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The Settlement Claims Case: Dames & (and) Moore v. Regan

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The Settlement Claims Case: *Dames & Moore v. Regan*

The recent Supreme Court ruling in *Dames & Moore v. Regan*[1] could turn out to be a landmark in international law.[2] The Justices of the Supreme Court, in a unanimous decision fashioned a narrow ruling closely tied to the extraordinary events in Iran. The Court agreed that the President had the power to nullify judicial attachments, to order the transfer of Iranian assets out of the country, and to rule that private claims by American companies be settled by an international arbitration tribunal rather than by American courts. The Court determined that the President's actions were fully within the parameters of the International Emergency Economic Powers Act of 1977 (IEEPA).[3] The importance of this decision lies not only in its legal significance but in the political context in which it arose. The "Hostage Crisis" was the most sensitive issue in the last Presidential election, yet few dared to criticize the President's handling of it. The Supreme Court had an opportunity to make a political quantum leap, but delicately avoided opening the Pandora's box and addressed only the legal issues presented to it.

On November 14, 1979, in response to the taking of American citizens as hostages at the U.S. embassy in Tehran, President Carter declared a national emergency pursuant to the IEEPA and blocked the removal or transfer of all Iranian property subject to the jurisdiction of the United States.[4] The Treasury Department then issued implementing regulations which invalidated any attachment of property obtained without a license or authorization from the Secretary of the Treasury.[5] Subse-

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1. 49 U.S.L.W. 4969 (1981).
2. *See* BUSINESS WEEK, July 20, 1981, at 62.
3. 50 U.S.C. §§ 1701 *et seq.* (Supp. III 1979). Section 1702 (a)(1) provides in part:
   At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—
   (A) investigate, regulate, or prohibit—
   (i) any transactions in foreign exchange,
   (ii) transfers or credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof.
   (iii) the importing or exporting of currency or securities; and
   (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property subject to the jurisdiction of the United States.
4. Exec. Order No. 12,170, 3 C.F.R. 457 (1980), *reprinted in* 50 U.S.C.A. § 1701 (notes)(Supp. 1981).
5. 31 C.F.R. §§ 535.201, 535.203(a), 535.310, 535,502 (1980).

quently, the Secretary granted a general license authorizing judicial proceedings, including prejudgment attachments against Iran, with the exception of the "entry of any judgment or of any decree or order of similar or analagous effect . . . ."[6]

On December 19, 1979, Dames & Moore, the petitioner, filed suit in the U.S. District Court for the Central District of California against the Government of Iran, the Atomic Energy Organization of Iran (AEOI), and several Iranian banks, alleging that it was owed $3.7 billion for services performed pursuant to a contract with AEOI.[7] The district court issued orders of attachment against the property of the defendants, and property of certain bank defendants was then attached to secure any future judgment which later could be entered against them. On January 20, 1981, the American hostages were released pursuant to an agreement entered into the day before between the United States and Iran. This agreement was embodied in two declarations of the Government of Algeria: the Declaration of the Democratic and Popular Republic of Algeria, and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the Islamic Republic of Iran.[8]

Under the terms of the Agreement, the United States is obligated to: "terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, nullify all attachments and judgments obtained therein, prohibit all further litigation based on such claims and bring about the termination of such claims through binding arbitration."[9] The Agreement also called for the establishment of an Iran-United States Claims Tribunal[10] to arbitrate all claims not settled within six months of the date of the Agreement. The proceedings before the Tribunal will be subject to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)[11] except where modified by the Claims Settlement Agreement. Awards of the Claims Tribunal are to be "final and binding" and "enforceable" in the courts of any nations. Additionally, the Agreement required that all Iranian property then in the United States

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6. 31 C.F.R. 535.504(a)-(b)(1) (1980).

7. Brief for Petitioner at 3, Dames & Moore v. Regan, 49 U.S.L.W. 4969, 4971 (1981).

8. *Iran-United States: Settlement of the Hostage Crisis, reported in* 21 INT'L LEGAL MAT. 224 (1981).

9. 21 INT'L LEGAL MAT. at 227 (1981).

10. The tribunal has jurisdiction under the terms of the Agreement to decide claims of U.S. nationals against Iran that arise out of (1) debts, (2) contracts, (3) expropriations, or (4) other measures affecting property rights. Claims which are barred include those that arise out of events occurring before January 19, 1981, and concerning: (1) the seizure of the hostages in Iran; (2) their subsequent detention; (3) injury to U.S. property or property of U.S. nationals within the U.S. Embassy in Iran after November 3, 1979; and (4) injury to U.S. nationals or their property "as a result of popular movements in the course of the Islamic revolution in Iran which were not an act of the Government of Iran." 49 U.S.L.W. at 2636. *See also* BUSINESS WEEK, May 4, 1981, at 58.

11. 46 Fed. Reg. 19,893 (1981).

be transferred back to Iran. One billion dollars of these assets were transferred into a "security account" to be used for the payment of awards made by the Claims Tribunal. Nearly eight billion dollars of the remaining unfrozen assets were transferred to a bank account in England in the name of the Banque Centrale D'Algérie pending the safe release of the American hostages. A total of about $3.7 billion were transferred to the Federal Reserve Bank of New York to pay outstanding syndicated bank loans. Another $1.4 billion went into an escrow account to pay outstanding loans as to which amounts may still be in dispute. The excess of the assets in the escrow account was then transferred to Bank Markazi Iran.[12]

On April 28, 1981, petitioner filed suit for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive orders and Treasury Department regulations implementing the Agreement with Iran in a way that would adversely affect its actions against the Iranian defendants.[13] Petitioner alleged that these Executive orders and regulations were unconstitutional to the extent that they affect its final judgment against the Government of Iran and AEOI. The district court denied petitioner's motion for a preliminary injunction and dismissed the complaint for failure to state a claim upon which relief could be granted. The court, however, entered an injunction pending appeal preventing the federal government from requiring the transfer of Iranian property that is subject to any writ of attachment, garnishment, judgment, levy, or lien issued by any court in favor of petitioner.[14] Upon granting certiorari before judgment, the Supreme Court of the United States held:

> 1. The President was authorized to nullify the attachments and order the transfer of Iranian assets by the provision of the IEEPA 50 U.S.C. § 1702(a)(1)(B), which empowers the President to 'compel,' 'nullify,' or 'prohibit' any 'transfer' with respect to, or transactions involving, any property subject to the jurisdiction of the United States in which any foreign country has any interest.
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> 2. On the basis of the inferences to be drawn from the character of the legislation, such as the IEEPA and the Hostage Act which Congress has enacted in the area of the President's authority to deal with international crises, and from the history of congressional acquiescence in executive claims settlement, the President was authorized to suspend claims pursuant to the Executive Order in question here.
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> . . . .
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> 3. The possibility of the President's actions with respect to the suspension of the claims may effect a taking of a petitioner's property in violation of the Fifth Amendment in the absence of just compensation, makes ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims. And there is no jurisdic-

12. TIME, June 1, 1981, at 37.
13. Dames & Moore v. Regan, No. 81-2064 (C.D. Cal. 1981) (complaint).
14. *Id.* (order of May 28, 1981).

> tional obstacle to an appropriate action in that court under the Tucker Act.[15]

The President's power in the area of foreign policy was challenged in *Goldwater v. Carter*,[16] where the Supreme Court was presented with the constitutional issue regarding the proper procedure for treaty termination. In *Goldwater*, the President's actions terminating the Mutual Defense Treaty of 1954 with the Republic of China[17] without the advice or consent of the Senate was challenged. Although the Court declined to rule on the constitutional question presented to it and merely vacated the prior judgment, the result was that the President was not precluded from unilaterally terminating the Treaty.[18] While not expressly ruling on the issue presented to it, the Supreme Court tipped the delicate balance of power in favor of the Executive, when it found that it was politically expedient to do so.[19]

It has been argued that the President has certain authority with respect to the disposition of foreign assets pursuant to IEEPA,[20] but the issue in dispute is the nature and extent of the powers the President possesses under that Act. In *Dames & Moore*, the Supreme Court relied on two recent appellate court cases which addressed the same issue. In *Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Authority*,[21] the Court of Appeals for the First Circuit entered an order approving attachment of Iranian assets on trustee process, and entered a temporary restraining order preventing the Iranian defendants from "selling, assigning . . . or in any way disposing of any of the assets located in the United States." The court remarked: "The language of IEEPA is sweeping and unqualified. It provides broadly that the President may void or nullify the 'exercising [by *any* person] *any* right, power or privilege with respect to . . . any property in which any foreign country has any interest. . . ."[22]

In *American Int'l Group, Inc. v. Islamic Republic of Iran*,[23] the Court of Appeals for the District of Columbia similarly remarked:

> The Presidential revocation of the license be issued permitting prejudgment restraints upon Iranian assets is an action that falls within the plain language of the IEEPA. In vacating the attachments, he acted to nullify and void . . . any exercising any right, power, or privilege with respect to . . . any property in which any foreign country . . . has any interest . . . by any person . . . subject to the juris-

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15. 49 U.S.L.W. at 4970. *See also* Tucker Act, 28 U.S.C. § 1491 (1976).

16. 444 U.S. 996 (1979).

17. Mutual Defense Treaty, Dec. 2, 1954, United States-Republic of China, 6 U.S.T. 433, T.I.A.S. No. 3178.

18. 444 U.S. 996 (1979).

19. *See* Note, *Treaty Termination and the Separation of Powers: The Constitutional Controversy Continues In Goldwater v. Carter*, 9 DEN. J. INT'L L. & POL'Y 239 (1980).

20. *See, e.g.*, WASH. POST, June 25, 1981, at A25, col. 1.

21. 651 F.2d 800 (1981).

22. *Id.* at 807.

23. No. 80-1779, 80-1891 (D.C. Cir. June 5, 1981).

diction of the United States.[24]

The Supreme Court rejected the petitioner's argument that the enactment of the IEEPA in 1977 limited the President's emergency powers.[25] The Court stated that the operative provisions of section 1702 of the IEEPA "basically parallels" section 5(b)(1) of the Trading With the Enemy Act (TWEA) from which the language of the IEEPA is directly drawn.[26] Therefore, within certain limitations, the President has the same blocking powers under IEEPA as under the TWEA.[27]

In drafting the IEEPA, Congress observed that the TWEA had become "essentially an unlimited grant of authority for the President to exercise at his discretion, broad powers in both the domestic and international economic arena, without Congressional review."[28] Congress thus determined that such extreme wartime powers were inappropriate in peacetime emergencies. The IEEPA's legislative sponsor noted that TWEA created "a dangerous situation in that it virtually conferred upon the President what could have been dictatorial powers. . . ."[29] To limit the scope of Executive Authority, IEEPA substituted a "new set of international economic powers, more restricted than those available during time of war. . . ."[30]

The TWEA confers upon the President two main powers:[31] 1) the power to freeze or block the transfer of foreign-owned assets in the United States;[32] and 2) the power summarily to seize and permanently vest title to foreign-owned assets and use them "for the benefit of the United States."[33]

The IEEPA specifically excluded those portions of section 5(b) of the TWEA which authorized the President "1) . . . to vest title to foreign-owned assets; 2) to regulate purely domestic transactions; 3) . . . to regulate gold or bullion; and 4) . . . to seize records.[34] The Supreme Court addressed this distinction in a footnote:

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24. Nos. 80-1779, 80-1891, slip op. at 18-19 (D.C. Cir. June 5, 1981).

25. 49 U.S.L.W. at 4974.

26. *Id. See also* Trading with the Enemy Act of 1917, ch. 106, 40 Stat. 411 (1917) (current version at 50 U.S.C. app. § 5 (1976 & Supp. III 1979).

27. Congress did impose certain limitations on the President's power under IEEPA that were not imposed under section 5(b) of the TWEA. Under IEEPA, the President may not "vest" foreign property, nor may he seize records or regulate solely domestic transactions. *See* S. REP. No. 466, 95th Cong., 1st Sess. 5 (1977).

28. H.R. REP. No. 459, 95th Cong., 1st Sess. 7 (1977) [hereinafter cited as IEEPA House Report].

29. HOUSE COMM. ON ON INTERNATIONAL RELATIONS, REVISION OF TRADING WITH THE ENEMY ACT, Markup on H.R. Doc. No. 7738, 95th Cong., 1st Sess. 5 (1977).

30. IEEPA House Report, *supra* note 5, at 10.

31. Propper v. Clark, 337 U.S. 472 (1949).

32. 50 U.S.C. app. § 5(b)(1)(B) (1976).

33. *Id.* at § 5(b)(1). *See* Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 HARV. L. REV. 721 (1949).

34. IEEPA House Report, *supra* note 28, at 15.

> Although it is true the IEEPA does not give the President the power to 'vest' or to take title to the assets it does not follow that the President is not authorized under both the IEEPA and the TWEA to otherwise permanently dispose of the assets in the manner done here.[35]

The Court buttressed its position by restating a previously recognized congressional intent that the purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President. . . ."[36]

A contrary view was taken by the United States District Court for Northern Texas in *Electronic Data Systems Corporation, Iran v. Social Security Organization of the Government of Iran*,[37] where the district court, in interpreting the IEEPA, stated that it:

> expressly excludes certain authority granted to the President under the Trading With the Enemy Act, including 'the power to vest, i.e. to take title to foreign property.' Thus, it is clear that under the IEEPA the President may 'freeze but not seize' assets in which a foreign nation has an interest.[38]

The district court's interpretation was based on the assumption that Congress passed the IEEPA in 1977 to replace the Presidential peacetime emergency authority which previously existed under the TWEA.[39] One must contrast this fundamental premise with the Supreme Court's determination that both Acts of Congress are to be construed simultaneously. If both acts are to be interpreted simultaneously, one could arguably dispute the result reached by the Supreme Court. If, however, as the legislative history indicates, the IEEPA was enacted to specifically replace the TWEA, then the validity of the Court's holding requires closer scrutiny. One should examine the actual authority to freeze foreign assets as preserved by the IEEPA, contrasted with the vesting power which IEEPA abolished. There is authority holding that a freeze, however uncertain its precise duration, results in a temporary and not a permanent disposition of foreign property.[40] The President's "transfer" order seeks to dispose of Iranian assets by permanently divesting American creditors of their statutory rights. Once such a transfer occurs, the freeze order no longer retains the character of a temporary measure, but rather becomes a permanent vesting order.

Although the Supreme Court declined to conclude that the IEEPA[41]

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35. 49 U.S.L.W. at 4974 n.5 (1981).

36. Propper v. Clark, 337 U.S. 472, 493 (1949), *as quoted in* Dames & Moore v. Regan, 49 U.S.L.W. at 4974 (1981).

37. 49 U.S.L.W. 2531 (N. Tex., Feb. 12, 1981).

38. 49 U.S.L.W. at 2532.

39. *Id.*

40. Neilson v. Secretary of the Treasury, 424 F.2d 833, 843 (D.C. Cir. 1970); *see also* Markham v. Cabell, 326 U.S. 404, 411 (1945). *See generally* Littaver, *The Unfreezing of Foreign Funds*, 45 COLUM. L.J. 132 (1945).

41. 50 U.S.C. §§ 1701 *et seq.* (Supp. III 1979).

or the Hostage Act[42] granted the President specific authority to suspend claims pending in American courts, it did conclude that Congress had approved the settlement of claims by executive agreement.[43] The Court relied primarily on the International Claims Settlement Act of 1949[44] which created the International Claims Commission, now the Foreign Claims Settlement Commission. This Commission has authority to make final and binding arbitration decisions with respect to claims by U.S. nationals against settlement funds.[45] The Court rejected the petitioner's argument that by enacting the Foreign Sovereign Immunities Act of 1976,[46] Congress divested the President of authority to settle claims by placing political commercial lawsuits in the hands of the courts. The petitioner further asserted that by suspending its claims, the President had usurped the jurisdiction of the U.S. courts in violation of Article III of the Constitution. The Court instead stated that by enacting Executive Order No. 12294 the President did not attempt to divest the federal courts of their jurisdiction, but merely attempted to suspend claims, because "those claims not within the jurisdiction of the Claims Tribunal will 'revive' and

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42. Hostage Act, 22 U.S.C. § 1732 (1868). The Hostage Act provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release: and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

Id.

43. Since 1952, the President has entered into ten binding settlements with foreign nations, to wit: Settlement of Claims, May 11, 1979, United States-People's Republic of China, 30 U.S.T. 1957, T.I.A.S. No. 9306; Claims: Marcona Mining Company, Oct. 21, 1976, United States-Peru, 27 U.S.T. 4214, T.I.A.S. No. 8417; Claims of United States Nationals, Oct. 27, 1976, United States-Egypt, 27 U.S.T. 4214, T.I.A.S. No. 8446; Settlement of Certain Claims, Feb. 19, 1974, United States-Peru, 25 U.S.T. 227, T.I.A.S. No. 7792; Hungarian People's Republic Settlement of Claims, Mar. 6, 1973, United States-Hungary, 24 U.S.T. 522, T.I.A.S. No. 7569; Claims: Trust Territory of the Pacific Islands, July 7, 1969, United States-Japan, 20 U.S.T. 2654, T.I.A.S. No. 6724; Yugoslavia: Claims of United States Nationals, Jan. 20, 1965, United States-Yugoslavia, 16 U.S.T. 1, T.I.A.S. No. 5750; Bulgaria Claims, July 2, 1963, United States-Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5387; Poland: Settlement of Claims of United States Nationals, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545; Rumania Settlement of Claims of United States Nationals and Other Financial Matters, Mar. 30, 1960, United States-Rumania, 11 U.S.T. 317, T.I.A.S. No. 4451. 49 U.S.L.W. at 4976.

44. 22 U.S.C. §§ 1621 *et. seq.* (1955). The Act had two purposes: (1) to allocate to U.S. nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed.

45. 49 U.S.L.W. at 4978.

46. 28 U.S.C. §§ 1602 *et seq.* (1976).

become judicially enforceable in the United States courts."[47]

The Court used an historical argument[48] in concluding that the President had the authority to settle American claims. Although the decision did not acknowledge plenary power in the presidency to settle claims against foreign nations, it did acknowledge a grant of authority to the President in settling claims which are a "necessary incident" to the resolution of a conflict between our country and a foreign nation.[49] An important consideration in the Court's decision was the fact that Congress acquiesced to the President's actions by not taking measures against the Agreement when it had the opportunity to do so.[50] Further corroborating the Court's decision was the fact that the President provided American litigants with an alternative forum, the Claims Tribunal, in which to seek relief.[51]

The President's actions have not deprived American nationals from obtaining relief for claims against the Iranian Government, but rather have facilitated certain lawsuits by the creation of a ready made, internationally recognized forum. Moreover, if claimants are not within the jurisdiction of the Claims Tribunal, the same forums as originally sought—the U.S. courts—are still available.

The Court did not address the question of whether or not the suspension of claims would constitute a taking of property in the absence of just compensation in violation of the Fifth Amendment,[52] stating that the issue was not yet ripe for judicial review. The Court did leave open the question whether companies that do not fare well in the arbitration proceedings will have an adequate remedy at law in the Court of Claims under the Tucker Act.[53]

Much criticism has been spawned by what some believe to be the subjugation of property rights to the liberal authority granted the President to conduct foreign policy.[54] The fact that the Court's decision was rooted in an express grant to the President of constitutional and statutory authority will certainly be considered, but the belief that the Court's

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47. 49 U.S.L.W. at 4977.

48. In United States v. Pink, 315 U.S. 203 (1942), the Court upheld the validity of the Litvinov Agreement whereby the Soviet Union assigned to the United States amounts owed to it by U.S. nationals, which funds were then used to pay outstanding claims of American nationals against Russia. The Court recognized that the "power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' " *Id.* at 229.

49. 49 U.S.L.W. at 4977.

50. *Id.* at 4978.

51. *Id.*

52. *Id.*

53. *Id.*

54. 67 A.B.A.J. 647 (1981). *See also* Den. Post, June 24, 1981, at 26, col. 3.

decision was motivated by political expediency will certainly not be denied. The full impact of the decision will rest upon the decisions of the Claims Tribunal and resulting future litigation.

Sharon D. Liko

Spiess v. C. Itoh & Co. (America), Inc.: Another Chapter in the Continuing Conflict between FCN Treaties and Title VII

The Fifth Circuit, in *Spiess v. C. Itoh & Co. (America), Inc.*,[1] recently held that the 1953 Treaty of Friendship, Commerce and Navigation (FCN) between the United States and Japan[2] grants wholly owned American subsidiaries of Japanese corporations "the limited right to discriminate in favor of Japanese nationals" in filling managerial and technical positions.[3] By contrast, the Second Circuit in *Avigliano v. Sumitomo Shoji America, Inc.*[4] held that the Japanese Treaty does not exempt wholly owned American subsidiaries of Japanese corporations from laws prohibiting discrimination in employment.[5] *Spiess* is unique because it thrusts the Second and Fifth Circuits into discord regarding the applicability of domestic employment discrimination laws to wholly owned Japanese subsidiaries incorporated in the United States. Unlike *Avigliano*, *Spiess* holds that "Article VIII [of the Japanese Treaty] does exempt C. Itoh-America from domestic employment to the extent of permitting discrimination in favor of Japanese citizens in employment for executive and technical positions."[6]

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1. 643 F.2d 353 (5th 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].

3. 643 F.2d at 355.

4. 638 F.2d 552 (2d Cir. 1981).

5. In *Avigliano*, female secretarial employees of Sumitomo Shoji America, Inc., a wholly owned subsidiary of a Japanese commercial firm, appealed from an order entered by the district court dismissing their claim of discrimination on the basis of sex and national origin in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e *et seq.*, the Civil Rights Act of 1966, 42 U.S.C. § 1981 *et seq.*, and the Thirteenth Amendment of the U.S. Constitution. 638 F.2d at 553. The Second Circuit held that the Treaty did not exempt Japanese companies operating in the United States "whether or not they are incorporated in the United States, from American laws prohibiting discrimination in employment." *Id.* at 554. The present note should be read in conjunction with that published in volume 10, number 2 of this journal on the *Avigliano* case. Development, *The Impact of Title VII Protection on FCN Treaties: Conflict and Interpretation*, 10 DEN J. INT'L L. & POL'Y 373 (1981).

6. 643 F.2d at 359.