Denver Journal of International Law & Policy

Volume 10
Number 2 *Winter*

Article 14

January 1981

The Impact of Title VII Protection on FCN Treaties: Conflict and Interpretation

Christine J. Jobin

The Impact of Title VII Protection on FCN Treaties: Conflict and Interpretation

Keywords
Treaties, Civil Rights

willingness to take even a brief look at the reasons behind Fedorenko's misstatements seems unjustified.

Perhaps at the bottom of the Court's difficulties with this case were the emotions and memories that remain of World War II concentration camps. In his dissent, Justice Stevens recognized this force—"a sort of 'hydraulic pressure' that tends to distort our judgment."[52]

He concluded:

> Perhaps my refusal to acquiesce in the conclusion reached by my highly respected colleagues is attributable in part to an overreaction to that pressure. Even after recognizing and discounting that factor, however, I remain firmly convinced that the Court has committed the profoundest sort of error by venturing into the unknown to find a basis for affirming the judgment of the court of appeals. That human suffering will be a consequence of today's venture is certainly predictable; that any suffering will be allayed or avoided is at best doubtful.[53]

Bernie M. Tuggle

The Impact of Title VII Protection on FCN Treaties: Conflict and Interpretation

Avigliano v. Sumitomo Shoji America, Inc.,[1] a recent Second Circuit case, brings into focus a direct conflict between United States domestic law and the provisions of a 1953 commercial treaty between the United States and Japan.[2] A group of female secretarial employees of Sumitomo Shoji America, Inc. (Sumitomo), a New York-incorporated, wholly-owned subsidiary of a Japanese commercial firm, brought a class action alleging that the corporation's practice of hiring only male Japanese nationals for management-level positions violated Title VII of the Civil Rights Act of 1964,[3] section 1981 of the Civil Rights Act of 1866,[4] and the Thirteenth Amendment.[5]

Sumitomo sought dismissal on the ground that the Japanese Treaty of Friendship, Commerce and Navigation (FCN) exempted Japanese trading companies and their wholly owned subsidiaries in the United

52. 101 S. Ct. at 763 (Stevens, J., dissenting).
53. *Id.*

1. 638 F.2d 552 (2d Cir. 1981).
2. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Japanese Treaty or Treaty].
3. 42 U.S.C. §§ 2000e *et seq.* (1976).
4. 42 U.S.C. § 1981 (1976).
5. U.S. CONST. amend. XIII.

States from the Application of Title VII. The district court dismissed the plaintiffs' section 1981 and Thirteenth Amendment claims, but denied the motion with respect to the Title VII claim.[6] Although the court of appeals affirmed the denial of the defendant's motion, it did so on grounds other than that relied on by the district court. On appeal, the Treaty was found not to exempt Japanese companies operating in the United States, whether or not they were incorporated in the United States, from United States laws prohibiting discrimination in employment. The action was remanded to the district court for a determination of the Title VII claim.

The significance of the appellate decision is twofold. First, the Treaty has been construed to clarify the issue of whether a wholly owned locally incorporated subsidiary has standing to invoke a Treaty provision to protect foreign investments in a discriminatory employment action. Second, the right of Japanese firms operating in the United States under the Treaty to hire executives "of their choice"[7] has been limited by the standards prescribed by United States laws prohibiting discrimination in employment. The denial of the defendant's defense will have ramifications beyond the Japanese Treaty because the United States presently is party to some two dozen treaties containing substantially similar provisions.[8] Another factor is accelerating foreign investment in the United States,[9] creating more managerial positions to be staffed by foreign personnel.[10] Although the practical effect of the *Sumitomo* decision has yet to be fully realized, the Second Circuit has struck the initial balance between the needs of foreign employers and the value of fair employment practices in

---

6. 473 F. Supp. 506 (S.D.N.Y. 1979). The district court denied the defendant's motion on the ground that the Treaty was not meant to protect the employment practices of Japanese subsidiaries incorporated in the United States. Sumitomo sought reconsideration of the refusal to dismiss, and upon reconsideration the motion was again denied, this time on the ground that, while Japanese subsidiaries incorporated in the United States are given some rights by the Treaty, the specific provision of the Treaty on which Sumitomo was relying was not intended to apply to subsidiaries. No. 77-5641 (S.D.N.Y. Nov. 29, 1979).

7. Japanese Treaty, *supra* note 2, art. VIII, para. 1.

8. For a partial list, see 1 INT'L LEGAL MAT. 92 (1962).

9. *See Japan Steps Up its "Invasion" of U.S.*, U.S. NEWS & WORLD REP., Dec. 11, 1978, at 57.

10. Two visa categories, "treaty traders" and "treaty investors," permit foreign citizens to enter the United States and serve as managerial employees for foreign employers. A "treaty trader" is an alien who enters the United States to serve in a supervisory capacity, pursuant to a commercial treaty, "to carry on substantial trade, principally between the United States and the foreign state of which he is a national." 8 U.S.C. § 1101(a)(15)(E)(i) (1976). A "treaty investor" is an alien who enters the United States to serve in a "responsible capacity" pursuant to a commercial treaty "to develop and direct the operations of an enterprise in which he has invested." 8 U.S.C. § 1101(a)(15)(E)(ii) (1976). From 1966 to 1975 the total number of treaty-trader and treaty-investor visas issued by the United States grew from 4,521 to 13,548, with Japanese employees accounting for more than half of the increase. U.S. DEP'T OF STATE BUREAU OF SECURITY AND CONSULAR AFFAIRS, ANNUAL REPORT OF THE VISA OFFICE 66 (1975); U.S. DEP'T OF STATE BUREAU OF SECURITY AND CONSULAR AFFAIRS, ANNUAL REPORT OF THE VISA OFFICE 68 (1966).

the United States in favor of a commitment to anti-discrimination principles.[11]

The 1953 Japanese Treaty is a commercial agreement designed to create a legal environment that encourages mutually beneficial trade and investment between the United States and Japan. The general aim of the Treaty, as in most FCN agreements, is to

> establish or confirm in the potential host country a governmental policy of equity and hospitality to the foreign investor. This means, above all, assurance that the enterprise and property of the alien will be respected and that he will be accorded equal protection of the laws alike with citizens of the country.[12]

FCN treaties have contained so-called "establishment provisions" dealing with the right of citizens of each country to establish and carry on business activities within the other and to receive due protection there for themselves and their property. The basic rule to govern the conduct of such activities has long been settled in United States treaty practice: "national treatment," or equality of treatment, is accorded the alien. It is also customary that the alien and property will receive "a certain minimum degree of protection, as under international law, regardless of a Government's possible lapses with respect to its own citizens."[13]

Article VII of the Japanese Treaty is the "basic establishment provision"[14] and embodies the juridical basis of economic intercourse and level of treatment to be accorded Sumitomo. Article VII provides in relevant part that

> Nationals and companies of either Party shall be accorded national treatment . . . whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories . . . to organize companies under the general company laws of such other Party. . . . Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall . . . be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.[15]

As stated above, the district court's denial of Sumitomo's motion was affirmed on appeal, but on different grounds. Unlike the lower court, the court of appeals construed Articles I, VIII and XXII of the Treaty in such a way as to reach the determination that a wholly owned locally incorporated subsidiary is entitled to the protection of the Treaty. Article I pro-

---

11. For an analysis of American anti-discrimination principles, see *Developments in the Law § 1981*, 15 HARV. C.R.-C.L.L. REV. 29 (1980).

12. Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 (1956).

13. *Id.* at 232.

14. The State Department has referred to Article VII as such in its Outgoing Airgram No. A-453, U.S. Department of State to USPOLAD, Tokyo, Jan. 7, 1952.

15. Japanese Treaty, *supra* note 2, 4 U.S.T. 2069.

vides that "nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein . . . for the purpose of carrying on trade . . . and engaging in related commercial activities . . . ."[16] Article XXII(3) provides that "companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof."[17] Article VIII provides that "nationals and companies of either Party shall be permitted to engage, within the territories of the other Party . . . executive personnel . . . of their choice."[18]

The district court determined that since the definition, derived from the relevant articles, did not include subsidiaries, Sumitomo was a United States company. Therefore, it was ineligible to invoke the freedom of choice protection of Article VIII of the Treaty. The court of appeals, however, took the position that "such a reading would overlook the purpose of the Treaty, which was not to protect foreign investments made through branches, but rather to protect foreign investments generally"[19] without regard to the specific corporate vehicle employed.[20]

The remaining issue that could affect the standing of a subsidiary is whether the subsidiary incorporated in the United States is sufficiently a national of a state party to invoke the Treaty's provisions. This determination turns on whether the standards set forth in State Department regulations of "treaty traders" and "treaty investors" have been met.[21] Apparently, this issue was resolved in Sumitomo's favor.

A caveat with respect to the Second Circuit's interpretation is in order. Future determinations of a subsidiary's standing to invoke the substantive provisions of an FCN treaty may depend on a particular court's analysis of the September 11, 1979 communication from the State Department to the Equal Employment Opportunity Commission,[22] indicating that locally incorporated subsidiaries were not intended to come under the protection of the Treaty. Until more courts face the issue, however, the Second Circuit's position is clear, and will be the standard by

---

16. *Id.* at 2066.

17. *Id.* at 2080.

18. *Id.* at 2070.

19. 638 F.2d at 556.

20. This interpretation finds support in the negotiations that preceded ratification of the FCN treaty between the United States and the Netherlands. The Dutch negotiators finally concluded, however, there was no need to include in the treaty a provision explicitly granting parent-company rights to subsidiaries. *See* Official-Informal Letter from Counselor of Embassy for Economic Affairs, Trade Agreements and Treaty Division, U.S. Dep't of State, to Counselor for Economic Affairs, American Embassy, The Hague, Netherlands, Oct. 28, 1955.

21. *See* note 10 *supra.*

22. *See* Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 181 (1980). *But see* Letter of Lee R. Marks, Deputy Legal Adviser, U.S. Department of State, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission (Oct. 17, 1978), *reprinted in* 73 AM. J. INT'L L. 281, 284 (1979).

which the parties can govern their choice of foreign investment vehicle.

Although the district court did not reach the issue of the degree of protection that Article VIII might provide from charges of discrimination under Title VII, the court of appeals, not limiting its decision to the standing issue, resolved that the Treaty did not exempt Sumitomo from Title VII with respect to executive personnel. In formulating a narrow interpretation of the phrase "[executives] of their choice," the court relied heavily on the general purpose of FCN treaties to establish competitive equality between domestic and foreign businesses, not to provide special privileges to foreign businesses.[23] Supportive of this interpretation are other United States commercial treaties of the same period which incorporate the phrase "regardless of nationality" into the employer's choice provision[24] to guarantee that companies operating abroad would be exempt from local legislation restricting employment of non-citizens. There is evidence that the United States included employer's choice provisions largely to protect United States firms abroad from being forced to hire locally when American employees might be considered better qualified.

The Supreme Court recognized in *Reid v. Covert*[25] that the treaty power is subject to constitutional limits on government action. The present holding in *Sumitomo* should not be viewed as an entirely new position, given the *Bolling v. Sharp*[26] indication that reading any of the treaties to exempt foreign employers from anti-discrimination laws might offend the equal protection component of the Fifth Amendment.

However, despite the court's refusal to accept Sumitomo's broad interpretation of the "of their choice" clause, the decision explicitly leaves the Japanese company with the option of going forward with evidence to support a "bona fide occupational qualification" ("bfoq"). The closing comments of the *Sumitomo* decision are of interest when one contemplates the eventual impact of the holding in light of "bfoq" precedent:[27]

> Although the 'bona fide occupational qualification' exception of Title VII is to be construed narrowly in the normal context . . . we believe as applied to a Japanese company enjoying rights under Article VIII of the Treaty it must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese

---

23. *See* Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 951 n.21 (1979).

24. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. VII, para. 4, 12 U.S.T. 908, T.I.A.S. No. 4797.

25. 354 U.S. 1 (1957).

26. 347 U.S. 497 (1954).

27. From the time of Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court has interpreted Title VII to prohibit not only the intentional use of the proscribed categories, but also neutral employment practices which result in discriminatory effects on any of the categories when an employer cannot show a "business necessity" for its practices. *Id.* at 429-33. *Accord* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

company doing business in the United States . . . .[28]

The courts have devised several tests to implement the "bfoq" provision of Title VII. Upon remand, the district court will probably rely on one of the following tests to decide the validity of Sumitomo's "bfoq" claim. Most frequently used is the "all or substantially all" test announced in *Weeks v. Southern Bell Telephone & Telegraph Co.*[29] The test as originally devised addressed sex discrimination, but it can readily be applied to nationality discrimination as well. To rely on the "bfoq" exception, Sumitomo would have the burden of proving that it had reasonable cause to believe, or had a factual basis for believing, that all or substantially all non-Japanese nationals would be unable to perform safely and efficiently the duties of the jobs involved. A major weakness of this test is that the generality of the phrase "all or substantially all" permits the employer to avoid an individual applicant's qualification. As a result, courts have expanded the test to require an employer to justify discrimination by demonstrating the impracticality of individualized testing.[30]

The "essence test" announced in *Diaz v. Pan American World Airways, Inc.*[31] focuses on the word "necessary" in the language of the "bfoq" provision. Courts distinguish business necessity from business convenience and will uphold discrimination only when the essence of the business operation would be undermined by a prohibition against hiring members of one class exclusively. This is a narrow test requiring a determination of what constitutes the essence of a total business operation, not merely the essence of the employment position in question. However, subsequent cases have interpreted the *Diaz* test to apply also to the essence of the employment position in question. Under this interpretation of *Diaz,* an employer must demonstrate that applicants of one class are unable to perform the required duties of the employment position.

The third major test developed is one of "economic feasibility" as set forth in *Robinson v. Lorillard Corp.*[32] A determination is made "whether there exists an overriding legitimate business purpose significantly compelling to override the significant impact on one class" and whether there is available "no acceptable alternative policy or practice which would better accomplish the business purpose advanced, or accomplish the business purpose advanced, or accomplish it equally well with a lesser differential impact."[33]

It would appear that despite the Second Circuit's narrow interpretation of the "of their choice" clause, and regardless of which test the dis-

---

28. 638 F.2d at 559.
29. 408 F.2d 228, 235 (5th Cir. 1969).
30. *See* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).
31. 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied,* 404 U.S. 950 (1971).
32. 444 F.2d 791 (4th Cir. 1971), *cert. denied,* 404 U.S. 1006 (1971).
33. E.E.O.C. DECISION No. 72-2179 (1976).

trict court uses on remand to decide the validity of the claimed "bfoq" exception, Sumitomo will have the advantage of the uniqueness of its treaty rights and its requirements as a Japanese company to bolster its argument for an exception to Title VII standards, at least for some of the executive positions in question. This conclusion is premised on the factors cited in the appellate opinion as worthy of consideration: linguistic and cultural skills; knowledge of Japanese products, markets, customs, and business practices; familiarity with the parent enterprise in Japan; and acceptability to those persons with whom the company or branch does business.[34]

To predict the outcome on remand would be mere speculation, but in light of precedent and the uniqueness of its treaty reights, Sumitomo will have a good argument for the validity of the "bfoq" exception even though the court has spoken out in favor of a strong commitment to anti-discrimination principles.

Christine J. Jobin

Forum Non Conveniens: Limiting Access to Federal Courts for Transnational Disputes

United States citizens conducting business abroad should be aware of recent court decisions restricting access to United States courts for redress of grievances against foreign nationals.[1] The federal appeals courts in these cases have allowed the trial courts broad discretionary power to dismiss transnational suits based upon the doctrine of forum non conveniens. The courts' application of the doctrine effectively remits a United States citizen's claim to a foreign country's jurisdiction: the ramifications of this ouster are serious for U.S. litigants. The decisions represent a shift from the traditional preference for upholding the plaintiff's choice of forum toward allowing the court to dismiss an action based upon judicial efficiency and convenience. The courts in *Pain v. United Technologies Corp.*[2] and *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*[3] adopted a new basis for dismissal of actions brought in United States courts which is ideologically inconsistent with the concept of the right of access to United States courts.[4]

---

34. 638 F.2d at 559.

---

1. Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980); Alcoa S.S. Co., Inc. v. M/V Nordic Regent, 636 F.2d 860 (2d Cir. 1980).

2. 637 F.2d 775 (D.C. Cir. 1980).

3. 636 F.2d 860 (2d Cir. 1980).

4. *See* Comment, *Forum Non Conveniens and American Plaintiffs in Federal Courts*, 47 U. CHI. L. REV. 373 (1980) (discussing Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821)).