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I. INTRODUCTION

Friendship, Commerce, and Navigation (FCN) treaties, like other treaties, create unique and difficult problems for the courts when attempting to reconcile their provisions with conflicting federal legislation. When signed by the President of the United States, an FCN treaty becomes part of the domestic law of this country without the necessity of further legislative action.1 Like federal legislation, treaties become part of the "supreme Law of the Land . . . ."2 This comment will discuss article VIII(1), as worded in the Korean and Japanese FCN treaties and its relation to various federal civil rights and labor regulations.3

Article VIII(1) of the Japanese FCN Treaty states in relevant part that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel . . . of their choice."4 The "of their choice" language, read in its broadest light, appears to exempt foreign corporations from United States labor and civil rights standards with regard to the hiring and firing of executive personnel. However, both courts and commentators have overlooked the plain meaning of article VIII to avoid granting such a broad exemption to foreign corporations claiming

1. See, e.g., Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (involving a Japanese citizen, a pawnbroker, who challenged a city ordinance allowing only United States citizens to engage in his line of business on grounds that it conflicted with the FCN treaty with Japan).
2. U.S. CONST. art. VI, cl. 2.
4. Japanese Treaty, supra note 3, at 2070. As noted above, this is the identical language found in the Korean provision. See ROK Treaty, supra note 3, at 2223.
protected under article VIII.5

While the determination of the scope of article VIII appears primarily to involve the application of established doctrines of treaty interpretation, two caveats are of note. First, the doctrines of treaty interpretation are unclear regarding federal legislative preemption of prior conflicting treaty provisions. Second, the primary goal of FCN treaties—encouraging foreign investment—often runs contrary to the undoubtedly significant goals pursued by United States civil rights and labor laws.

Article VIII was negotiated and agreed upon prior to two significant social and economic changes occurring in the United States. The first event was the passage of the Civil Rights Act of 1964,6 which raises the question of whether an international agreement is so elastic as to be subjected to various interpretations based upon fluctuations in the United States social climate. The second event was the tremendous growth in foreign investment (especially Pacific Rim investment), which was largely unforeseen by the United States negotiators. At the time the treaty was signed, the United States might have been willing to concede a narrow but complete exemption from United States laws with regard to the engagement of executive personnel. However, were it foreseeable that United States branches of foreign corporations would today be employing a vast number of American citizens, such a concession seems less likely. Do such unanticipated events warrant a unilateral revision (i.e., ignoring the plain meaning of the words “of their choice”) of a bilateral international agreement?

The bilateral nature of the treaties must also be recognized. Although the issue centers on a foreign corporation's exemption from American legal standards, it must not be forgotten that United States corporations are given the same benefit in the signatory's country. Therefore, when attempting to understand the underlying intent of article VIII, it is critical to remember that the United States negotiated on behalf of its own corporations to achieve the most favorable investment climate possible in the foreign nation.

Considering the tremendous economic bargaining power the United States maintained over the various FCN nations when the treaties were enacted, it becomes clear that the relative advantage of


exempting United States executives from foreign labor standards greatly outweighed any concession given in return. Thus, while advantageous to impose American labor standards on a foreign corporation’s ability to engage executive personnel, it is foolish to assume that this unilateral revision of article VIII would go unreciprocated. In turn, this could subject United States corporations to a wide array of foreign standards which might effectively eliminate United States control over its foreign subsidiaries.

Given this complex backdrop, it comes as no surprise that the case law defining article VIII has resulted in inconsistent interpretations. Two federal appellate court cases providing the foundation for this divergence of views are Avagliano v. Sumitomo Shoji America, Inc. and Spiess v. C. Itoh & Co.

In Sumitomo, the Second Circuit concluded that article VIII does not grant foreign corporations a “license to violate American laws prohibiting discrimination in employment.” The court reasoned that article VIII was included in the treaty in response to the laws of “a number of American states and many foreign countries [which] severely restricted the employment of noncitizens within their boundaries.” The court felt article VIII “was primarily intended to exempt companies operating abroad from local legislation restricting the employment of noncitizens.” Title VII of the Civil Rights Act does not “preclude the company from employing Japanese nationals” due to the Act’s bona fide occupational qualification (BFOQ) exception, which grants foreign corporations the ability to engage executives of

7. 638 F.2d 552 (2d Cir. 1981), vacated and remanded, 457 U.S. 176 (1982). On appeal, the Supreme Court in Sumitomo avoided interpreting the scope of article VIII and its relation to Title VII of the Civil Rights Act by concluding that a foreign subsidiary, incorporated in the United States, was not a company of Japan and was therefore not entitled to FCN treaty protections. 457 U.S. at 183.

8. 643 F.2d 353 (5th Cir. 1981).

9. Sumitomo, 638 F.2d at 558. In Sumitomo, female secretarial employees brought a class action suit against a Japanese corporation complaining of Sumitomo’s hiring practice regarding management level positions open only to male Japanese nationals. Id. at 553.

10. Id. at 559 (quoting Note, Japanese Employers, supra note 5, at 952-53 & n.28).

11. Sumitomo, 638 F.2d at 559.

12. Id.

13. 42 U.S.C. § 2000e-2(e) (1982). The bona fide occupational qualification (BFOQ) 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 in those certain instances where . . . national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .” Id.
their choice providing certain criteria are met.\textsuperscript{14}

The Fifth Circuit in \textit{Itoh} noted, however, that the primary purpose of FCN treaties was "to provide a stable environment for private international investment."\textsuperscript{15} The court held that \textit{Sumitomo} incorrectly labeled article VIII as a clause which should only be "read to grant national treatment."\textsuperscript{16} In an extensive analysis regarding the rights to be accorded various treaty provisions,\textsuperscript{17} the court found article VIII to be a noncontingent provision providing for "absolute rules" unrelated to national treatment concerns.\textsuperscript{18} These absolute rules permit foreign nationals to control their overseas investments.\textsuperscript{19} \textit{Itoh} concluded that "[c]onsidering the Treaty as a whole, the only reasonable interpretation is that article VIII(1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws."\textsuperscript{20}

This comment suggests that the proper interpretation of article VIII falls somewhere between the two polarities represented by \textit{Sumitomo} and \textit{Itoh}. Certainly, the words "of their choice" can reasonably be read to grant a complete exemption from the host countries' labor standards as illustrated by the \textit{Itoh} case. Such an interpretation, however, effectively grants foreign corporations the right to engage executive personnel in a manner that is not only unnecessary, but also was not bargained for by the treaties' signatories.

\begin{itemize}
  \item \textsuperscript{14} \textit{Sumitomo}, 638 F.2d at 559. The court recognized that the BFOQ exception "is to be construed narrowly," but went on to hold that: [A]s applied to a Japanese company enjoying rights under Article VIII of the Treaty it [the BFOQ exception] must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States, including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business. \textit{Id.}
  \item \textsuperscript{15} The court, however, failed to address the fact that subjecting foreign corporations to Title VII resulted in a case by case evaluation of their employment practices which was not the intention of the treaties' signatories. Further, while the BFOQ exception provides some minimal protection from Title VII, it does absolutely nothing for a corporation subjected to other United States labor laws (e.g., The Fair Labor Standards Act, 29 U.S.C. § 212 (1938)).
  \item \textsuperscript{16} \textit{Itoh}, 643 F.2d at 359.
  \item \textsuperscript{17} \textit{Id. at 360}.
  \item \textsuperscript{18} In determining what standards are to be accorded various treaty provisions, the court relied extensively on FCN authority Herman Walker. \textit{Id. at 357}. "A State Department cable notes that Mr. Walker formulated the modern concept of FCN treaties and negotiated many treaties on behalf of the United States." \textit{Id. at} 357 n.2. Walker recognized three possible standards to be applied to various treaty provisions, two contingent and one noncontingent standard. \textit{See} Walker, \textit{Modern Treaties of Friendship, Commerce and Navigation}, 42 MINN. L. REV. 805, 811 (1958).
  \item \textsuperscript{19} \textit{Itoh}, 643 F.2d at 360.
  \item \textsuperscript{20} \textit{Id. at 361}.
\end{itemize}
The purposes behind article VIII indicate that the parties to the treaties were primarily concerned with maintaining control over their foreign investments. In order to maintain this control, the parties were concerned only with protecting their ability to engage their own citizens in executive positions without regard to the host country’s labor standards. For example, there is no indication or basis for inferring that the treaties were intended to allow a foreign corporation to hire United States children in violation of child labor laws, or to hire white United States citizens over black United States citizens in violation of Title VII of the Civil Rights Act. Thus, an interpretation that article VIII provides a complete exemption from all host country labor laws appears to be overly broad.

Conversely, the Sumitomo approach also appears erroneous. Subjecting foreign corporations protected by FCN treaties to all United States labor standards not only renders article VIII entirely meaningless, but is also contrary to the primary purpose of FCN treaties, which is to encourage investment.

This comment’s proposal for interpreting article VIII’s “of their choice” language grants a complete exemption from the host country’s labor laws only when a foreign corporation is attempting to engage its own citizens in executive positions. This approach does not grant foreign corporations permission to violate United States labor laws under any other circumstances. Such an interpretation is consistent with the plain meaning of article VIII, the intent of the parties to the treaties, as well as the scope of United States labor and civil rights standards. In support of this proposition, it is necessary to explore the language of the treaty, the intent of its signatories, and the doctrines of treaty interpretation.

II. THE LANGUAGE OF ARTICLE VIII

To interpret the meaning of article VIII, two key phrases require investigation. Article VIII(1) states: “Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.”

The meaning of the word “engage” is significant because often a labor discrimination action arises after the foreign corporation has ter-

21. See infra notes 134-136 and accompanying text.
22. See Itoh, 643 F.2d at 362.
23. See Japanese Treaty, supra note 3, art. VIII(1), at 2070 (emphasis added).
minated a United States citizen and replaced him with a citizen of its own country. The question then becomes whether the right to "engage" also includes the right to terminate employment. It seems consistent with the interests associated with article VIII to conclude that such a right exists.

The Supreme Court has noted that "[t]he power of removal is incident to the power of appointment ...." This is consistent with the Black's Law Dictionary definition of "engage" which provides that the word "imports more than a single transaction." Further, since one of article VIII's primary purposes is to ensure that foreign investment remains in the investor's control, it would be anomalous to conclude that the right to engage does not include the right to terminate. Otherwise, a foreign corporation may be forced to retain an unnecessary employee in a control position due solely to the laws of the host country. This is exactly the situation article VIII was designed to protect.

Furthermore, had the parties intended to limit the scope of article VIII to hiring but not firing, they could have expressly stated such intent. Any other interpretation will discourage foreign firms from hiring local residents, since the only way to avoid the risk of liability under local laws would be refusing to hire them in the first place. Thus, it is consistent with the objectives of article VIII to include the right to terminate within the definition of the right to engage.

The second phrase needing definition is the "of their choice" language found in article VIII. A fundamental principle of treaty construction specifies that "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvi-


25. Treaty provisions should be interpreted with a special sensitivity to the words actually chosen by the parties. This is especially true with regard to the Japanese and Korean treaties because the two documents were written in two languages between people of different countries who did not even share a common linguistic heritage.

26. Myers v. United States, 212 U.S. 52, 122 (1926) (postmaster appointed by the President to a four-year term brought suit for past salary after being terminated by an order of the Postmaster General).

27. BLACK'S LAW DICTIONARY 622 (4th ed. 1957) (citing Head v. New York Life Ins. Co., 43 F.2d 517, 519 (10th Cir. 1930)).


29. Though Wickes and MacNamara had the opportunity to directly address this issue, they were silent on the matter; their silence can be interpreted as an implied acceptance of this view. See Linskey v. Heidelberg, 28 Fair Empl. Prac. Cas. (BNA) 1686 (E.D.N.Y. 1981) (impliedly assuming "engage" includes the right to terminate in Title VII conflict involving FCN provision similar to article VIII).
ous meaning effects a result inconsistent with the intent or expectations of its signatories.’”30 The obvious meaning of the words “of their choice” lends support to the Fifth Circuit’s view in Itoh that article VIII exempts foreign corporations from any law limiting their ability to control their executive personnel.31 However, whether the obvious meaning effects a result inconsistent with the intent or expectations of the signatories requires a deeper look into the underlying policies and the general intent of article VIII.

III. THE INTENT OF THE SIGNATORIES

The Sumitomo court based its holding that article VIII(1) does not exclude foreign corporations from United States labor standards on the proposition that the signatories’ intent was to exempt foreign corporations from percentile restrictions imposed by the host country on employment of noncitizens.32 Based on this somewhat narrow view of the provision’s intent, the court concluded that the foreign corporation was subject to Title VII restrictions since there was no percentile restriction on the corporation’s ability to hire their own citizens, especially in light of the court’s expanded interpretation of the BFOQ exception.33

However, the intent mentioned in Sumitomo appears to be only one of many reasons behind the inclusion of article VIII in the FCN treaties. As the court in Zenith Radio Corp. v. Matsushita Electric Industrial Co.34 noted, “[t]he Treaty with Japan was ‘part of a program to develop a series of modern commercial treaties whose general aim is to assure protection for American citizens and American interests in foreign countries.’”35 The fact that these interests included more than just immunity from percentile restrictions on the hiring of noncitizens is reinforced by the legislative histories of the

30. Sumitomo, 457 U.S. at 180 (quoting Maximov v. United States, 373 U.S. 49, 54 (1963)).
31. See supra notes 15-20 and accompanying text. “Choice implies the chance, right, or power to choose, usually by the free exercise of one’s judgment . . . .” WEBSTER’S NEW WORLD DICTIONARY 250 (2d ed. 1972).
32. Sumitomo, 638 F.2d at 559.
33. See supra notes 13-14 and accompanying text.
34. 494 F. Supp. 1263 (E.D. Pa. 1980) An American manufacturer brought suit against a branch office of a Japanese corporation claiming violation of The Antidumping Act of 1916. Id. at 1264. The court held that an FCN treaty did not impliedly repeal the statute. Id. at 1268.
35. Id. at 1267. (citing S. Rep. No. 5, 83d Cong., 1st Sess. 2 (1953)).
treaties. Prior to the ratification of the Japanese treaty, Harold Linder, Deputy Assistant of State for Economic Affairs testified that:

Perhaps the most important respect in which the current treaties differ from those of the twenties and thirties is in the greatly increased emphasis on the encouragement of American private investment abroad, by the expansion and strengthening of provisions relating to the protection of the investor and his interests. This development, of course, reflects the process of continuous adjustment to the needs and conditions of the era in which negotiation takes place. The United States came out of the war with a greatly expanded industrial machine and, alone among the major nations of the world, with a surplus of private capital available for export. To encourage the investment of this capital in the production of goods and services abroad was a matter of importance to our domestic economy and to economic development and world prosperity generally.36

Other comments during the ratification process also support the conclusion that the overriding purpose of the FCN treaties was to encourage American businesses, especially corporations, to develop foreign branch and subsidiary operations.37 Although percentile restrictions were one concern, it would be unrealistic to assume that the signatories were not also concerned about other types of legislation which would equally impair the ability to control their investment through executive hiring practices.

Sumitomo's reliance on the premise that article VIII was a reaction to percentile restrictions stemmed from an article by FCN authority, Herman Walker.38 Yet, even the provision from Walker's article cited to in the court's opinion39 shows that Walker had no intent to limit article VIII to percentile restrictions. He described article VIII as follows: “[M]anagement is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from 'percentile' restrictions and the like . . . .”40 The use of the phrase “and the like” indicates that Walker felt the United States was concerned with more than just percentile restrictions. Article VIII was apparently directed toward any domestic employment statute which would in-
terfere with the management and control of a foreign branch operation.

However, just as the commentary and legislative history of FCN treaties seems to indicate that article VIII was drafted to provide an exemption from all domestic labor laws, there is also authority to suggest that this exemption was intended to be available only in certain situations. Legislative history, though sparse, does indicate that the exemption was intended to apply only when a foreign corporation is attempting to engage one of its own citizens. For example, regarding the Japanese treaty, a congressional report described article VIII as only giving foreign employers the right to engage executive personnel "regardless of nationality." Further, the concern over percentile regulations, though not necessarily the sole intent behind article VIII, does lend support to the conclusion that article VIII was drafted to protect the placement of only nationals in certain executive and managerial positions.

The passage of the Immigration and Naturalization Act (INA) also supports this narrower interpretation of article VIII. Section 1101(a)(15)(E) of the INA sets forth circumstances under which an alien can enter the United States pursuant to an FCN treaty. The Sixth Circuit interprets this section to require that:

[b]efore a nonimmigrant alien can be issued a treaty trader visa, the State Department is required to certify that he will be 'engaged in duties of a supervi-

41. 1953 Hearings, supra note 37, at 9; see also Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, art. VIII, para. 1-2, 5 U.S.T. 550, 558, T.I.A.S. No. 2948 (incorporating the "regardless of nationality" language directly into article VIII).

42. The limited amount of legislative history supporting any position regarding the scope of article VIII has led to a great deal of reliance on passages that were probably never intended to carry such weight. The weight given to concern over percentile restrictions is a good example. If relied upon as the sole purpose of article VIII, it is possible to conclude that only laws limiting the hiring of noncitizens would fall within the purview of that clause. However, if the concern over percentile restrictions is properly taken as only one of many reasons behind article VIII, then it becomes clear that nonpercentage restrictions impacting the ability of the foreign corporation to engage executive personnel of their choice do not automatically apply. The comments relating to the concern over percentile restrictions support the conclusion that the complete exemption was intended to apply only when the foreign corporation wanted to "engage" one of its own citizens. This is the activity to which percentile restrictions pose a threat. See generally Note, Japanese Companies, supra note 5; Note, Japanese Employers, supra note 5.


44. 8 U.S.C. § 1101(a)(15)(E) (1982); see Wickes v. Olympic Airways, 745 F.2d 363, 368-69 (6th Cir. 1984) (holding that article VII of the Greek treaty, similar to article VIII of the Japanese treaty, allowed Greek corporations to discriminate in favor of Greek citizens only).
Accordingly, foreign corporations attempting to hire their own citizens to fill executive positions in the United States are "subject to the supervision and control of the State Department." When the INA and article VIII are read in conjunction, there is strong evidence that the intended exemption was for citizens of the foreign corporation's country only. Furthermore, by having control and supervision over the ability of these foreign citizens to enter the United States, the fear expressed in Sumitomo that such an exception would emasculate United States labor laws is greatly reduced.

Thus, there is substantial evidence that applying the obvious meaning to the words "of their choice" might well effect a result inconsistent with the intent or expectations of the signatories. Focusing on the character of article VIII, its relation to United States labor standards, and the policy behind FCN treaties in general reinforces this position.

IV. THE NONCONTINGENT CHARACTER OF ARTICLE VIII

Herman Walker, in articulating the scope of various FCN treaty provisions, recognized three mutually exclusive standards: (1) a standard contingent on "most favored nation treatment"; (2) a standard contingent upon "national treatment"; and (3) noncontingent standards. Most favored nation treatment is defined as treatment as

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45. Wickes, 745 F.2d at 369. A visa will issue to an alien if the purpose of his entry into the United States is:

(i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital.

8 U.S.C. § 1101(a)(15)(E) (1982). However, an alien will only be eligible for a “treaty trader” visa under an FCN treaty, if he:

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


46. Wickes, 745 F.2d at 369.

47. The court felt that "no evidence supports Sumitomo's broad interpretation [of article VIII] which carried to its logical conclusion, would immunize a party not only from Title VII but also, from . . . [all United States labor standards]." Sumitomo, 638 F.2d at 559.

48. See supra notes 30-32 and accompanying text.

49. See supra note 17.

50. Walker, supra note 17, at 811.
favorable as that enjoyed by the citizens of any foreign nation,\textsuperscript{51} while national treatment amounts to the same treatment afforded to native citizens.\textsuperscript{52} However, noncontingent standards are "[a]bsolute rules . . . intended to protect vital rights and privileges of foreign nationals in any situation, whether or not a host government provided the same rights to the indigenous population."\textsuperscript{53}

The characterization of article VIII into any one of these three categories will have a significant impact on its proper scope. The court in \textit{Sumitomo} appeared to place article VIII in the national treatment category.\textsuperscript{54} Such a classification favors limiting the scope of article VIII to the treatment which is enjoyed by United States corporations. In other words, foreign corporations would be subject to United States labor and civil rights laws to the same degree as domestic corporations. This interpretation, however, seems to render the "of their choice" language meaningless. By interpreting article VIII to fall into the noncontingent class, the court in \textit{Itoh} recognized that "article VIII(1)'s 'of their choice' provision was intended, not to guarantee national treatment, but to create an absolute rule permitting foreign nationals to control their overseas investments."\textsuperscript{55} The court also noted that other provisions which were intended to be accorded "national treatment" were all prefaced with the following phrase: "[N]ationals of either Party shall be accorded national treatment."\textsuperscript{56} Article VIII contains no such express limitation, thus lending support to the court's conclusion.\textsuperscript{57}

Walker also interprets article VIII(1) as an example of a noncontingent standard.\textsuperscript{58} According article VIII greater than national

\textsuperscript{51} See Walker, \textit{supra} note 28, at 236.
\textsuperscript{52} See Walker, \textit{supra} note 17, at 810-11.
\textsuperscript{53} \textit{Itoh}, 643 F.2d at 360 (citing Walker, \textit{supra} note 17, at 823).
\textsuperscript{54} \textit{Sumitomo}, 638 F.2d at 559. The court stated that "the clause 'of their choice' was . . . intended, in furtherance of the overall purpose of the Treaty, to facilitate a party's employment of its own nationals to the extent necessary to insure its operational success in the host country . . . ." Id. One source has supported this view of article VIII by arguing that a broad interpretation of this provision would exempt foreign corporations from all American labor laws and that this "would be a major departure from the Treaty's basic purpose of assuring equal, 'national' treatment." Note, \textit{Japanese Employers}, \textit{supra} note 5, at 950-51.
\textsuperscript{55} \textit{Itoh}, 643 F.2d at 360.
\textsuperscript{56} \textit{Id.} at 361.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} Walker, \textit{supra} note 28, at 234 n.15. In regard to noncontingent provisions, Walker describes them as:

\begin{itemize}
  \item rule-making in independent terms, without reference to the treatment given to others. Although non-contingent standards, because of their implication of definiteness might at first blush appear to provide the avenue to provisions of
\end{itemize}
treatment is not only consistent with the "of their choice" language, but also with the overriding goal of the FCN treaties to assure investors that they will be able to maintain control over their foreign investments.

Besides allowing greater than national treatment, the noncontingent character of article VIII is of a more concrete nature than either of the two contingent standards. Walker notes that, as opposed to noncontingent standards, "[c]ontingent standards . . . carry built-in automatic equalization and adjustment mechanisms."59 This is because both of the contingent standards are tied to a "determinable pole of reference"60 (i.e., the treatment of others or of one's own citizens). However, noncontingent standards are limited only by their own terms pursuant to their "absolute rule nature."61 Thus, noncontingent standards like article VIII should not be amenable to varying interpretations based upon the ever-changing United States political and social climate. This is a critical point to remember when analyzing article VIII's conflict with subsequently enacted labor and civil rights legislation.

V. ARTICLE VIII'S CONFLICT WITH UNITED STATES LABOR AND CIVIL RIGHTS LAWS

Assuming that article VIII was intended to accord foreign corporations a certain degree of control over their executive personnel, it must be reconciled with existing United States labor and civil rights laws. The courts have primarily concerned themselves with the con-

Walker, supra note 17, at 811-12 (emphasis in original).
59. Walker, supra note 17, at 812.
60. See supra note 58.
61. This is supported by and explains Walker's belief that: the non-contingent standard generally finds its best utility in a few contexts in which, no contingent standard being adequate, some recognizable body of applicable international law and terms of art has nevertheless evolved; it is also used at times faute de mieux, or to suggest a general guidepost of behavior en principe, or to solve some special problem. Walker, supra note 17, at 812 (footnote omitted). The language "engage executive personnel of their choice" appears to fit nicely into the category of a general guidepost of "behavior en principe."
conflict between article VIII and Title VII of the Civil Rights Act. Title VII prohibits hiring policies that have the purpose or effect of discriminating on the basis of race, color, religion, sex, or national origin.

Article VIII, however, specifically allows foreign corporations to discriminate on the basis of national citizenship. While Title VII does not appear to specifically bar discrimination based on citizenship, it would not require innovative pleading skills to turn discrimination based upon citizenship into a national origin, racial, or sexual discrimination claim. Furthermore, such suits could be brought on reverse discrimination grounds. Thus, even if the courts adopt the view that article VIII grants an exception for the engagement of the foreign corporation's own citizens, a conflict with Title VII exists.

The court in Sumitomo resolved this conflict in favor of Title VII. The court felt that Title VII was consistent with the language and purpose of article VIII because "Title VII, construed in the light of the Treaty, would not preclude the company from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business." In other words, the foreign corporation had to satisfy the BFOQ exception. The court also held that requiring a foreign corporation to establish BFOQ status would not "impose undue burdens on foreign employers." Further, the court was concerned that any broad interpretation of article VIII would "immunize" the foreign corporation from other important labor laws such as those covering the employment of non-Japanese nationals.

63. Id.
64. Id.
65. In Espinoza v. Farah Mfg. Co., 414 U.S. 86, 89-91 (1973), the Court held that by "national origin," Congress had not intended to refer to distinctions based on citizenship.
66. See Porto v. Canon, U.S.A., Inc., 28 Fair Empl. Prac. Cas. (BNA) 1679 (N.D. Ill. 1981), the plaintiff objected to the foreign corporation's hiring and promotion practices as violating Title VII by claiming that these practices were discriminatory against "non-Japanese national origin employees." The court, after deciding in plaintiff's favor, mentioned in a footnote that plaintiff might merely be stating that defendant corporation was discriminating in favor of Japanese citizens, and may have failed to state a cause of action. Id. at 1684 n.3. Subjecting foreign corporations to litigation of this sort was clearly not intended by the FCN treaty signatories.
67. See supra notes 7-14 and accompanying text.
68. Sumitomo, 638 F.2d at 559.
69. See supra notes 13-14 and accompanying text.
70. Sumitomo, 638 F.2d at 559.
children.\textsuperscript{71}

The approach taken by \textit{Sumitomo} is misguided for several reasons. Initially, the BFOQ exception was intended to be, and has been, interpreted narrowly.\textsuperscript{72} Under the \textit{Sumitomo} approach "[t]he bfoq would become the equivalent of the ‘of their choice’ provision . . ."\textsuperscript{73} Expanding the BFOQ to allow the engagement of one’s own citizens in executive positions would result in the BFOQ having a greater scope than anticipated by Congress.\textsuperscript{74}

Secondly, \textit{Sumitomo}'s conclusion requiring the foreign corporation to establish BFOQ status every time it desires to engage a national in an executive position seems to create an unreasonable burden. The "of their choice" language was not included in the treaty to subject both parties to a case by case determination and review of executive employment decisions.\textsuperscript{75} In fact, it seems that article VIII was drafted for the very purpose of avoiding such excessive litigation.

Furthermore, "[t]he main difficulty with such an attempt to provide an exemption from civil rights laws by use of the [BFOQ] . . . is that the Friendship, Commerce and Navigation Treaties appear to \textit{provide broader exemptions} than merely to the civil rights provisions."\textsuperscript{76} Both the \textit{Sumitomo} and \textit{Itoh} courts noted that the article VIII exemption being requested exceeded civil rights coverage and extended to other laws that do not have provisions similar to the BFOQ.\textsuperscript{77} As Joseph Fleming\textsuperscript{78} noted:

\textit{[t]here is no similar exemption in many of the other federal labor and discrimination laws; if the pending case is resolved by virtue of the \text{unique attempt to reconcile a treaty conflict with a statutory conflict by relying on an exemption in the statute, the treaty question will still create problems with regard to other labor and discrimination laws.}}\textsuperscript{79}

Thus, while the BFOQ exception may provide a marginally acceptable escape from Title VII liability, it offers no protection from other

\begin{itemize}
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} See Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).
\item \textsuperscript{74} "To expand the bfoq exception in an attempt to reconcile Title VII to the Treaty language will only result in 'lip service' to Title VII while widening and weakening the heretofore narrow construction given to the bfoq exception." \textit{Id.}
\item \textsuperscript{75} See supra note 22 and accompanying text.
\item \textsuperscript{77} \textit{Sumitomo}, 638 F.2d at 559; \textit{Itoh}, 643 F.2d at 362. "For example, it would be difficult to find a similar means of reconciling the conflict between the treaty provisions and the application of the Labor Management Relations Act [29 U.S.C. §§ 141-187 (1947)] which provides rights to labor organizations." Fleming, supra note 76, at 459.
\item \textsuperscript{78} Fleming is a partner of the law firm of Fleming and Huck in Miami, Florida. He has served as chairman of the Labor Law Committee and the Environmental and Land Use Section of the Florida Bar. Fleming, \textit{supra} note 76, at 457.
\item \textsuperscript{79} \textit{Id.} at 460 n.60 (emphasis added).
\end{itemize}
labor regulations that would equally impair the ability of foreign corporations to maintain control over their foreign investments by limiting their power to engage executive personnel "of their choice."

It should also be noted that by providing only foreign corporations with the BFOQ exception to escape Title VII liability, article VIII is being accorded only "national treatment" standards because all locally incorporated firms are also entitled to the privilege of the BFOQ exception. Such an approach is inconsistent with the noncontingent nature of article VIII, which was intended to provide greater than national treatment. Although the Supreme Court reversed Sumitomo on grounds other than article VIII, it noted that "[t]he only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)." The BFOQ approach treats branches and subsidiaries incorporated in the United States (and not entitled to FCN protection) alike, thus negating the Supreme Court's view of the role of article VIII.

The Second Circuit's concern for the integrity of non-Title VII labor standards also appears overstated. Article VIII would exempt only executives, accountants, attorneys, agents, specialists, and technical experts. "Since these employees would be of executive, professional, managerial or administrative categories, they would be exempt from the overtime provisions of the Fair Labor Standards Act . . . and would not be covered employees under the Labor Management Relations Act . . . ." Concern over child labor laws also seems misplaced since article VIII deals only with top level employees whose services are necessary to ensure the operational success of the foreign corporation.

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80. See supra note 52 and accompanying text.
81. See supra note 58 and accompanying text.
82. See supra note 7.
83. Sumitomo, 457 U.S. at 189 (emphasis added).
84. ROK Treaty, supra note 3, at 2223.
86. As the court in MacNamara noted:

[Employees at this level are in a position to make their own bargains or at least to discover before applying for or accepting a position with a foreign corporation that it is doing business in this country pursuant to a Treaty and to ascertain the conditions of employment. If it were within a court's prerogative to set policy, which it is not, it would seem that the balance would tip in favor of construing the treaty language plainly and not contorting it to protect what is likely a relatively small number of persons who knowingly assume essential positions which establish or administer the policy and solely advance the financial interests of the employing foreign entity.

Id. at 390-91.
If the courts adopt the approach that article VIII applies only when citizens of the foreign corporation's country are engaged in executive positions, the concerns of destroying the integrity of United States labor regulations will be even more reduced. Under this approach, United States citizens could not be subjected to labor practices inconsistent with these regulations. For example, if a Korean corporation hires a child protected by United States child labor laws, the article VIII exemption would be available only if the child was a Korean citizen. Children that are United States citizens are not covered by the exemption. This is consistent with both the goal of encouraging foreign investment by way of article VIII and the intended scope of American labor regulations, which arguably were not meant to cover foreign citizens working in foreign corporations.

Because of the paramount importance of Title VII, some courts are still unwilling to provide an exemption despite the express language of article VIII. After conceding that the rationale of the Itoh decision was compelling, the court in Linsky v. Heidelberg Eastern, Inc., held in favor of the plaintiff and Title VII: "There is . . . a firm commitment to uphold and support the progress of Title VII in its attempt to wipe out all forms of invidious discrimination, and this court perceives no compelling reason to put a chink in that armor." This rationale raises the issue of the relationship between treaty provisions and subsequently enacted federal legislation; doctrines of treaty interpretation assist in determining their relative priority.

VI. TREaty INterpretation

Since a majority of FCN treaties were entered into prior to the passage of the Civil Rights Act, the relative priority of Title VII and article VIII turns on the appropriate rules of treaty interpretation. The cases seem to follow two inconsistent sets of rules which largely contributed to the disparity between the Sumitomo and Itoh decisions.

In Whitney v. Robertson, the Supreme Court noted that when resolving conflicts between treaties and federal laws, a well established principle requires that the court first attempt to reconcile the

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87. 28 Fair Empl. Prac. Cas. (BNA) 1686 (E.D.N.Y. 1981) (American subsidiary of a Danish corporation discharged plaintiff because he was an older American citizen and not a Danish citizen).
88. Id. at 1689. The opinion stated that "[t]his court does concede that the Fifth Circuit's rationale is quite compelling as there is a strong argument for the theory that American businessmen like foreign businessmen sought provisions . . . 'to ensure so that the . . . businessman's investment in the host country would remain within his control.'" Id. (citing Itoh, 643 F.2d at 361).
89. Itoh, 643 F.2d at 361; Linsky, 28 Fair Empl. Prac. Cas. (BNA) at 1689.
90. 124 U.S. 190 (1888) (plaintiff merchants claiming that the treaty with the Dominican Republic entitled them to import various goods duty-free consistent with a statute allowing duty-free imports from Hawaii).
two. This is apparently the approach taken by the court in Sumitomo. However, the conflict between article VIII and Title VII is not adequately reconciled by way of the BFOQ exception. If the conflict is irreconcilable, as in Sumitomo, the question becomes if and when subsequent federal legislation supersedes prior treaty provisions.

The court in Zenith Radio Corp. v. Matsushita Electric Industrial Co., follows a line of cases that adhere to an “implied repeal” doctrine. This doctrine emerges from the Robertson decision holding that when a treaty and a federal statute directly conflict with one another, the one most recently enacted controls. Based on this approach, Title VII simply overrides article VIII via the implied repeal doctrine.

However, the Itoh court followed a separate line of cases, which adhere to the general rule that “subsequent federal legislation will invalidate treaty obligations if the congressional intent to do so is clearly expressed.” This approach was also followed in MacNamara v. Korean Air Lines. The Supreme Court has expressed concern over interfering in the “delicate field of international relations” absent the clearly expressed intention of Congress.

Under this approach, the Itoh court found no language in Title VII indicating Congress’s intent to repeal article VIII. The court further

91. Id. at 194.
92. See supra notes 67-79 and accompanying text.
94. See supra note 90 and accompanying text.
95. Robertson, 124 U.S. at 194.
96. Itoh, 643 F.2d at 362 (emphasis added) (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963)). The court then inferred that “principles governing the implied repeal of statutes by subsequent statutes [are] to apply with equal force to subsequent treaty provisions.” Id.
97. 45 Fair Empl. Prac. Cas. (BNA) 384, 391 (E.D. Pa. 1987). In MacNamara, the court found that “[i]n the absence of the clear intent of Congress to disavow the Treaty, it is appropriate to consider whether there is any reconciliation between the Treaty language and Title VII.” Id. The court then noted the Second Circuit BFOQ reconciliation and discounted it for the reasons stated above. Id; see supra notes 67-83 and accompanying text.
98. Benz v. Compania Naviera Hidalgo, 333 U.S. 138, 147 (1957) (discussing whether the Labor Management Relations Act applied to United States labor disputes involving foreign vessels and foreign crews); see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658 (1979). “Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . .” Id. at 690 (emphasis added).
noted that despite the high priority of employment discrimination laws, "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."\textsuperscript{99}

The diversity of case law reflects the difficulty of reconciling two entirely different types of authority, both of which are considered to be the "supreme Law of the Land."\textsuperscript{100} However, the nature of FCN treaties favors a construction consistent with that adopted in \textit{Itoh}. This is supported by the fact that FCN treaties are "negotiated on a \textit{bilateral}, rather than a multilateral, basis."\textsuperscript{101}

FCN treaties are "normally concluded for an initial period of ten years certain and indefinitely thereafter, unless and until terminated upon the giving of one year's formal notice."\textsuperscript{102} The stability, durability, and breadth of FCN treaties "demand rules framed in terms of principles that remain valid regardless of an unpredictable future."\textsuperscript{103} Thus, the bilateral nature of the treaty makes a unilateral "implied repeal" of a very important provision most unnatural.

For instance, the United States reacted unfavorably when Korea tried to unilaterally repeal a treaty provision through subsequent legislation. In 1963, the Republic of Korea passed the "Newspaper, Communication, Etc. Registration Act,"\textsuperscript{104} which prohibited foreign nations and foreign organizations from becoming publishers or editors of foreign periodicals. The United States Commercial Attache in Korea asked whether any consideration was given to the possibility of conflicts with the FCN treaty, but was assured that none existed.\textsuperscript{105} Despite these assurances that the FCN treaty would remain intact despite subsequent legislation, the State Department forwarded a telegram which read:

\begin{quote}
Embassy should express hope that appropriate administrative action be taken to protect these rights and request ROKG [Korea] consider appropriate changes be made to conform law to Treaty guarantees. Koreans might be reminded that a law of this nature is scarcely conducive to favorable foreign investment climate which [is] presumably one of [the] objectives [of the]
\end{quote}

\textsuperscript{99.} \textit{Itoh}, 643 F.2d at 362.
\textsuperscript{100.} U.S. CONST. art. VI, cl. 2.
\textsuperscript{101.} Walker, \textit{supra} note 28, at 240 (emphasis added).
\textsuperscript{102.} Walker, \textit{supra} note 17, at 809 (footnote omitted).
\textsuperscript{103.} \textit{Id.} (emphasis added). Walker also suggests that "the traditional bilateral approach offers the opportunity, in the context of a general regulation of relations commencing with the idea of 'friendship,' to accomplish step-by-step such progress as is now possible in building international rules of law for the protection of persons and their legitimate interests abroad." \textit{Id.} at 824.
\textsuperscript{104.} Korean Law No. 551, July 1, 1960 (unofficial translation found in 545 KOREA-UNOFFICIAL TRANSLATIONS, PUBLIC LAWS AS PROMULGATED).
\textsuperscript{105.} Incoming telegram from American Embassy in Seoul, South Korea, to the Department of State (Jan. 1, 1965).
Acceding to United States demands, the Korean government held that articles VII and VIII of the FCN treaty preempted domestic law under the doctrine of "Lex specialis deroget generali," for the treaty was applicable only to the people of the signatory countries, while the domestic law was applicable to all foreign persons. This approach is faithful to the bilateral nature of the treaty. Furthermore, it would be unaccommodating to the primary FCN goal of foreign investment to argue for the adoption of Lex specialis deroget generali when control over United States foreign investments is in jeopardy, and then to argue that domestic law is free to supersede FCN provisions to the detriment of foreign investors.

Thus, at a very minimum, it seems that in order for a subsequent federal statute to repeal a bilateral treaty provision, a clear intent to do so must be stated. This is consistent with the view recently taken by the Supreme Court in Trans World Airlines, Inc. v. Franklin Mint Corp., wherein the Court noted that "[t]here is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."

**VII. ANALYSIS OF OTHER FCN TREATIES**

Thus far, the focus has been on article VIII of the Japanese and Korean FCN treaties. However, a look at similar provisions in other FCN treaties is useful to determine the proper scope of article VIII.

In 1960, three years after the Korean treaty and seven years after the Japanese treaty, the United States ratified an FCN treaty with Pakistan. Article VIII of this treaty provides that "[n]ationals and companies of either Party shall be permitted, in accordance with the

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106. Outgoing telegram from Secretary of State Rusk to the American Embassy in Seoul, South Korea (Jan. 22, 1965).


108. An argument could be made that a subsequent federal statute should never unilaterally repeal a bilateral treaty provision. Since the FCN treaties are revocable upon one year's notice, timely revocation is the proper way of unilaterally repealing treaty provisions. See supra note 102 and accompanying text.


110. Id. at 252 (emphasis added).

applicable laws, to engage, within the territories of the other Party . . . executive personnel . . . of their choice." 112 This language clearly subjects the foreign corporation to the host country's applicable labor standards for executive employment decisions.

The absence of the phrase "in accordance with the applicable laws" in the Japanese and Korean treaties is significant. 113 It could easily have been inserted had the parties so intended. As the Supreme Court in Geofroy v. Riggs 114 noted, treaties "are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended." 115 Thus, the two versions of article VIII, being substantially different, deserve different interpretations consistent with the "ordinary meaning" of their terms. 116

Furthermore, when the government of Uruguay indicated an unwillingness to accept a similar provision in their FCN treaty, there was a strong negative reaction from the United States negotiators. Uruguay proposed that, with regard to the foreign corporations' ability to select executive personnel, "discrimination against [host country] nationals shall be avoided, and without prejudice to laws designed to protect their employment." 117 The United States negotiators felt that such an "amendment would seriously weaken rights which this paragraph seeks to safeguard . . . ." 118 The final document retained the rights of foreign corporations to employ executive per-

112. Id. at 114 (emphasis added).
113. The approach taken by the court in Sumitomo would render this discrepancy in the language of the treaties meaningless by subjecting Japanese and Korean corporations to American labor standards despite the clear language to the contrary. See Sumitomo, 638 F.2d at 558-59.
114. 133 U.S. 258 (1890) (resolving the question of whether a citizen of France, whose property rights are protected under a treaty with France, can inherit land from a United States citizen in the District of Columbia).
115. Id. at 271 (emphasis added).
116. This view is consistent with the established principle of treaty construction requiring a broad interpretation to protect the rights created, not a restrictive construction against those rights. See Asakura v. Seattle, 265 U.S. 332, 342 (1924).
117. Airgram No. 262 from the U.S. Department of State to the U.S. Embassy, Montevideo, Uruguay (Nov. 10, 1949).
118. Id. Further, the United States State Department was of the impression that the proposal would create "serious difficulties." Id.

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sonnel of their choice, regardless of nationality, in accordance with United States' desires.\textsuperscript{119}

The negotiations with Uruguay indicate the United States' intent that an article VIII provision be included to allow American investors to control their overseas investments by exempting them from foreign labor regulations in the hiring of American citizens in executive positions. The Uruguay treaty contains the first such provision written into an FCN treaty.\textsuperscript{120} It is reasonable to conclude that as the amount of foreign investment in the United States increased, leading to more United States citizens being employed by foreign firms operating in the United States, the desirability of a provision like article VIII may have decreased. The treaty with Pakistan may be seen as representative of this change. However, such a change in circumstances should not be allowed to alter the plain meaning of a noncontingent standard in a bilateral treaty.

VIII. FCN TREATY CHARACTERISTICS AND THE DESIRE TO MAINTAIN CONTROL OVER FOREIGN INVESTMENTS

In determining the intended scope of any particular FCN provision, it is essential to look at the characteristics and policies of the treaty as a whole. Through an understanding of the objectives of treaty negotiations, a more accurate and consistent interpretation of article VIII is possible. In describing the nature of the FCN agreement, Herman Walker noted:

> [A]lthough 'friendship' is attributed an honored place in the title . . . these treaties are not political in character. Rather, they are fundamentally economic and legal. Moreover, though 'commerce' and 'navigation' complete the title and accurately describe part of their content, their concern nowadays is only secondarily with foreign trade and shipping. They are 'commercial' in the broadest sense of that term.\textsuperscript{121}

Not only are FCN treaties predominantly commercial in nature, they are also primarily concerned with the encouragement and protection of foreign investment:\textsuperscript{122}

Treaties for investment purposes deal with the basic legal conditions which in-


\textsuperscript{121} Walker, supra note 17, at 806 (emphasis added).

\textsuperscript{122} "The principal vehicle advocated by the United States Government . . . to deal by agreement with the ground rules affecting investment is the bilateral treaty of friendship, commerce, and navigation . . . ." Walker, supra note 28, at 230 (emphasis added).
fluence the degree to which potential investors are willing to venture their
capital in undertakings in a foreign land. They aim, on a joint consensual ba-
sis, to establish or confirm in the potential host country a governmental policy
of equity and hospitality to the foreign investor.¹²³

These primary goals of commercial investment, encompassing both
foreign investment in the United States and United States invest-
ment in foreign nations, are of significant importance when address-
ing the intended scope of article VIII. These treaties were not
drafted for the primary purpose of protecting American labor from
potential discriminatory hiring practices of foreign firms, and their
provisions should be read accordingly.¹²⁴

Another characteristic of FCN treaties to consider in determining
the scope of article VIII is their bilateral nature. Prior to the ratifica-
tion of the Japanese treaty, Senator Hickenlooper made a significant
point in noting that:

[W]hen the United States gives a right or a privilege to an alien to carry on
activities in this country, the United States in turn obtains similar rights for
American citizens abroad. I emphasize this point because it is essential that
we not view the conventions simply as documents which give aliens limited
rights in this country. In fact, since there are many more Americans doing
business abroad than there are aliens doing business in this country, Ameri-
cans, as measured in either numbers or in volume of business, get more ad-
vantages abroad than we accord advantages here to aliens.¹²⁵

Thus, an important concern related to any restrictive interpreta-
tion of article VIII is the likely retaliation by foreign signatories
against United States investments abroad, an interest that, as Senator
Hickenlooper notes, is substantially greater than those small conces-
sions we gave up in return. Consequently, due to the bilateral nature
of the treaty, any restrictive interpretation of article VIII will virtu-
ally undermine one of a primary United States FCN interest—to fa-
cilitate American private sector investment in foreign nations.¹²⁶

¹²³. Id. Walker also felt that “following World War I ... [FCN] treaties were
designed especially to promote international trade ... With the consequent decrease
of emphasis on the FCN treaty’s role in international trade, the instrument lay ready
to hand following World War II to be retooled to fit the newly-crystallized investment
need.” Id. at 231 (emphasis added). “It meant ... a shift in orientation and internal
balance, with the refinement, building up, and supplementing of familiar features es-
pecially pertinent to investor requirements.” Id.

¹²⁴. Even the court in Sumitomo recognized the investment concerns leading to
the drafting of the Japanese treaty. Sumitomo, 638 F.2d at 554.

¹²⁵. Even the court in Sumitomo recognized the investment concerns leading to
the drafting of the Japanese treaty. Sumitomo, 638 F.2d at 554.

¹²⁶. Even the court in Sumitomo recognized the investment concerns leading to
the drafting of the Japanese treaty. Sumitomo, 638 F.2d at 554.
The bilateral nature of the treaty also requires that United States courts provide some deference to the interpretation given article VIII by the foreign signatories. While the *Sumitomo* case was before the Supreme Court,\(^{127}\) several foreign groups filed briefs expressing their concern over the Second Circuit's interpretation of article VIII. The Japan External Trade Organization argued that "endorsement of the decision of the Second Circuit will tend to discourage Japanese direct investment... The court's decision tends to frustrate the intention of the FCN treaty 'by undercutting the ability of Japanese investors to control the key personnel who manage their investments in the United States.'"\(^{128}\) Japan's Ministry of International Trade and Industry took the position that "[t]he ability of Japanese investors to dispatch executive employees *from Japan* to manage and control their overseas subsidiaries is of great importance and is indeed a basic prerequisite to the successful management of their overseas business activities."\(^{129}\) Thus, the view of the foreign signatories is consistent with a complete exemption from the host country's laws.

This discussion points out that when looking at the "four corners" of the treaty, it is reasonable to conclude that *Itoh* was correct in holding that the intent of the signatories with respect to article VIII was exactly as they wrote it; namely, that "[c]ompanies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws."\(^{130}\)

This absolute exemption, however, can be refined and narrowed by changing the focus of analysis from the overall policy concerns of the treaty as a whole, to the more specific purposes associated with article VIII. It is this more specific analysis which leads to the conclusion that a complete exemption from host country laws was actually intended to apply only when the foreign corporation was engaging one of its *own citizens* in executive or top managerial positions.

Article VIII, and its right to free choice of executive personnel, seeks to ensure that a foreign businessman's investment in the host country will remain under his own control.\(^{131}\) However, it appears that this interest should extend only as far as granting foreign inves-

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\(^{127}\) See supra note 7 and accompanying text.

\(^{128}\) *Decision in Sumitomo Case Will Influence Foreign Investment, Supreme Court Told*, INT'L TRADE REP. U.S. IMPORT WEEKLY, Mar. 3, 1982, at 518.


\(^{130}\) *Itoh*, 643 F.2d at 361.

\(^{131}\) *See Commercial Treaties—Treaties of Friendship, Commerce and Navigation, with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan: Hearings*
tors the capability of engaging their own citizens in control positions. No reasonable justification exists for assuming that the signatories were concerned with an unfettered right to engage the host country's citizens in any manner they saw fit. Such an assumption is wholly inconsistent with the general purpose behind article VIII—keeping management and control in the hands of the foreign investor.

Although legislative history is sparse in this area, there is sufficient evidence suggesting that the "of their choice" language was intended to be limited in this manner. Complementary "Treaty Trader" provisions found in the Immigration and Naturalization Act of 1952 further supports this position. By narrowing the broad exemption adopted by the court in *Itoh* (which would have granted immunity regardless of the citizenship of the employee in question), the risk of emasculating United States civil rights and labor laws is reduced; simultaneously, the commercial and investment nature of the treaties is recognized, together with adherence to the plain meaning of the provision, as the Second Circuit in *Sumitomo* failed to do.

**IX. CONCLUSION**

The "of their choice" language of article VIII is clear on its face. Yet the nature of treaties is inherently complex, both in terms of interpreting the language of the treaty as well as resolving conflicts with subsequent federal legislation. However, the "of their choice" language was inserted into these heavily negotiated international agreements to protect a specific right. That the provision was meant merely to allow the foreign corporation to be subject to the host country's labor standards is not only contrary to article VIII's plain meaning, but is in direct conflict with the treaty's overriding goal of encouraging foreign investment.

When negotiating the Korean FCN treaty, the Committee on Foreign Relations noted: "The obligation of this treaty is to protect the personal security, rights and property of Americans in Korea and to facilitate their travel and business activities. The treaty emphasizes measures which will promote private investment by the United States in Korea."  

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*Before the Subcomm. of the Senate Comm. on Foreign Relations, 83d Cong., 1st Sess. 2, 3, 6-9 (1953).*

132. *See Wickes v. Olympic Airways,* 745 F.2d 363, 367-68 (6th Cir. 1984). The court in *Wickes*, while interpreting article XII of the Greek FCN treaty (substantially similar to article VIII of the Japanese and Korean treaties), concluded that "[t]he legislative history of the Greek Treaty contains substantial evidence that Article XII was intended to be a narrow privilege to employ Greek citizens for certain high level positions, not a wholesale immunity from compliance with labor laws prohibiting other forms of employment discrimination." *Id.* at 365 (emphasis in original).
133. *See supra* notes 43-47 and accompanying text.
This comment reveals both the treaty’s investment orientation as well as its bilateral nature. In treaties designed to encourage investment, subjecting the foreign corporation’s engagement of employees in control level positions to the host country’s labor standards is anomalous. Under a bilateral treaty, it is foolish to presume that if the United States unilaterally narrows article VIII, reciprocal measures will not be taken in those countries where United States corporations have vital investments. Further, the labor laws of these foreign nations may be much more severe than our own.

The intent behind article VIII reveals that the signatories were primarily concerned with maintaining management and control over their foreign investments, not with the impact the limited exemption to the host country’s labor laws would have on the host country’s citizens. As Senator Hickenlooper remarked:

[i]f a country could in any manner limit the right of a foreign enterprise to engage or terminate the employment of executive personnel of its choice, it would severely undercut the ability of an enterprise to control and manage its investment—an ability which the United States sought to secure.135

Control over one’s investment is adequately maintained by granting a complete exemption to the placement of citizens of the foreign corporation’s country in executive and other important central positions. Any broader interpretation, though possible due to the plain meaning of the language of article VIII, would effect “a result inconsistent with the intent or expectations of its signatories.”136

Doctrines of treaty interpretation, though inconsistent, are adequate to support the conclusion that subsequent federal legislation will not impliedly override previously established bilateral treaty provisions. Legislation expressing an intent to do so, however, is much more consistent with the bilateral nature of FCN treaties. Accordingly, legislation such as the Civil Rights Act will not void the exemption carved out by article VIII.

Thus, in adhering to the overriding objectives of FCN treaties and to the more specific objectives sought by article VIII, the “of their choice” language should be interpreted to grant a complete exemption from the host country’s laws where a foreign corporation is attempting to engage one of its own citizens in an executive position in their foreign office. The benefits which American overseas invest-

135. 99 CONG. REC. 9312 (1953) (emphasis added).
136. See supra note 30 and accompanying text.
ments will enjoy greatly outweigh the cost of granting this narrow exception to United States labor standards.

GREGORY S. LANE