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Japanese Corporations and American Civil Rights Laws

Robert M. Cooper

DEVELOPMENTS

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I. INTRODUCTION

In a recent case, *Sumitomo Shoji America, Inc. v. Avigliano*,[1] the United States Supreme Court held that a subsidiary of a Japanese corporation that incorporated in the United States is, by the literal language of the Treaty of Friendship, Commerce and Navigation (Treaty or Japanese Treaty), an American corporation.[2] Therefore, the American company could not use the Japanese Treaty as a shield against American civil rights laws. This case directly resolved issues posed by the Second Circuit,[3] and provided guidance in an almost identical Fifth Circuit case, *Spiess v. C. Itoh & Co. (America)*.[4]

Plaintiffs in both cases argued that the U.S. subsidiaries are U.S. corporations, and must comply with U.S. law proscribing racial discrimination in employment. Defendants countered that the Japanese Treaty shielded them from U.S. law. The district courts in both cases held that American subsidiaries were not foreign corporations, and thus, they could not invoke articles of the Japanese Treaty to avoid U.S. discrimination laws.

These holdings raised the difficult issue of corporate nationality. Of what nationality is a corporation that is incorporated in the United States, yet owned by Japanese citizens? The Fifth and Second Circuits both reversed the district courts' holdings on corporate nationality, and held that American subsidiaries were, in essence, foreign corporations, and could invoke provisions of the Japanese Treaty.

However, the basic issue of whether a foreign corporation could discriminate in violation of U.S. laws was not resolved. The Second Circuit held that the Treaty does not exempt a Japanese company operating in the United States from discrimination laws, while the Fifth Circuit held that the Treaty shielded a foreign company from these laws. Thus, this issue was ripe for determination by the United States Supreme Court.

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1. 102 S.Ct. 2373 (1982).

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 Treaty or Japanese Treaty].

3. 473 F. Supp. 506 (S.D.N.Y. 1979) *aff'd on other grounds*, 638 F.2d 552 (2d Cir. 1981).

4. 469 F. Supp. 1 (S.D. Tex. 1979); 643 F.2d 353 (5th Cir. 1981), 102 S.Ct. 2951 (1982).

Deciding that a U.S. subsidiary of a Japanese corporation is a U.S. corporation, the Supreme Court avoided the more difficult question of whether or not a Japanese corporation operating in the United States can discriminate in violation of U.S. laws.

This article will focus initially on the analysis each court made to reach its respective holding. Next, the relevant discrimination laws will be reviewed. Finally, the Japanese Treaty, general rules of treaty interpretation, and the issue of corporate nationality will be discussed.

II. DISCUSSION OF THE CASES

Plaintiffs in *Spiess v. C. Itoh & Co. (America)*,[5] who were non-Japanese employees of the defendant, brought suit alleging racially-based employment discrimination.[6] To support their motion to dismiss, defendants stressed that the Treaty provided them with the absolute right to hire executive personnel "of their choice."[7] Also, defendants argued that the "treaty trader" test of corporate nationality was applicable.[8] The district court acknowledged that the right to hire personnel "of their choice" might be available to a foreign corporation, but denied this right to Itoh-America. Applying the rationale of *United States v. R.P. Oldham*,[9] the court held that Itoh-America is an American corporation both by the terms of the Treaty, and under settled law determining corporate nationality.[10] Further, the court found that the "treaty trader" argument was not worthy of consideration,[11] and noted that section two of the Treaty Protocol would be rendered meaningless if defendants' arguments were adopted.[12]

Itoh-America also asserted that it could raise the rights of its parent corporation. However, the facts of the case law argued were distinguishable from the facts of this case,[13] and the court denied the motion to dis-

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5. 469 F. Supp. 1.

6. *Id.* at 2.

7. *Id.* at 23.

8. The "treaty trader" test uses ownership of stock as the basis for determining corporate nationality. For a discussion of the "treaty trader" test, see notes 94-97 *infra*, and accompanying text.

9. 152 F. Supp. 818 (N.D. Cal. 1957). The court in *Oldham* stated that place of incorporation determined corporate nationality. For a discussion on corporate nationality and the *Oldham* decision, see notes 80-100 *infra*, and accompanying text.

10. 469 F. Supp. at 5.

11. *Id.* at 6.

12. *Id.* at 7. Section 2 of the Protocol to the Treaty provides, in relevant part, "[t]he provisions of Article VI, paragraph 3, providing for the payment of compensation shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party." This section provides protection against state appropriation. If these foreign corporations were already protected, the addition of section 2 of the Protocol would have been redundant. 469 F. Supp. at 7.

13. The cases relied upon were Association of Data Processing Services Org., Inc. v. Camp, 397 U.S. 150 (1970) and Calnetics Corp. v. Volkswagen of Am., 532 F.2d 674 (9th Cir. 1976).

miss. However, recognizing the novelty of the issue, the court granted an immediate appeal to the Fifth Circuit Court of Appeals.[14]

The Fifth Circuit reviewed the Treaty history and stressed that treaties "[u]nlike domestic legislation . . . must create a common ground between differing cultures . . . ."[15] After reviewing many secondary sources,[16] the court concluded that these sources supported the proposition that all foreign corporations can invoke provisions of the Treaty. Otherwise, there would be "an unreasonable distinction between treatment of American subsidiaries of Japanese corporations on the one hand, and branches of Japanese corporations on the other."[17]

The Fifth Circuit also held that the article VIII(a) "of their choice" provision gave Japanese corporations the absolute right to hire and promote as they choose, irrespective of American civil rights laws.[18] The court recognized that Title VII of the Civil Rights Act of 1964 (Title VII) might be consistent with the Treaty if applied.[19] However, reasoning that Title VII was passed subsequent to the Treaty, and did not expressly overrule the Treaty, the court found Title VII inapplicable.[20]

In *Avigliano v. Sumitomo Shoji America*, plaintiffs, past and present female secretaries of the defendant, claimed that defendant discriminated on the bases of sex and national origin, in violation of Title VII, and of 42 U.S.C. section 1981.[21] Defendants denied that they discriminated, argued that the Treaty shielded them from these claims, and also interposed four counterclaims that arose out of the filing of the suit.[22]

Calnetics involved antitrust violations brought against Volkswagen of America, Inc. (VW), a U.S. incorporated subsidiary of a West German corporation, and Volkswagen Products Corporations (VPC), VW's wholly-owned American incorporated air conditioning subsidiary. The trial court had enjoined VW and VPC from importing automobiles equipped with air conditioning. VW, VPC and the Federal Republic of Germany urged that the restriction "offends Article 16 of the German/American Treaty of 1954, and Articles I and III of the General Agreement on Tariffs and Trade, because it restricts German manufacturers but not American automobile manufacturers, who remain free to sell cars with factory installed air conditioning." *Id.* at 693. The Ninth Circuit recognized the discriminatory effect the ban imposed and seriously questioned the prudence of granting equitable relief. *Calnetics* stands for the proposition that an American subsidiary has standing to raise the claim that its parent's treaty rights may be affected by court ordered relief. However, the instant cases are easily distinguishable in that the parent company will not be affected by a court order to hire host country nationals. The parents do not participate in the hiring and firing decisions of the American corporations.

14. 469 F. Supp. at 910.

15. 643 F.2d at 356.

16. *Id.* at 356-58. For a discussion of the secondary sources, see notes 92-100 *infra*, and accompanying text.

17. *Id.* at 358.

18. *Id.* at 360-63.

19. Under Title VII, bona fide occupational qualification requirements might exempt a Japanese corporation from complying with the antidiscrimination mandate.

20. 643 F.2d at 362.

21. 473 F. Supp. at 508.

22. *Id.* at 508-09.

The district court reviewed the secondary sources, but ultimately held that the reasoning of *Oldham* was applicable.[23] The court allowed the Title VII claims to stand, but dismissed the section 1981 claims.[24]

The Second Circuit analyzed the case in a fashion similar to that of the Fifth Circuit. After discussing the history of the Treaty and the purpose of the relevant articles, the court held that the Treaty granted rights to American subisdiaries; otherwise, "a crazyquilt pattern would emerge."[25] However, the Second and Fifth Circuits differed in interpreting the article VIII(1) phrase "of their choice." The Second Circuit construed the phrase in the light in which it was drafted. Its purpose was "to facilitate a party's employment of its own nationals to the extent necessary to insure its operational success in the host country . . . ."[26] The court concluded that a Title VII claim could stand on the facts of this case.

In summary, the Fifth and Second Circuits reached opposite decisions concerning the applicability of American civil rights laws on foreign subsidiaries incorporated in the United States. The Fifth Circuit exalted the Treaty while the Second Circuit exalted American civil rights laws.

The Supreme Court initially reviewed rules of treaty interpretation. Relying on *Maximov v. United States*,[27] the Court held that the treaty language controls unless allowing it to control would be inconsistent with the intent of the treaty drafters.[28] Next, the Court focused specifically on Treaty articles VIII(1) and XXII(3). Article VIII(1) provided that companies of either party shall be permitted to engage managerial personnel "of their choice." Article XXII(3), the definitional article, provided that "companies" means any entity, whether or not established for pecuniary profit. Furthermore, article XXII(3) provided "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party."[29] (Emphasis added).

As Sumitomo was constituted under the laws and regulations of the State of New York, the Court held that it was a company of the United

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23. *Id.* at 511-13. The court held that the terms of the Treaty and established rules of law provide that the corporation is American.

24. *Id.* at 514. Section 1981 does not cover claims based upon sex and national origin discrimination. *See* notes 37-43 *infra* and accompanying text.

25. 638 F.2d at 556.

26. *Id.* at 559.

27. 373 U.S. 49 (1963). *Maximov* was a case involving the interpretation of article 14 of the income tax convention between the United States and the United Kingdom. Plaintiffs, who were beneficiaries of a trust, asserted that they need not pay tax on capital gains because they were subjects and residents of the United Kingdom, and exempted by convention provisions. The Supreme Court stated that the Second Circuit's interpretation "is the one more consonant with its [the Convention's] language, purpose and intent. *Id.* at 51.

28. 102 S. Ct. at 2377.

29. Treaty, *supra* note 2, at art. XXII, para. 3.

States.[30] Therefore, Sumitomo could not invoke rights provided by article VIII(1).

In support of its holding, the Court noted that this interpretation is consistent with other Treaty provisions.[31] Also, the Governments of Japan and the United States agreed with this interpretation.[32] The Court simply disagreed with Sumitomo's argument that "the intent of Japan and the United States was to cover subsidiaries regardless of their place of incorporation," and with the Second Circuit's assertion that a "crazy-quilt" pattern would emerge.[33]

III. THE CIVIL RIGHTS LAWS

Plaintiffs in these cases brought suit under Title VII of the 1964 Civil Rights Act and 42 U.S.C. Section 1981.[34] Title VII[35] is probably the most comprehensive federal scheme directed against employment discrimination.[36] It provides that it shall be unlawful for an employer to refuse to hire, or otherwise discriminate against an individual because of the individual's race,[37] color, religion, sex or national origin. In these cases, the Japanese employers allegedly discriminated against females, and Americans. Thus, to fall within the purview of Title VII, either the term "American" must be characterized as describing a national origin, or the evidence must show sex discrimination.[38]

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30. 102 S. Ct. at 2378.

31. *Id.* at 2378 n.8.

32. *Id.* at 4645. Considering the image problems that Japan has had in the United States since the Japanese have captured the automobile and other markets, the Japanese Government's position is not too surprising.

33. *Id.* at 2380-82.

34. In *Avigliano v. Sumitomo Shoji Am.*, a claim under the Thirteenth Amendment to the United States Constitution was also brought and apparently dropped. 653 F.2d at 553 n.1. Other laws that deal with employment discrimination include: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; The Equal Pay Act of 1963, 29 U.S.C. § 206(d); The National Labor Relations Act of 1967, 29 U.S.C. § 141; and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621; J. PEMBERTON, EQUAL EMPLOYMENT OPPORTUNITY-RESPONSIBILITIES, RIGHTS, REMEDIES 172 (1975). For a list of Federal enactments pertaining to employment discrimination, see *id.* at 345-51.

35. Civil Rights Act of 1964, 42 U.S.C. § 2000e-17 *as amended* (1972).

36. J. PEMBERTON, *supra* note 34, at 9.

37. Race discrimination under Title VII requires proof that a plaintiff:

> (i) belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Because Americans are not a racial minority, it is doubtful whether a claim based on race could stand.

38. A claim of sex discrimination under Title VII will require a showing of inequality in pay, working conditions, or opportunity for advancement. *See* Fitzgerald v. Sirloin Stockade, Inc. 642 F.2d 945 (10th Cir. 1980); and East v. Romine Inc., 518 F.2d 332 (5th Cir. 1975), for cases dealing with sex discrimination under Title VII.

National origin discrimination was the focus of the Supreme Court's decision in *Espinoza v. Farah Manufacturing Company*.[39] Plaintiff in *Espinoza*, a Mexican citizen, was denied employment at the defendant company because of the company's policy against hiring aliens. Plaintiff asserted that this treatment was discrimination based on national origin. The Court stated that the "term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."[40] Applying this literal definition, the Court determined that although Title VII protects against discrimination on the basis of nationality, it does not apply where a company merely discriminates on the basis of citizenship.[41]

In these cases, it is questionable whether national origin discrimination is present. The Japanese employers could take the position that they have a company policy against promoting non-Japanese citizens to executive or managerial positions.[42] Furthermore, the Japanese corporation can assert that it has been deemed an American corporation, and is merely being selective in hiring its employees. Even if the plaintiffs can later prove discrimination, the Japanese corporations will have several defenses available.[43]

Section 1981[44] is derived from the Civil Rights Act of 1866.[45] The Act of 1866, an implement to the Thirteenth Amendment to the United States Constitution, was aimed at ensuring that the recently freed slaves had the same political and economic rights as other citizens. Thus section 1981 was originally held to grant protection only in actions between white and non-white citizens.[46] Yet, rights under this section have been expanded. Protection has been granted to "all persons [who have a claim] against state legislation bearing unequally upon them either because of

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39. 414 U.S. 86 (1973).

40. *Id.* at 89.

41. If the court had decided that the discrimination was based on national origin, the claim would have been sustained. In Roach v. Dreiser Ind. Valve & Instrument Div., 494 F. Supp. 215 (W.D. La. 1980), the court allowed plaintiff's claim to stand, even though the discrimination was against an individual of Acadian ancestry, and Acadia was never a country.

42. This position is arguably supported by *Espinoza*, 414 U.S. 86 (1973).

43. For a discussion of the defenses available, see Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947 (1979).

44. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Civil Rights Act of 1964, 42 U.S.C. § 1981.

45. Civil Rights Act of 1866, ch. 31, § 4, 14 Stat. 27 (1866).

46. Georgia v. Rachel, 384 U.S. 780 (1966).

alienage or color."[47] Further, the Fifth Circuit has held that section 1981 proscribes discrimination on the grounds of citizenship by private employers.[48] However, claims under this section are limited, and discrimination claims based upon sex[49] and national origin[50] have been denied.

The U.S. discrimination laws will play an important role in these cases. A possible conclusion that may be reached is that American subsidiaries of Japanese corporations can legally discriminate.

IV. THE TREATY

In April of 1953, the United States and Japan signed the Treaty of Friendship, Commerce and Navigation. The Treaty was one of over one hundred commercial treaties concluded by the United States prior to 1958.[51] For Japan, the Treaty had special significance. For obvious political and economic reasons, many nations, including the United States, terminated relations with Japan during World War II.[52] The 1953 Treaty represented Japan's initial step toward economic recovery; it was Japan's first postwar commercial treaty.[53]

The purpose of the Treaty was not political.[54] Similar to all Friendship, Commerce and Navigation treaties, the purpose was "to provide a legal framework within which economic relations between the two countries [could] be developed to their mutual advantage."[55]

The Treaty is composed of twenty-five articles and the Protocol.[56]

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47. Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419-20 (1948).

48. Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974).

49. Apodaca v. Gen. Elec. Co., 445 F. Supp. 821 (D.N.M. 1978); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972).

50. Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (E.D. Pa. 1975).

51. Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958) [hereinafter cited as *Modern Treaties*]. Previously, Walker said that the United States had concluded approximately 130 commercial treaties, the first treaty being the Treaty of Amity and Commerce of February 6, 1778, with France. Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 374 (1956).

52. During the hearings, it was noted that "[p]rewar commercial relations between the United States and Japan rested upon a commercial treaty concluded in 1911." *Commercial Treaties-Treaties of Friendship, Commerce and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan: Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations*, 83rd Cong., 1st Sess. 26 (1953) [hereinafter cited as 1953 *Hearings*].

53. *Id.* at 27.

54. *Modern Treaties, supra* note 51, at 806.

55. 1953 *Hearings, supra* note 52, at 27.

56. Walker stated that:

> [t]he Protocol, by serving *inter alia*, as a convenient vehicle in attending to special variations or preoccupations of individual countries, reduces the amount of deviation between treaties, with respect to general outline, basic content and array of principles. It also serves as a bulletin board for posting certain tenets of construction which are considered desirable to record formally but which may lead to mischievous inferences of being substantive additions rather than precautionary explanations, if they are integrated into the rule to

These provisions grant personal rights to nationals of the other party, and provide the framework within which business may be conducted. The personal rights granted include "such fundamentals as freedom of travel and residence, freedom of worship, freedom of communication, the right to decent and humane treatment if in police custody, access to courts of justice and security for property rights."[57] Concerning business activities, the Treaty provides, inter alia, that nationals of the other party shall conduct business upon as favorable terms as nationals of the host country.[58] The Treaty also provides that the owner of a business has the right to manage his own affairs, that a business in competition with a state controlled enterprise shall receive fair treatment, and that the state will provide just compensation for nationalized property and allow reasonable opportunity to repatriate earnings and capital.[59]

Treaty articles I, VII(1) and XXII(3), the provisions at issue in the instant cases, merit further discussion. Article I(1) provides that nationals shall be able to enter and remain in the territories of the other Party for the purpose of "carrying on trade . . . and engaging in related . . . activities." [60] Further, nationals are permitted to develop and direct "operations of an enterprise in which they have invested . . . ."[61] Article I(2) is a miniature bill of rights, and permits Parties within territories of the other Party to enjoy liberty of conscience, to hold religious services, to gather and transmit material and to communicate with persons inside and outside such territories.[62]

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which they relate.

Modern Treaties, *supra* note 51, at 808 n.9.

57. 1953 *Hearings*, *supra* note 52, at 2.

58. This treatment, where a national of the other Party is accorded treatment equal to nationals of the country, is known as "national treatment." Treaty, *supra* note 2, at art. XXII(1). Contrast national treatment with "most favored nation treatment," where nationals of the other Party are accorded treatment no less favorable than other non-nationals in the nation. Treaty, *supra* note 2, at art. XXII(2).

59. 1953 *Hearings*, *supra* note 52, at 2-3. The normal content of a Friendship, Commerce and Navigation Treaty includes the elements found in the following synoptical outline:

> Preamble, general purposes; Entry, movement and residence of individuals; Liberty of conscience and communication; Protection of persons from molestation and police malpractices; Protection of acquired property; Standing in the courts; Right to establish and operate businesses; Formation and management of corporations; Nonprofit activities; Acquisition and tenure of property; Tax treatment; Administration and exchange controls; Rules on international trade and customs administration; Rules governing the state in business; Treatment of ships and shipping; Transit of goods and persons; Reservations, definitions and general provisions; Settlement of disputes; Procedural clauses; Protocol, an appendix of varying length, containing material construing and clarifying the treaty text, and making accomodations to take account of individual situations.

Modern Treaties, *supra* note 51, at 808.

60. Treaty, *supra* note 2, at art. 1, para. (1)(a).

61. *Id.* art. I, para. (1)(b).

62. *Id.* art. I, para. (2).

Article VII(1) provides the framework for economic relations between the two countries. In relevant part, article VII(1) provides:

> Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party . . . . Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party; and (c) to control and manage enterprises which they have established or acquired.[63]

The right of citizens of one country to form local subsidiaries under the corporate laws of the other country, granted by this article, is a post World War II achievement.[64]

Article VIII(1), the major focus of dispute in these cases, provides in relevant part that "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*.[65] (Emphasis added). Read in light of articles I and VII(1), article VIII(1) appears to give foreign subsidiaries choice over management personnel. Unfortunately, article XXII(3) clouded the issue. Article XXII(3) provides "the term 'companies' means corporations, partnerships, companies and other associations . . . . Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."[66] Article XXII(3) appears to say that a company incorporated in the United States is an American corporation. Thus, read together, these articles are amenable to two conflicting interpretations. As argued in these cases, articles I, VII(1) and VIII(1) appear to provide, even to an American subsidiary, the right to employ management and other specialists "of their choice." However, the Supreme Court, adopting the plaintiffs' position, found article XXII(3) controlling. Article XXII(3) says

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63. *Id.* art. VII, para. (1).

64. During the Hearings before the Subcommittee, it was noted that:

> [t]he legal reason inhibiting a more extensive provision for corporations in earlier treaties (namely, the reserved rights of the states as to the admission of foreign corporations) has been solved in the current treaties by a formula which equates the alien corporation to other out of state corporations, rather than to the domestic corporation, for the purposes of national treatment in the United States.

Commercial Treaties-Treaties of Friendship, Commerce and Navigation Between the United States and Columbia, Israel, Ethiopia, Italy, Denmark, and Greece: Hearings Before the Subcomm. of the Senate Comm. of Foreign Relations, 82d Cong., 2d Sess. 5 (1952).

65. Treaty, *supra*, note 2, at art. VIII, para. (1).

66. *Id.* art. XXII, para. (3).

that an American subsidiary of a foreign corporation is an American corporation. Therefore, the American corporation must abide by all domestic laws, including discrimination laws.

V. TREATY INTERPRETATION

In 1953, the year the Treaty was executed, the world was recovering from the effects of World War II, and civil rights, as we know them today, were not a major concern of the Treaty drafters. The purpose of article VIII(1)[67] was simply to permit foreigners to own and operate a company within the territory of the other country. Although the Treaty drafters were protecting foreigners from discrimination by the host country,[68] it is questionable whether article VIII(1) was aimed at eliminating reverse discrimination. Practically speaking, it is probable that the Treaty drafters never envisioned foreigners discriminating against nationals of the host country. This consideration makes interpretation of the Treaty difficult, and limits the weight that can be given to the Treaty drafters' intent.

The Supreme Court, however, looked at intent, and relying on *Maximov v. United States* said that "[t]he clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectation of its signatories."[69] One expectation of the Treaty drafters was that place of incorporation should determine corporate nationality.[70] The Supreme Court complied with this expectation and carrying it to an extreme, implying that the Treaty drafters intended that a Japanese owned American corporation is American for all purposes, including compliance with American civil rights laws. This interpretation avoided the issue of the conflict between treaty and subsequent law.

In *Asakura v. City of Seattle*,[71] the Supreme Court said "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it

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67. *Id.* art. VIII, para. 1.

68. Describing rights of entry and the change in treaties from the 1920's and 1930's to postwar treaties, Walker said:

> Though equal provision for subordinate investor-enterprise employees is not yet possible owing to lack of statutory authority, such personnel is to an extent provided for, in that management 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 . . . .

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 234 (1956). The problem that Article VIII(1) resolved was discrimination by the host country against foreigners, not reverse discrimination.

69. 102 S.Ct. at 2377.

70. Treaty, *supra* note 2, at art. XXII, para. 3.

71. 265 U.S. 332 (1923). Asakura, a citizen of Japan, brought suit against the City of Seattle when the City passed an ordinance prohibiting non-U.S. citizens from engaging in the pawnbroker business. The ordinance was held to violate the treaty.

and the other favorable to them, the latter is preferred."[72] The rationale for this rule is twofold. First, domestic courts should not make foreign policy. Second, treaty beneficiaries must be granted all possible rights under a treaty.[73] In *Fong Yue Ting v. United States*,[74] the Supreme Court described the relationship between treaties and subsequent federal laws.[75] In *Fong*, officers of the United States arrested and detained three Chinese subjects. Under authority of the Act of 1892,[76] the United States planned to deport petitioners. Petitioners claimed that deportation would be in violation of the July 28, 1868 treaty between the United States and China.[77] The Court said:

> In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty . . . . [Treaties are] of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control.[78]

Fong permits Congress to overrule prior law, in the form of treaty or statute.[79]

In these cases, the applicable laws were promulgated subsequent to the execution of the Treaty. However, Congress was not explicit, and if the Treaty and the laws conflict, it can only be implied that the laws control.

VI. CORPORATE NATIONALITY

The Supreme Court noted that application of a control test could

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72. *Id.* at 342.

73. Applying this rule, the Japanese would be allowed to discriminate. However, *Asakura* is distinguishable from the instant cases. *Asakura* involved a city ordinance, while these cases involved federal law.

74. 149 U.S. 698 (1893).

75. *Id.*

76. Act to Prohibit the Coming of Chinese Persons Into the United States, ch. 60, 27 Stat. 25 (1892).

77. Treaty with China, July 28, 1868, United States-China, 16 Stat. 739; T.S. No. 48.

78. 149 U.S. at 720-21.

79. The Court upheld the validity of the subsequent Act and deportation of petitioners. 149 U.S. at 735.

certainly make nationality a subject of dispute.[80] The control test is one approach taken to determine the nationality of a corporation. Professor Vagts identified various criteria used to determine corporate nationality. These include: "[t]he jurisdiction of incorporation, the principal place of doing business, the nationality of the voting control, the nationality of the dominant investors, the nationality of management, [and] the nationality of 'control' . . . ."[81] These criteria are often found in combination. Major criteria combinations have been recognized and the following doctrines identified: 1) the center of administration; 2) the center of exploitation and 3) the place of incorporation[82] doctrines. Under the center of administration doctrine, nationality is determined "at the place where the commercial business is carried on, and in the case of a noncommercial legal person, the place where its functions are discharged."[83] This doctrine puts the world on actual notice of nationality. The center of exploitation doctrine uses "the main place where the legal person executes its purpose" to determine nationality.[84] This doctrine has been criticized because a company often exploits resources in more than one location, and more significantly, many of management's activities take place far from where the exploitation takes place, and are excluded from the nationality decision. According to the place of incorporation doctrine, "the personal law of a legal person is the law under which that person has been incorporated."[85] Although place of incorporation is the doctrine most often applied,[86] it is not without shortcomings. This doctrine allows for "forum shopping," and companies can avoid harsh laws by incorporation in a favorable foreign jurisdiction.[87]

Applying any one of these doctrines to the instant cases results in a finding that the Japanese subsidiaries are of American nationality. The corporations' commercial businesses are carried on in the United States

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80. 102 S. Ct. at 2379-80 n.11.

81. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints of Foreign Enterprise*, 74 HARV. L. REV. 1489, 1490 (1961).

82. M. WOLFF, PRIVATE INTERNATIONAL LAW 297 (2d ed. 1950). Wolff noted that this doctrine is also known as the "seige social" and "prevails in France, Germany, Italy, Spain, Austria, Switzerland, Poland and most other continental countries." *Id.*

83. *Id.*

84. *Id.* at 298. This doctrine has been applied in France and is accepted by many of France's eminent scholars.

85. *Id.* at 299.

86. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 27 (1965) has adopted the place of incorporation as the nationality of a corporation.

87. *See also* G. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 90 (2d. ed. 1970). Henn has recognized two basic principal tests for determining corporate nationality. The aggregate test looks "to the nationality, domicile, or residence of the individuals who control the corporation." The aggregate test is similar to Wolff's center of administration doctrine. The second test, the entity test, looks "to the nation where it was incorporated, where its shareholders or board of directors meetings are held, or where it has its principal place of business. This test combines Wolff's place of incorporation doctrine, and at least part of the center of exploitation doctrine. *See* note 82 *supra* and accompanying text.

in satisfaction of the "center of administration" doctrine. The business purposes are executed in the United States, in satisfaction of the "center of exploitation" doctrine. Finally, the corporations were incorporated in the United States, in accordance with the "place of incorporation" doctrine.

In determining corporate nationality, the district courts in both of the instant cases recognized and applied[88] *United States v. R.P. Oldham.*[89] Defendants in *Oldham* were indicted for conspiring in restraint of trade in violation of the Sherman Act and Wilson Tariff Act. In particular, defendants, who were in the business of importing and selling wire nails on the West Coast of the United States, were charged with restraining interstate and foreign commerce in Japanese wire nails. One issue discussed by the court was the effect of the Treaty. One of the coconspirators, Kinoshita & Co., a Japanese subsidiary incorporated in the United States, asserted that Treaty article XVIII provided the exclusive remedy. Article XVIII provides in relevant part, "[a]ccordingly, each Party agrees upon the request of the other Party to consult with respect to any such [antitrust] practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects."[90] The *Oldham* court found fault with this argument for three reasons. First, article XVIII did not provide an exclusive remedy, because it was permissive rather than mandatory.[91] Second, the court found the article XXII(3) definition of companies controlling.[92] Finally, the court concluded that nationality is determined by place of incorporation and said:

> Thus by the terms of the Treaty itself, as well as by established principles of law, a corporation organized under the laws of a given jurisdiction is a creature of that jurisdiction, with no greater rights, privileges or immunities than any other corporation of that jurisdiction.[93]

Secondary sources, such as negotiating history, unilateral statements made by a party, subsequent practices of the parties, and change of circumstances, are often used in treaty interpretation.[94] They played an im-

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88. 469 F. Supp. at 4; 473 F. Supp. at 510.

89. 152 F. Supp. 818 (N.D. Cal. 1957).

90. Treaty, *supra* note 2, at art. XVIII, para. 1.

91. 152 F. Supp. at 823.

92. Article XXII(3) provides that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof . . . ." Treaty, *supra* note 2, at art. XXII, para. (3).

93. 152 F. Supp. at 823. Thus, the court recognized that place of incorporation is relevant in determining corporate nationality, and went on to say:

> If co-conspirator Kinoshita & Co., Ltd., Tokyo had wished to retain its status as a Japanese corporation while doing business in this country, it could easily have operated through a branch. Having chosen instead to gain privileges accorded American corporations by operating through an American subsidiary, it has for the most part surrendered its Japanese identity with respect to the activities of this subsidiary.

94. Block v. Compagnie Nationale Air France, 386 F.2d 323, 336-38 (5th Cir. 1967).

portant role in these cases, providing valuable background information.

Although the Supreme Court did not address the issue, in the courts below defendants argued that the "treaty trader" test of corporate nationality should be applied. This argument makes use of article I, paragraph 1 of the Treaty and guidelines promulgated by the Department of State. Article 1, paragraph 1 provides that the so-called "treaty trader" can enter the United States for the purpose of carrying on trade.[95] Department of State regulations require, inter alia, that a "treaty trader" be employed "by an individual employer having the nationality of the treaty country . . . or by an organization which is principally owned by a person or persons having the nationality of the treaty country . . . ."[96] Further, Department of State Guidelines provide that "the nationality of the employing firm is determined by those persons who own more than 50% of the stock of the employing corporation regardless of the place of incorporation."[97] Under the "treaty trader" doctrine, place of incorporation becomes irrelevant, while the nationality of the shareholders gains importance.

Application of the "treaty trader" doctrine in this case presents two problems. First, the Department of State's regulations deal with general immigration rules, while the Treaty deals with commerce between two nations. The immigration rules were not necessarily written with the instant issues in mind. Second, and of greater importance, is that the Treaty itself appears to contradict the Department of State's regulations. Article XXII(3) says a corporation is a national of the place in which it incorporated.

Other secondary sources offered to interpret the Treaty influenced the Court's decision regarding corporate nationality. Relying on *Kolorat v. Oregon*,[98] the Court stated that "[a]lthough not conclusive, the meaning attributed to Treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight."[99] In 1982, the Governments of Japan and the United States agreed that a subsidiary of a Japanese company that incorporated in the United States is not protected by the Treaty.[100] The 1982 communications clarified the

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"The Supreme Court itself has said: Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.* at 387.

95. *See* notes 82-92 *supra* and accompanying text.

96. 22 C.F.R. § 41.40 (1981).

97. 9 FOREIGN AFF. MANUAL, part II.

98. 366 U.S. 187 (1961). *Kolorat* involved an alien's right to take both real and personal property by intestate succession. The Supreme Court relied in part on the interpretation given to the treaty provision by an agency of the government.

99. 102 S. Ct. at 2379.

100. Dep't of State Cable No. 026490, from the U.S. Embassy in Tokyo to the Secretary of State, dated Feb. 21, 1982; and Diplomatic Communication from the Embassy of Japan in Washington to the U.S. Dep't of State, Apr. 21, 1982; relevant part *reprinted in* 102 S.

confusing communications discussed at the trial court and court of appeals levels, and also simplified the Court's task. Both parties to the Treaty agreed to an interpretation consistent with American society's view concerning civil rights.

VII. CONCLUSION

In *Sumitomo Shoji America, Inc. v. Avigliano,* the Supreme Court held that a Japanese owned company that incorporated in the United States, must comply with U.S. civil rights laws. The company had argued that article VIII(1) of the Japanese Treaty permitted it to hire executive and managerial personnel "of their choice," without complying with U.S. discrimination laws. The Supreme Court however, went to a different section of the Treaty and found a seemingly simple answer to the dispute. Article XXII(3) provided that a company created in the United States is a company of the United States. Therefore, U.S. discrimination laws could be applied. The Supreme Court relied in part on the views of the Governments of Japan and the United States. Both Governments stated that where a company incorporates within the jurisdiction of the other country, the company becomes a citizen of the other country. Thus, the Court's decision did not upset the political community.

However, the Court did take an extremely narrow stance and avoided many difficult issues. This case did not resolve the issue of whether a purely Japanese corporation, operating in the United States, can blatantly discriminate in violation of U.S. laws. The Japanese Treaty was not written to license each country's companies to discriminate. Rather, the Treaty was written to assist foreign companies to establish themselves in the other country's business community. Reverse discrimination was not addressed by the Treaty, nor was it in the minds of the Treaty drafters when the Treaty was written. The Court could have taken a bolder stance against discrimination, and held that even article VIII(1) does not permit unfettered discrimination.

Robert M. Cooper

The New Mexican Transfer of Technology Law

The original Mexican transfer of technology law[1] (Old Technology

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Ct. 2379.

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1. Law on the Registration of the Transfer of Technology and the Use and Exploitation