 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 the 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.

Id.

147. *Hearing Before a Subcommittee of the Committee on Foreign Relations, United States Senate*, 83d Cong., 1st Sess. (1953) [hereinafter cited as 1953 Hearing].

their choice" provisions,¹⁴⁸ the 1952 Senate Hearings regarding several other FCN treaties¹⁴⁹ do address the issue. In summarizing the provisions of Article VIII of the FCN Treaty with Israel¹⁵⁰ one Senator explained that "Article VIII apparently is an attempt to give great latitude and privilege to nationals of either party to use their own technical and professional experts within the territories of the other."¹⁵¹ As the preceding analysis illustrates, Article VIII(1) must be read to permit Japanese companies operating in the United States to hire their own citizens for certain executive positions within these companies.

2. The Conflict Between Article VIII(1) Rights and Title VII Restraints

*Espinoza v. Farah Manufacturing Co.*¹⁵² is the sole Supreme Court case which examines the issue of citizenship discrimination as a basis for Title VII claims. Plaintiff in *Espinoza*, a Mexican citizen and resident alien of the United States, applied and was rejected for a position with defendant, allegedly on the basis of defendant's policy against employment of aliens.¹⁵³ Plaintiff alleged that this policy constituted discrimination based upon national origin.¹⁵⁴ Defendant countered by explaining that its employment practices could not constitute national origin discrimination since persons of Mexican ancestry constituted 96 per cent of its work force.¹⁵⁵

In determining whether the citizenship requirement in this case constituted national origin discrimination, the Court began by defining national origin as "the country where a person was born, or, more broadly, the country from which his or her ancestors came."¹⁵⁶ Under such a definition the Court held that citizenship in the instant case did not constitute national origin discrimination

148. *Id.* at 2. The text of the 1953 Hearing states in relevant part that "of 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 . . ."

149. 1952 Hearing, *supra* note 79.

150. The FCN Treaty with Israel, art. VIII, 5 U.S.T. 550, 558-59, T.I.A.S. No. 2948, is identical to the Japanese FCN Treaty, *supra* note 1, art. VIII, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863.

151. 1952 Hearing, *supra* note 79, at 38.

152. 414 U.S. 86 (1973).

153. *Espinoza*, 414 U.S. at 87. To establish a prima facie case of hiring discrimination under Title VII, plaintiff must plead and prove that he applied and was rejected for a position on the basis of race, color, religion, sex or national origin. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

154. *Espinoza*, 414 U.S. at 87.

155. *Id.* at 92-93.

156. *Id.* at 88. The Court in *Espinoza* looked to the legislative history of Title VII for support for this contention. Though admitting that the history on this point was sparse, the Court cited a definition given by Congressman Roosevelt, Chairman of the House Subcommittee which reported on Title VII, as follows: "[national origin] means the country from which you or your forebears came . . . You may come from Poland, Czechoslovakia, England, France or any other country." *Id.* at 89, *citing* 110 CONG. REC. 2549 (1964).

for purposes of the statute, since 96 percent of those filling the job for which the plaintiff had applied were of the same national origin as the plaintiff.¹⁵⁷

The Court went on to limit this holding, however, by citing certain instances in which a hiring preference based on citizenship might constitute national origin discrimination.¹⁵⁸ Title VII would proscribe hiring based on citizenship where such a practice has the "purpose or effect" of national origin discrimination.¹⁵⁹ The Court stated 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. 'The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'"¹⁶⁰

The very situation which the *Espinoza* court warned might constitute national origin discrimination, i.e., a citizenship classification having the effect of national origin discrimination, occurred in the *Sumitomo* case. The Supreme Court indicated in *Sumitomo* that hiring Japanese citizens exclusively to fill certain executive positions may have the requisite "purpose or effect" which could constitute national origin discrimination.¹⁶¹ Since Article VIII(1) allows Japanese companies to hire Japanese citizens to the exclusion of all others, the effect of such a practice is to create discrimination against anyone not of Japanese national origin.¹⁶² The *Sumitomo* Court declined to decide this issue since the question was not certified for interlocutory appeal by the court of appeals.¹⁶³ The Supreme Court noted, however, that the district court had treated the type of discrimination at issue in *Sumitomo* as national origin discrimination.¹⁶⁴ The

157. *Espinoza*, 414 U.S. at 92-93. The Court also asserted that Congress probably did not intend the type of citizenship discrimination at issue in *Espinoza* to contravene Title VII since the Federal government has had the long standing policy of restricting certain service positions to U.S. citizens only. *Id.* at 89-93.

158. *Id.* at 92.

159. *Id.* The Court gave two examples of possible exceptions to their holding in *Espinoza*. Where citizenship discrimination is part of a larger plan to discriminate, or where it is used as a pretext to hide actual national origin discrimination, the Court suggested that a citizenship requirement may in fact constitute national origin discrimination.

160. *Id.*, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (where application exams were racially neutral but had the effect of excluding blacks, the exams were held to constitute hiring discrimination).

The single dissent in *Espinoza*, written by Justice Douglas, would have characterized this type of discrimination as "based on birth outside the United States and [would] thus [be] discrimination based on national origin in violation of Title VII." *Espinoza*, 414 U.S. at 97, quoting Brief for Commission as Amicus Curiae at 5. Douglas felt that any other construction of Title VII would contravene the Congressional policy behind Title VII — to eliminate hiring practices which create "artificial, arbitrary or unnecessary" impediments to employment. *Id.* at 98, citing *McDonnell Douglas Corp. v. Green*, 41 U.S. 792 (1973).

161. 457 U.S. at 180 n.4.

162. The Japanese are an extremely homogeneous group — fully 99% of the population is of Japanese origin. D. WHITAKER, *AREA HANDBOOK FOR JAPAN 70* (American Univ. Foreign Area Studies, 1974). See also E. REISHAUER, *THE JAPANESE*, 34-35 (1977). For a different approach to this problem, see Note, *supra* note 63, at 957-58.

163. 457 U.S. at 180 n.4.

164. *Id.* Nowhere in the district court opinion is there an express analysis of the citizenship/national origin question. The court denied the defendant's motion to dismiss the Title VII claim on the basis that

Court justified the district court's treatment of Sumitomo's hiring practices by quoting the principle elucidated in *Espinoza* that hiring based on citizenship may violate Title VII where it has the effect of national origin discrimination.¹⁶⁵ Thus, Article VIII(1) permits Japanese companies to make hiring decisions which have the effect of national origin discrimination and as a result contravene the provisions of Title VII.

C. *Resolution of the Conflict Between Article VIII(1) and Title VII*

Under U.S. law, a treaty is considered, as are federal statutes, the supreme law of the land.¹⁶⁶ The Supreme Court has carefully scrutinized conflicts between treaty provisions and subsequently enacted legislation.¹⁶⁷ It is well established that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."¹⁶⁸ In examining possible conflicts, the Supreme Court will try to find any way in which the treaty and statute can be construed consistently and will only invalidate an enactment when there is a "positive repugnancy" — clearly conflicting language on the face of the statute and the treaty.¹⁶⁹ "Absent explicit statutory language, [the Supreme Court has] been extremely reluctant to find congressional abrogation of treaty rights."¹⁷⁰ As a result, the Supreme Court will not uphold a repeal by implication.¹⁷¹ However, once the language of the treaty is found to be inconsistent with a subsequently enacted statute, the inconsistent treaty provisions are held to be void.¹⁷²

At issue in the case of *Morton v. Mancari*¹⁷³ was a conflict between Section 12 of the Indian Reorganization Act of 1934¹⁷⁴ (Section 12) and the Equal Opportunity Act of 1972¹⁷⁵ (1972 Act). Section 12 allows the Bureau of Indian Affairs (Bureau)¹⁷⁶ to give preferential treatment to Indians when making hiring deci-

it is not exempt from Title VII by way of the treaty, but simply referred to the the type of hiring practices alleged as national origin discrimination. See *Sumitomo*, 473 F. Supp. at 508-13.

165. *Sumitomo*, 487 U.S. at 180 n.4.

166. U.S. CONST. art. VI, cl. 2.

167. See *Reid v. Covert*, 354 U.S. 1 (1957), *Morton v. Mancari*, 417 U.S. 535 (1974).

168. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See also *Cook v. United States*, 228 U.S. 102 (1933).

169. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1977); *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842).

170. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 690 (1979).

171. *Mancari*, 417 U.S. at 549.

172. *Hijo v. United States*, 194 U.S. 315, 324 (1903); *Reid*, 354 U.S. at 18.

173. 417 U.S. 535 (1974).

174. 25 U.S.C. §§ 461-486 (1976).

175. 42 U.S.C. §§ 2000e-2000e-17 (1976).

176. The Act refers to only the "Indian Office" as the department permitted to maintain preferential hiring practices. 25 U.S.C. § 472 (1976). However, the 1979 amendment to the Indian Reorganization Act makes the Indian preference laws applicable to the Bureau of Indian Affairs. Pub. L. No. 96-135, § 2, 93

sions.¹⁷⁷ The congressional purpose in enacting Section 12 was to accord Indians a greater voice in self-government.¹⁷⁸ The 1972 Act was promulgated to extend the provisions of Title VII to employment discrimination in most areas of federal employment.¹⁷⁹ Although Title VII specifically exempts employment of Indians on or near an Indian reservation from its prohibitions,¹⁸⁰ the 1972 Act makes no mention, either on its face or in its legislative history, of preferential hiring of Indians by the federal government or its agencies.¹⁸¹ A conflict between Section 12 and the 1972 Act thus arises when the Indian Office, pursuant to Section 12, preferentially hires Indians and, as a result, discriminates against those of other national origins in contravention of the 1972 Act.¹⁸²

Plaintiffs, non-Indian employees of the Bureau, brought suit against the Commissioner of Indian Affairs and several others,¹⁸³ charging that Section 12 had been repealed by the 1972 Act.¹⁸⁴ The Supreme Court, in a unanimous decision written by Justice Blackmun, disagreed, holding that the two Acts could coexist.¹⁸⁵ The rationale for the Court's approach was based upon several grounds. First, the Court felt that although the 1972 Act made no mention of Indian preference,¹⁸⁶ the exception for employment on Indian reservations

Act makes the Indian preference laws applicable to the Bureau of Indian Affairs. Pub. L. 96-135, § 2, 93 Stat. 1057 (1979), 25 U.S.C. § 472a (Supp. III 1979).

177. Section 12 of the Indian Reorganization Act provides:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian Tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such position.

June 18, 1934, c. 576, § 12, 48 Stat. 986, 25 U.S.C. § 472 (1976).

178. *Morton*, 417 U.S. at 541-43. In making this determination, the Court looked to the legislative history of the Act. *Hearings on S. 2755 and S. 3645 Before the Senate Committee on Indian Affairs*, 73d Cong., 2d Sess. 256 (1934) (remarks of co-sponsor Senator Wheeler to the effect that the purpose of the Indian Reorganization Act was to assist the Indians in self government); H.R. REP. No. 1804, 73d Cong., 2d Sess. 8 (1934). (It is the obligation of the United States to provide the Indians with the right to political liberty and self government).

179. *Morton*, 417 U.S. at 546-47. The 1972 Act provides, in relevant part: "All personnel actions affecting employees or applicants for employment [in certain government positions] . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (1976 & Supp. IV 1980).

180. 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.

42 U.S.C. § 2000e-2(i) (1976).

181. *Morton*, 417 U.S. at 547.

182. *See id.* at 539.

183. The defendants included the Secretary of the Interior and the Bureau Directors for the Albuquerque and Navajo Area as well as the Commissioner of Indian Affairs. *Id.*

184. *Id.*

185. *Id.* at 547.

186. *Id.*

contained in Title VII was some indication that Congress intended to favor the employment of Indians where Indian affairs were involved.¹⁸⁷ Second, the Court noted the longstanding federal policy affording preferential hiring treatment to Indians,¹⁸⁸ as an indication that Congress intended to maintain Section 12.¹⁸⁹ Finally the Court looked to the principle that repeals by implication are not favored¹⁹⁰ and can only be effectuated where the earlier and later are irreconcilable.¹⁹¹ Further, the Court held that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."¹⁹² Finding that Section 12 is a specific statute of limited application while the 1972 Act is general in application, the Court held that the two must coexist.¹⁹³ Although the 1972 Act proscribes national origin discrimination in federal employment, the Court held that Section 12 preferential hiring is permitted as an exception to the 1972 Act.¹⁹⁴

Examining Article VIII(1) against the principles outlined in *Morton*, Article VIII(1) must be read as an exception to the hiring constraints imposed by Title VII. As noted in the *Spiess* decision, nothing in the legislative history of Title VII or on the face of the statute indicates a congressional intent to abrogate Article VIII(1) of the FCN Treaty with Japan.¹⁹⁵ The Fifth Circuit in *Spiess* held that

[n]o evidence suggests that Congress intended to repudiate Article VIII(1) when it enacted Title VII. 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.¹⁹⁶

187. *Id.* at 547-48.

188. Justice Blackmun points out that for many years prior to the enactment of the 1972 Act, Executive Orders forbidding employment discrimination within the federal government made an exception for Indian preferences within the Bureau. Further, the Justice noted that three months after the enactment of the 1974 Act, Congress promulgated two additional Indian preference laws. *Id.* at 548-49.

189. *Id.*

190. *Id.* at 549, citing *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Wood v. United States*, 41 U.S. (16 Pet.) 342-43, 363 (1842); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968).

191. *Morton*, 417 U.S. at 550, citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945).

192. *Morton*, 417 U.S. at 550-51, citing, e.g., *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Rogers v. United States*, 185 U.S. 83, 87-89 (1902).

193. *Morton*, 417 U.S. at 551.

194. *Id.*

195. *Spiess*, 643 F.2d at 362. See *supra* notes 94 to 99 and accompanying text.

196. *Id.*

The Fifth Circuit's analysis clearly shows that Congress did not intend to repeal Article VIII(1) when it enacted Title VII.

Although Article VIII(1) and Title VII appear to be irreconcilable since Title VII prohibits the very hiring practices which Article VIII(1) allows, the treaty provision can still stand under the specific statute/general statute rationale adopted in *Morton*. Article VIII(1), like the Section 12 provision at issue in *Morton*, is a specific enactment of limited scope aimed at aiding a very specific and limited group of persons. Just as Section 12 was enacted to grant Indians greater control over self-government, so too Article VIII(1) was included in the Japanese treaty to afford the foreign company greater control over its holdings.¹⁹⁷ Moreover, both Title VII and the 1972 Act are statutes of general scope which proscribe discrimination in the employment area. Based on the principles expounded in *Morton v. Mancari*, a Title VII type statute which is general in scope cannot abrogate a specific enactment of the Article VIII(1) variety, absent congressional intent to do so, regardless of the order of enactment. As a result, Article VIII(1) must stand regardless of the provisions of Title VII.¹⁹⁸

IV. CONCLUSION

This Note has examined the relationship between Title VII of the Civil Rights Act of 1964 and Article VIII(1) of the FCN Treaty with Japan. It is settled case law that only "companies of Japan" have standing to invoke Article VIII(1) and

197. See *supra* notes 119 to 124 and accompanying text.

198. Japanese companies may be motivated to take advantage of the Article VII(1) hiring provisions because of Japanese culture and society. The Japanese have traditionally been wary of foreigners and foreign customs. This chauvinism grew up out of the period of isolation in Japanese society. One commentator pointed out that Japanese executives who serve as managers in foreign offices at times find it necessary to denounce any value derived from their foreign sojourn to prove their loyalty to the Japanese employer. E. REISCHAUER, *supra* note 162, at 403-06.

Since the Supreme Court concluded in *Sumitomo* that branches rather than subsidiaries of Japanese companies can take advantage of the significant benefits provided by the hiring provisions of Article VIII(1) of the Japanese FCN Treaty, Japanese companies may consider switching their U.S. enterprise from the subsidiary to the branch format. One of the major advantages to organization in the United States as a subsidiary is that liability for debts and judgments against the U.S. subsidiary will be limited to the assets of the subsidiary. H. HENN, LAW OF CORPORATIONS § 73 (1970). However, this problem can be overcome if the Japanese company creates a single-purpose subsidiary in Japan. The Japanese subsidiary would then establish a branch operation in the United States. *Avagliano Court Leaves Several Issues Unresolved*, 5 LEGAL TIMES 17, 22 (1982). For a discussion of the procedures required for organization and management of a branch, see AMERICAN BAR ASSOCIATION, SECTION OF CORPORATE, BANKING AND BUSINESS LAW, COMMITTEE TO STUDY FOREIGN INVESTMENT IN THE UNITED STATES, A GUIDE TO FOREIGN INVESTMENT UNDER UNITED STATES LAW (1979) [hereinafter cited as GUIDE TO FOREIGN INVESTMENT]; J. FORRY, A PRACTICAL GUIDE TO FOREIGN INVESTMENTS IN THE UNITED STATES (1979); Phillips, *Legal Restraints on Foreign Direct Investment in the United States*, 7 COMMERCE DEPARTMENT, REPORT TO THE CONGRESS ON FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, Appendix K (1976); *Doing Business*, 1 CORP. L. GUIDE (CCH), 1000 *et seq.*

For a discussion of the U.S. tax consequences involved in organization as a branch or as a subsidiary see J. FORRY, *supra*; GUIDE TO FOREIGN INVESTMENT, *supra*; P. McDANIEL & H. AULT, INTRODUCTION TO UNITED STATES INTERNATIONAL TAXATION (1981).

that for a company to be deemed a Japanese company, it must be incorporated in Japan. Thus, subsidiaries of Japanese corporations which are incorporated in the United States cannot invoke Article VIII(1) while unincorporated branches of Japanese corporations operating in the United States do qualify as Japanese companies for treaty purposes.

The circuits are split on the question of the extent of the rights granted by Article VIII(1). The Fifth Circuit held that Article VIII(1) grants Japanese companies complete freedom in the area of hiring regardless of United States laws while the Second Circuit found that Article VIII(1) could not be read even so broadly as to exempt Japanese companies from Title VII. An examination of the language and negotiating and legislative history of the treaty reveals that the intent of the signatories and of Congress was to allow Japanese companies freedom to hire their own citizens to fill certain executive functions in the United States.

The Supreme Court has said that in certain situations discrimination based on citizenship does not constitute discrimination based on national origin in contravention of Title VII. A Japanese employer hiring only Japanese citizens for its U.S. operation does not, however, fall into the type of situation for which this rule was promulgated by the Court. Since this type of discrimination has the effect of discrimination based on national origin, it is likely to be construed as a violation of Title VII. As a result, it appears that Article VIII(1) grants companies of Japan the right to hire based on national origin in contravention of Title VII.

Resolution of the conflict between the Article VIII(1) treaty provision and Title VII is likely to come down in favor of allowing both enactments to coexist. It has long been the policy of the Supreme Court to disfavor the repeal of a treaty or statute by implication and without express congressional action. Further, where a specific statute, such as Article VIII(1), is in conflict with a general statute, such as Title VII, the general statute has not been held to abrogate the specific one. Therefore, Article VIII(1) must stand as an exception to Title VII.

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